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DROWNING IN REGULATIONS: THE WATERS OF THE U.S. RULE AND THE CASE FOR REFORMING THE RFA

HEARING

BEFORE THE

COMMITTEE ON SMALL BUSINESS AND ENTREPRENEURSHIP UNITED STATES SENATE

ONE HUNDRED FOURTEENTH CONGRESS

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DROWNING IN REGULATIONS: THE WATERS OF THE U.S. RULE AND THE CASE FOR REFORMING THE RFA

WEDNESDAY, APRIL 27, 2016

UNITED STATES SENATE,
COMMITTEE ON SMALL BUSINESS
AND ENTREPRENEURSHIP,
Washington, DC.

The Committee met, pursuant to notice, at 10:00 a.m., in Room 428A, Russell Senate Office Building, Hon. David Vitter, Chairman of the Committee, presiding.

Present: Senators Vitter, Risch, Rubio, Fischer, Gardner, Ernst, Ayotte, Shaheen, and Heitkamp.

OPENING STATEMENT OF HON. DAVID VITTER, CHAIRMAN, AND A U.S. SENATOR FROM LOUISIANA

Chairman VITTER. Good morning, everyone. We are going to call the meeting to order and proceed with this hearing right on time, particularly in light of our 11:00 a.m. vote on the Senate floor.

Thank you all for joining us here today. This Senate Small Business and Entrepreneurship Committee hearing will examine the implementation of the Regulatory Flexibility Act. We are going to be hearing from the Chief Counsel for the Office of Advocacy at the SBA and a panel of industry representatives, and I want to thank all of our witnesses for being here today.

Our conversation will focus on the need for regulatory reform in light of how federal agencies oftentimes issue new rules and regulations that cause undue burdens on small businesses. While there are laws in place like the Regulatory Flexibility Act to protect small businesses, federal agencies have been taking advantage of loopholes and misinterpretations to circumvent these laws.

This is a major problem for our nation's small businesses that struggle to comply with overly burdensome regulations. A large corporation has far more resources—some even have entire departments devoted to regulatory compliance—and the economies of scale result in heavier compliance costs for small businesses.

It has become much more challenging for the owner of a small firm to shift his or her time and energy and money away from growing a business in order to comply with over-demanding regulations, particularly those that have increased under this Obama administration.

I hope that today's hearing will explore possible solutions to level the playing field for small businesses, specifically through the RFA.

Many small businesses count on the RFA to protect their interests from economic burdens due to federal regulations.

One of the most important tools to protect these firms is called an Initial Regulatory Flexibility Analysis, which requires agencies to conduct an economic analysis when a new rule will have a significant economic impact on a substantial number of small entities. Under President Obama's administration, many agencies have avoided conducting this IRFA by simply claiming their proposed rules have no significant economic impact on those small entities.

What is perhaps the biggest, most obvious example of this abuse occurred just last year, when the EPA and the Army Corps, their 2015 Waters of the United States rule, which significantly expanded the scope of federal jurisdiction across the country under the Clean Water Act, was deemed to have no significant impact on small entities. When EPA and the Corps drafted WOTUS, they failed to include small businesses during the process, violating the Small Business Regulatory Enforcement Fairness Act of 1996. The EPA claimed that the rule would not have a substantial direct impact on small businesses and thereby avoided having to conduct that panel.

Before WOTUS was finalized, this committee held a hearing in May 2015 examining the way the EPA and the Corps shut out small businesses during that rulemaking process. During that hearing, a representative from the SBA Office of Advocacy said, quote, "Advocacy believes, first, the rule will impose direct costs on small businesses. Second, these costs will have a significant economic impact on those small businesses. And, third, the agencies incorrectly certified the rule and should have conducted a SBREFA panel."

Despite Advocacy's testimony highlighting the negative effects of WOTUS, the rule was finalized and is now one of the most well-known cases in which the Obama administration, in my opinion, blatantly circumvented the process in an attempt to rush through a rule without considering the harm and burden it would cause to small businesses.

It is imperative that Congress create greater accountability for agencies' economic certification process and close loopholes in the RFA that allow the EPA, OSHA, and CFPB to avoid conducting these panels. That is why earlier this Congress, I introduced the Small Business Regulatory Flexibility Improvements Act, which provided comprehensive reform of the RFA and made vital adjustments to protect small businesses. I want our industry representatives here today to know that I am working to develop a new reform bill in an effort to make bipartisan common sense reforms.

Now, let us get today's conversation started. Again, I would like to thank everyone for being here today and look forward to our discussion.

And with that, I will turn it over to our Ranking Member, Senator Shaheen.

OPENING STATEMENT OF HON. JEANNE SHAHEEN, RANKING MEMBER, AND A U.S. SENATOR FROM NEW HAMPSHIRE

Senator SHAHEEN. Well, thank you, Mr. Chairman, and I have a full statement that I will submit for the record and I will apologize in advance for having to leave early for another commitment.

But, I certainly agree that there is no question that poorly crafted regulations can result in an excessive burden for small businesses, because unlike big companies, small firms often do not have the time and resources to devote to understanding new rules or to figure out how to comply. And for that reason, I think we need a regulatory process that works, not just for the public, but also for America's small businesses.

To improve the regulatory process for small business, we must ensure that federal agencies comply with the Regulatory Flexibility Act by consulting with small businesses and by working diligently to minimize the regulatory burden of new rules.

I have also heard from small businesses that one of the most meaningful ways to help them with regulation is to ensure that our federal agencies, including the SBA, have the resources they need to provide compliance assistance, because compliance assistance helps level the playing field for small businesses by giving them the support they need.

As we consider reforms to the rulemaking process, we need to be careful to do it in a way that does not stop important rules that protect the public.

So, Mr. Chairman, I am pleased that we have Darryl DePriest here from SBA to start out the first panel and I look forward to at least hearing some of his remarks. Thank you very much.

[The prepared statement of Senator Shaheen follows:]

Opening Statement
Hearing: "Drowning in Regulations: The Waters of the U.S. Rule and the Case for Reforming the RFA"
Senator Jeanne Shaheen
April 27, 2016

Thank you, Mr. Chairman.

I am interested in hearing from our witnesses today on their perspectives on our federal rulemaking process and how we can work together to improve our regulatory system for our small businesses.

There is no question that poorly crafted regulations can result in an excessive burden for small businesses. Unlike big companies, small firms often don't have the time and resources to devote to understanding new rules or to figure out how to comply.

At the same time, well-crafted regulations have the potential to encourage innovation and entrepreneurship, while addressing critical threats public health, the environment and safety.

For that reason, we need a regulatory process that works – not just for the public, but also for America's small businesses.

When the Committee held a hearing on the Waters of the United States rule last year, I expressed my frustration that, according to the Office of Advocacy at the Small Business Administration, the EPA did not adequately follow the appropriate procedures under the RFA, designed to consider the rule's impact on small businesses.

However, I do not believe that the way to address this concern is to throw out critical protections – which have been sought by many small businesses that rely on clean drinking water to meet their bottom lines.

Instead, I believe that the proper role for this Committee and others in Congress is to conduct proper oversight. Unfortunately, the EPA was not able to testify at last year's hearing and, to my knowledge, was not invited to participate today.

I have expressed my concerns directly with EPA Administrator McCarthy, and I hope to continue working with her to minimize any potential burdens on small

businesses going forward, while ensuring that small businesses that depend on the Waters of the US rule can see its benefits.

To improve the regulatory process for small businesses, we must ensure that federal agencies comply with the RFA by consulting with small businesses and working diligently to minimize the regulatory burden of new rules.

It is also important for Congress and the Administration to consider ways to cut red tape and get rid of outdated, unnecessary regulations.

I've also heard from small businesses that one of the most meaningful ways to help them with regulations is to ensure that our federal agencies – including the SBA – have the resources they need to provide compliance assistance. Compliance assistance helps level the playing field for small businesses by giving them the support they need.

As we consider reforms to the rulemaking process, we need to be careful to do it in a way that does not stop important rules that protect the public.

I am looking forward to hearing more from our witnesses today, including ideas for ensuring that we have a well-functioning rulemaking process that protects small businesses.

Thank you.

Chairman VITTER. Great. Thank you, Senator.

As we always do, we will invite other committee members to offer any opening comments for the record, but we want to go to our witnesses, and Senator Shaheen is right.

Our first panel is the Honorable Darryl DePriest, who serves as the Chief Counsel for the Office of Advocacy at the SBA. Darryl has been leading the Office of Advocacy in advancing the views and interests of small business in the Federal Government since January of this year.

Darryl, we all look forward to hearing from you. Your full written statement will be part of the hearing record, but you have five minutes to make a presentation here and then we will move on to a conversation.

STATEMENT OF DARRYL L. DePRIEST, CHIEF COUNSEL FOR ADVOCACY, U.S. SMALL BUSINESS ADMINISTRATION, WASHINGTON, DC

Mr. DEPRIEST. Thank you, Chairman Vitter, Ranking Member Shaheen, and members of the committee. Good morning. As Chief Counsel for Advocacy, I would like to thank you for the opportunity to appear before the committee today to discuss the Office of Advocacy and its recently released legislative priorities for Congress in areas that we think strengthening the RFA will help in our obligation to represent the interests of small business in the regulatory process.

As Chief Counsel, I will guarantee that the Office continues to work with federal agencies to alleviate the potential costs of regulation on small entities. To further describe our commitment and how we believe Congress can improve this process, I would like to update you on our priorities.

The topic list of our legislative priorities are indirect effects, the scope of the Regulatory Flexibility Act, the quality of analysis of the agencies, the quality of certification, as the Chair recognized, SBREFA panels, and retrospective review. Let me go through them briefly.

Insofar as indirect effects are concerned, under the RFA, agencies are not currently required to consider the impact of a proposed rule on small businesses that are not directly regulated by the rule, even though the impacts are foreseeable and often significant. Advocacy believes that indirect effects should be part of the RFA analysis, but that the definition of indirect effects should be specific and limited so that the analytical requirements of the RFA remain reasonable.

In addition, Advocacy believes that the scope of the RFA should be expanded. In some cases, federal agencies use different rulemakings than the more familiar notice and comment. We believe that requiring an RFA analysis on interim final rules and clarifying that the RFA applies to certain interpretative rules issued by the Internal Revenue Service would allow for greater small business consideration in federal rulemakings.

Another concern Advocacy has is the quality of analysis that is done in promulgating the rules. Advocacy is concerned that some agencies are not providing the information in a transparent and easy to access manner that is required by the Initial Regulatory

Flexibility Analysis, the IRFA, or IRFA, and the Final Regulatory Flexibility Analysis, the FRFA, or FRFA. This hinders the ability of small entities in the public to comment meaningfully on the impacts on small entities and possible regulatory alternatives.

Agencies should have a single section in the preamble of the Notice of Proposed Rulemaking and Notice of Final Rulemaking that lays out clearly the substantive contents of the IRFA or the FRFA, including a specific narrative for each of the required elements. In addition, agencies should be required to include an estimate of the cost savings to small entities in the FRFA.

Insofar as quality of certification is concerned, some agencies' improper certifications under the RFA have been based on a lack of information in the record about small entities rather than data showing that there would not be a significant impact on a substantial number of small entities. A clear requirement for threshold analysis would be a stronger guarantee of the quality of certifications. Advocacy believes that the RFA should be amended to require agencies to publish a threshold analysis supported by data in the record as part of the factual basis for the certification.

SBREFA, or the Small Business Regulatory Enforcement Fairness Act, requires that panels, known as SBREFA panels, and they have proven to be extremely beneficial to the small business community during rulemakings at the EPA, OSHA, and the CFPB. I do not believe that panels are necessary in most cases, since many agencies have developed internal procedures for the consideration of small entity impacts that are appropriate for their organizations and their particular rulemakings. We do recommend, however, adding the Fish and Wildlife Service to the list of covered agencies, as we believe that would improve that agency's rulemakings. Furthermore, requiring covered agencies to provide better information to panel participants in advance of the panel would give rise to better discussion and better rules.

And, finally, as retrospective review is concerned, Advocacy believes Congress should strengthen Section 610 through legislation. This could be accomplished by prioritizing petitions for review that seek to reduce the regulatory burden on small business and provide for more thorough consideration of alternatives. We believe this would be valuable in addition to the existing required periodic review. Moreover, agencies should be required to provide a timely and effective response in which they demonstrate that they have considered alternative means of achieving the regulatory objective while reducing the regulatory impact on small business. This demonstration could take the form of an analysis similar to an FRFA.

In closing, I would like to thank the committee and the staff for its continued support of the Office. As Chief Counsel, I look forward to working closely with you on ways to improve the RFA and issues affecting small entities across the country. Thank you.

[The prepared statement of Mr. DePriest follows:]

U.S. SMALL BUSINESS ADMINISTRATION
OFFICE OF ADVOCACY
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Testimony of

The Honorable Darryl L. DePriest, Esq.

Chief Counsel for Advocacy

U.S. Small Business Administration

U.S. Senate

Committee on Small Business and Entrepreneurship

Date:	April 27, 2016
Time:	10 AM
Location:	Room 428A
	Russell Senate Office Building
	Washington, D.C.
Topic:	Regulatory Reform

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Created by Congress in 1976, the Office of Advocacy of the U.S. Small Business Administration (SBA) is an independent voice for small business within the federal government. The Chief Counsel for Advocacy, who is appointed by the President and confirmed by the U.S. Senate, directs this office. The Chief Counsel advances the views, concerns, and interests of small business before Congress, the White House, federal agencies, federal courts, and state policy makers. Issues are identified through economic research, policy analyses, and small business outreach. The Chief Counsel's efforts are supported by Advocacy's staff in Washington, D.C., and by Regional Advocates throughout the country. For more information about the Office of Advocacy, visit http://www.sba.gov/advocacy, or call (202) 205-6533.

The Honorable Darryl L. DePriest, Esq.
Chief Counsel for Advocacy
SBA Office of Advocacy

Chairman Vitter, Ranking Member Shaheen, and Members of the Committee, good morning. As the Chief Counsel for Advocacy, I would like to thank you for the opportunity to appear before the Committee today to discuss the Office of Advocacy and its recently released legislative priorities for Congress.

Over the past 40 years, the Office of Advocacy has facilitated greater consideration of small business impacts through regulatory flexibility trainings, roundtables, comment letters, economic research, publications, and collaboration with federal officials throughout government. Federal agencies treat Advocacy as a partner in the rulemaking process in the effort to reduce the regulatory burden on small business.

As Chief Counsel, I will guarantee that the office continues to work with federal agencies to alleviate the potential costs of regulation on small entities. To further describe our commitment to this cause and how we believe Congress could improve this process, I would like to update you on Advocacy's 2016 Legislative Priorities.

The topic areas that our legislative priorities include are:

- Indirect Effects,
- Scope of the Regulatory Flexibility Act (RFA),
- Quality of Analysis,
- Quality of Certification,
- SBREFA panels, and
- Retrospective Review.

Indirect Effects

Under the RFA, agencies are not currently required to consider the impact of a proposed rule on small businesses that are not directly regulated by the rule, even when the impacts are foreseeable and often significant. Advocacy believes that indirect effects should be part of the RFA analysis, but that the definition of indirect effects should be specific and limited so that the analytical requirements of the RFA remain reasonable. Congress should amend section 601 of the RFA to define "impact" as including the reasonably foreseeable effects on small entities that purchase products or services from, sell products or services to, or otherwise conduct business with entities directly regulated by the rule; are directly regulated by other governmental entities as a result of the rule; or are not directly regulated by the agency as a result of the rule but are otherwise subject to other agency regulations as a result of the rule.

Scope of the RFA

Currently, the requirements of the RFA are limited to those rulemakings that are subject to notice and comment. Section 553 of the Administrative Procedure Act (APA), which sets out the general requirements for rulemaking, does not require notice and comment for interim final rulemakings, so agencies may impose a significant economic burden on small entities through these rulemakings without conducting an Initial Regulatory Flexibility Analysis (IRFA) or Final Regulatory Flexibility Analysis (FRFA). Advocacy believes the definition of a rule needs to be expanded to include interim final rulemakings that have the potential to impose economic burdens on small entities.

In addition, the RFA has its own definition of information collection. However, this definition is identical to the Paperwork Reduction Act (PRA) (35 USC 3501, et. seq.). A cross-reference to the PRA would allow Advocacy to rely on OMB's existing implementing regulations (5 CFR 1320) and guidance.
For these reasons, Advocacy recommends that Congress (1) require RFA analysis for all interim final rulemakings with a significant economic impact on a substantial number of small entities and (2) amend the conditions for IRS rulemakings to require an IRFA/FRFA to reference the PRA.

The Honorable Darryl L. DePriest, Esq.
Chief Counsel for Advocacy
SBA Office of Advocacy

Quality of Analysis

The Office of Advocacy is concerned that some agencies are not providing the information required in the IRFA and the FRFA in a transparent and easy-to-access manner. This hinders the ability of small entities and the public to comment meaningfully on the impacts on small entities and possible regulatory alternatives. Agencies should have a single section in the preamble of the notice of proposed rulemaking and notice of final rulemaking that lays out clearly the substantive contents of the IRFA or FRFA, including a specific narrative for each of the required elements. In addition, agencies should be required to include an estimate of the cost savings to small entities in the FRFA.

Quality of Certification

Some agencies' improper certifications under the RFA have been based on a lack of information in the record about small entities, rather than data showing that there would not be a significant impact on a substantial number of small entities. A clear requirement for threshold analysis would be a stronger guarantee of the quality of certifications. Advocacy believes that the RFA should be amended to require agencies to publish a threshold analysis, supported by data in the record, as part of the factual basis for the certification.

SBREFA Panels

I do not believe panels are necessary in most cases, since many agencies have developed internal procedures for the consideration of small entity impacts that are appropriate for their organizations and their particular rulemakings. However, the Department of Interior's Fish and Wildlife Service consistently promulgates regulations without proper economic analyses. Advocacy believes the rules promulgated by this agency would benefit from being added as a covered agency subject to Small Business Advocacy Review Panels.

In addition, Advocacy also believes that some recent Small Business Regulatory Enforcement Fairness Act (SBREFA) panels have been convened prematurely. SBREFA panels work best when small entity representatives have sufficient information to understand the purpose of the potential rule, likely impacts, and preliminary assessments of the costs and benefits of various alternatives. With this information small entities are better able to provide meaningful input on the ways in which an agency can minimize impacts on small entities consistent with the agency mission. Therefore the RFA should be amended to require that prior to convening a panel, agencies should provide, at a minimum, a clear description of the goals of the rulemaking, the type and number of affected small entities, a preferred alternative, a series of viable alternatives, and projected costs and benefits of compliance for each alternative.

Retrospective Review

Advocacy believes Congress should help strengthen Section 610 retrospective review through legislation. This could be accomplished by prioritizing petitions for review that seek to reduce the regulatory burden on small business and provide for more thorough consideration of alternatives. We believe this would be valuable in addition to the existing required periodic review. Moreover, agencies should be required to provide a timely and effective response in which they demonstrate that they have considered alternative means of achieving the regulatory objective while reducing the regulatory impact on small businesses. This demonstration should take the form of an analysis similar to a FRFA.

In closing, I would like to thank the Committee and its staff for its continued support of the Office of Advocacy. As Chief Counsel, I look forward to working closely with you on ways to improve the Regulatory Flexibility Act and on issues affecting small entities across this country. If there are any questions, I would be pleased to answer them.

Chairman VITTER. Thank you very much, Mr. DePriest.

I will start the conversation with some questions. As I said a few minutes ago, on May 19 of 2015, the Office of Advocacy testified before this committee and said it believed EPA incorrectly certified the Waters of the United States rule. Specifically, the Office said, quote, "Advocacy believes, first, the rule will impose direct costs on small businesses. Second, these costs will have a significant economic impact on those small businesses. And, third, the agencies incorrectly certified the rule and should have conducted a SBREFA panel." Has the Office of Advocacy changed that position in any way since then?

Mr. DEPRIEST. No, sir. That is still our position.

Chairman VITTER. Okay. When the Office faced that frustration of an improper certification, did it have any options to demand that EPA and the Corps certify properly that the rule would have had a significant impact? Did it have any tools at its disposal to make the agencies revisit that issue?

Mr. DEPRIEST. No, it did not. It is not within the statute to have that authority to force an agency to do that.

Chairman VITTER. So, do you believe the Office of Advocacy would be better able to perform its mission and serve as a source of accountability for federal agencies if it were given certain tools or options in that situation?

Mr. DEPRIEST. Senator, I think it would depend upon what the tools would be. I think, in general, our position is that, as currently structured, the RFA works in that respect. I am not sure what additional tools would be necessary.

Chairman VITTER. Well, as you know, some folks on this committee have ideas in that regard. We sent you my broad-based regulatory reform bill draft April 12, over two weeks ago, and it includes a provision allowing for a third party certification to judge whether an agency needs to conduct an IRFA or a SBREFA panel. Do you have a reaction to that sort of provision?

Mr. DEPRIEST. Yes, I do. Thank you for reminding me of that specific provision. The provision in the proposed—in your proposal would have a certification by the GAO if there is a dispute between the Office of Advocacy and an agency as to whether a panel should be done or whether there is—the certification is improper. I think, in general, we do not—my opinion is that that would not particularly work for a few reasons.

One is, as we looked at this particular instance of a difference between the EPA and the Office of Advocacy, then you have two executive groups with a conflict, and I wonder whether philosophically or policy-wise it is good to or wise to put a Congressional agency, like the GAO, in the middle between those two executive agencies. So, I have some concerns about that.

Chairman VITTER. So, that concern is based on GAO being Congressionally based?

Mr. DEPRIEST. And also the—yes, that is one of the concerns.

Chairman VITTER. I do not want to cut you off——

Mr. DEPRIEST. Go ahead.

Chairman VITTER [continuing]. Because I can follow up on that.

Mr. DEPRIEST. Go ahead.

Chairman VITTER. What if we moved the proposal to an entity that is not Congressionally based, that is executive based, like OIRA at OMB?

Mr. DEPRIEST. I examined that, and I have some concerns about that, as well. My sense is that, you know, you might have a situation where the dispute between the agencies is basically a question of law, and the question is whether you would want OIRA to be deciding that question of law.

Insofar as the particular instance that has been proposed, that I have seen proposals concerning, I am concerned that having a third party arbiter perhaps would shift the burden. Currently, the agencies have the burden of proving that the certification, or that the proposed rule will not have significant impact on a substantial number, and I am concerned that if we go to the process whereas the Office of Advocacy has to apply to some other agency to review our decision, that that shifts the burden to the Office to show that the proposal will have an effect, and I would prefer that the burden be on the agency.

Chairman VITTER. Well, I guess my reaction to that is the agencies do not have any burden at all. I mean, they are the judge and the jury of themselves. They can say, it does not have a substantial impact, done, move on. So, it seems to me there is no burden in present law if they just want to improperly certify lack of those impacts.

Mr. DEPRIEST. That is true, but there is legal recourse——

Chairman VITTER. What——

Mr. DEPRIEST [continuing]. And as you know, in the——

Chairman VITTER. What is that?

Mr. DEPRIEST. In the WOTUS case, the affected entities filed suit against the EPA and the Corps, and as you know, that rule has currently been enjoined by the Sixth Circuit.

So, my—it is a roundabout way, but it is the way that our system is designed, that there be another arbiter, but it will be a court of law as opposed to perhaps a Congressional arm or another executive agency.

Chairman VITTER. Okay. I am past my time. We may come back to a second round if we have time.

Let me turn to Senator Ernst—or, excuse me, Senator Shaheen.

Senator SHAHEEN. Close.

[Laughter.]

There have been a number of regulatory reform proposals that would give the Office of Advocacy additional responsibilities, as Senator Vitter was describing. Can you talk about the capacity that you currently have to, should your responsibilities be expanded, to address those. What kind of staff support do you have, and what kind of challenges do you have as you look at the requirements under the Regulatory Flexibility Act and the role of your Office——

Mr. DEPRIEST. Well——

Senator SHAHEEN [continuing]. In trying to address that?

Mr. DEPRIEST. Sorry. As Senator Vitter said, I have been in this role now for 16 weeks, not that I am counting.

[Laughter.]

But, I will say that the staff that I have encountered at the Office is very dedicated, very hard working, and they take their job very seriously representing the interest of small business.

The only proposal that I have—and I think we have the capacity to do a number of—to do what we do now. The only—I would say that the proposal that I think would probably most stretch the Office and would require an expansion of the Office would be a proposal such as the ones I have seen where every agency would have to have a SBREFA panel. I think that would stretch the agency. It would stretch our Office and would require us to develop and have more people.

Senator SHAHEEN. So, can you describe in a little more detail—you talked about how the process works and some of the changes that might—that you think would be helpful, but can you talk in more detail about how your office reviews proposed rules and then follows up with federal agencies?

Mr. DEPRIEST. Sure. When a rule is promulgated or proposed and put in the Federal Register, every agency, with the exception of one, sends us a copy of the proposal for us to review and we try to make a determination whether the agency is correct or incorrect insofar as a substantial impact is concerned. We have economists on staff who review the economic underpinnings of the particular rule and the determination as to what the impacts will be. We then meet and discuss the issue with small entity representatives. We try to bring small entity representatives together with the agencies, all during this process of dealing with a proposed rule.

There is also the interagency review that is done by OIRA that we participate in, and we hope that through the whole process of getting from the proposed rule where we analyze it and help the agency look at alternatives that may minimize the impact through the final rule that we can help the agency achieve their regulatory goal, at the same time minimize the impact that the regulation may have on small business.

Senator SHAHEEN. And, so, is there an opportunity for small businesses to engage with the Office of Advocacy on the proposed rule?

Mr. DEPRIEST. Yes. Even though—even in the absence of panels, there is a way to do that. We have pioneered a method called roundtables where we bring together the agency and small business to talk about an issue, and a lot of the times, that works. I give you just one specific example.

The IRS recently proposed some changes to small retirement plans. A number of the individuals who work in that area, who administer those plans, or companies that have those plans were concerned about the unintended effects of that regulation. We put together a roundtable between the IRS and the small representatives and they voiced their concerns. And a few weeks ago, the IRS said, we have heard your concerns. We are going to withdraw the regulation.

Senator SHAHEEN. Ahh.

Mr. DEPRIEST. So, we have instances where those sort of informal opportunities work to the best interest of small business.

Senator SHAHEEN. And, finally, can you comment on how expanding the role of Advocacy would affect the timing of when federal rules would be released.

Mr. DEPRIEST. Well, the—I think—it is really difficult to say. There is—a covered agency like EPA, OSHA, CFPB, where they are required to do the panels, that puts a little extra time into the process. But that is about the only way I can see that there would be more time in putting out the regulations.

Senator SHAHEEN. Thank you. Thank you, Mr. Chairman.

Chairman VITTER. Okay. Thank you.

Now we go to Senator Ernst.

Senator ERNST. Thank you, Mr. Chairman, and thank you, sir, for being in front of our panel today.

Before I get to my questions, I just wanted to say that I look forward to working with you on my legislation, the Prove It Act. I know you have not had a lot of time to review it yet, but you did mention in your testimony that you do have concerns with agency analysis and agencies that are not maybe paying attention to the voice of small business or your analysis, and what my bill does, it seeks to incentivize better analysis and certifications. So, I would love to work with you on this effort, find a great way forward, which I think we have got a great start to here with this bill.

You have mentioned a couple of different interesting points. You mentioned the roundtables that Senator Shaheen had asked about. Did EPA meet with small business at all, do a roundtable, when they were going through the WOTUS effort?

Mr. DEPRIEST. Yes, they were, if I remember correctly, at least four.

Senator ERNST. And they discounted the feedback that came from those small businesses during that discussion?

Mr. DEPRIEST. The small businesses did not persuade them that there would be the significant impact, yes.

Senator ERNST. Okay. Do we see that there is significant impact for small——

Mr. DEPRIEST. Well, the rule has been stayed, although as I said——

Senator ERNST. Correct.

Mr. DEPRIEST [continuing]. In response to Senator Vitter's questions, our position on this remains the same, that this particular rule will have a significant impact on a substantial number of small entities.

Senator ERNST. And I feel exactly the same way. So, we do understand that the rule has been stayed, but the important thing to remember is that it will take years for this process to happen through the judicial branch. And, so, rather than working with the agencies on the front end and bringing a little more transparency, the stakeholders together, and working to improve the legislation, now we are caught up in the judiciary.

And as—and this was a different issue, but I know that Administrator Gina McCarthy had mentioned with a different rule that was being promulgated and had gone through the court system that—and she made light of it—that it did not really matter how the court decided, because by the time it all came out in the end, after years of going through the judicial branch, those businesses

will have already made their changes to comply with the federal standards.

That is an unfortunate situation, and I see that our small businesses may be caught in that, as well, where they do not know how it is going to turn out, so they are going to make those unnecessary investments to meet the obligation should it not go in their favor. That is very unfortunate when I think we should be working these issues out on the front end.

How often would you say that agencies improperly certify?

Mr. DEPRIEST. I honestly do not know the answer to that question. I do know that it is significant, that it does occur, which is why we suggested in our legislative priorities that we look at the certification issue.

Senator ERNST. Yes. I think we need to. This is a problem.

Mr. DEPRIEST. Yes.

Senator ERNST. And, how often do you find that agencies have not provided the best analysis, in a transparent manner, and easy to access, as well, because I can tell you, a lot of stakeholders do not know where to go to find information, do not know how to access that.

Mr. DEPRIEST. I cannot give you, again, the exact numbers, but as I said in our—that is another of the areas where we think the RFA could be strengthened, given the strength of the certifications that we encounter.

Senator ERNST. Okay. Well, I appreciate it today. I am running a little short of time, but I do want to thank you for your efforts. I think it is really important and I would love to work with you in these areas. I think a number of us are very passionate about this, and so, Mr. Chair, I do want to thank you for holding this hearing today, so I appreciate it.

Chairman VITTER. Thank you very much.

Now, Senator Heitkamp.

Senator HEITKAMP. Thank you, Mr. Chairman.

You know, one of the things that I am troubled by, a lot of discussion about Waters of the United States, because we have been in and out of court for over 25 years. We know that EPA has not satisfied at least the Supreme Court's idea of what are Waters of the United States, but yet this body fails to act. We all have a pretty good time beating up on regulatory agencies, and I will not defend the process. I think that, clearly, Waters of the United States is going to have a very dramatic and significant impact on small entities.

But, just to lay down a marker, it is up to this body to step in after this kind of up and down litigation, and we do have an access for small business. They are called committee hearings and we like to hear from small entities.

I want to get to your discussion about retrospective review and why it is so significant. Under current existing mandates, after ten years, if there had been a finding that there was a significant impact on—substantial impact on a significant number of entities, that they would be required to automatically do a ten-year review. You suggested in your comments that we should look at how that retrospective review is being performed.

I am wondering if you have had a chance to review a bill that I have introduced that has come through unanimously the HSGAC Committee, which is S. 1817. Have you had a chance to take a look at that bill?

Mr. DEPRIEST. I have not, Senator.

Senator HEITKAMP. What that bill would do is it would automatically require for any major rule, regardless of any process that was gone through to begin with, once we have designated a major rule, there would have to be a process put in place when that rule is being promulgated to basically notify everyone, all the stakeholders, that this is the retrospective analysis that needs to be done into the future. And, so, I call it the prospective retrospective, because it would not deal with the body of legislation that we have—or regulation that we have outstanding, but it would, in fact, set down a marker for a process for substantial, or for significant review of any major regulation.

My question to you, and I guess if you can answer it today, is would that bill satisfy the concern that you have as a small business advocate that we would be, in fact, engaged in requiring retrospective review.

Mr. DEPRIEST. Senator, I would really like to take a look at it and see whether that addresses the issue. I am open to looking at it and working with you and your staff to see whether there are ways in which we can strengthen the retrospective review. As I said, it is one of our priorities, as well.

Senator HEITKAMP. We have another bill that has been knocking around that would basically put into place a commission that would, in fact, do retrospective review, or at least review rules, because one of the things that we see when we asked agencies, you know, how many of your rules are aging out of the system, no longer applicable, are make work paperwork but they still are doing it because no one takes a look at the rule, we find that they do not find a lot of their rules are aged out. And, so, I think we need a second look and an independent look, which I think the Chairman was getting at.

One of the other kind of challenges that we have in all of this is making sure that for many of our entities, they have the ability to help small business come into compliance. Most of the agencies, I think, believe—they want to help small business come into compliance, but yet we see this frustration when it is "gotcha" moments as opposed to cooperation. What could we do to strengthen the agencies' mandate to help small business come into compliance with new regulation?

Mr. DEPRIEST. Actually, there is currently a requirement——

Senator HEITKAMP. Right.

Mr. DEPRIEST [continuing]. That the agencies actually put together a compliance document.

Senator HEITKAMP. If they were doing that, we would not get complaints.

Mr. DEPRIEST. Understood.

Senator HEITKAMP. So, we think there is a failure to actually perform that function.

Mr. DEPRIEST. Understood. Well, we work with the agencies, and we have put that in our comment letters, as well, that the agency

has not come up with a compliance document. So, that is another area that we could study, certainly, and try to come up with something that might force that a little bit more.

Senator HEITKAMP. Mr. Chairman, if I could just have a few more minutes, the subcommittee that I am ranking on with Senator Lankford, and Senator Ernst sits on, as well, has been doing a lot of work on various proposals, and I think some of the suggestions that you provided today should help inform our work on that subcommittee and so we would like to engage your Office and the work that you do in reviewing some of these attempts at bringing more people into the process, helping small business, in particular, have a voice in what that regulation does, but then on the backside, making sure that the compliance requirements are being met.

And, so, I would love to have a visit with you, review the packages that we have been working on, and see if we can enhance those based on your experience at the Small Business Advocacy.

Mr. DEPRIEST. Certainly. Thank you. Certainly.

Chairman VITTER. Great. Thank you.

The vote, just so everyone knows, has been pushed from 11:00 to 12:00, so we have a little more flexibility. I want to just follow up with one question, and then I will invite the other members, if they have any wrap-up for Mr. DePriest.

I commend you and thank you for recognizing the need for some additional SBREFA panels, specifically Fish and Wildlife, which I agree with. Do you believe the Department of Labor could benefit from conducting panels? Specifically, their Wage and Hour Division has issued significant rules with big, big impact on small business in a number of areas, so that is why I specifically bring that up.

Mr. DEPRIEST. Well, as you know, the purpose of the SBREFA panels is to bring small business to the table and so the regulators can hear the interest. Better information, better rules is our mantra.

Insofar as the other agencies, OSHA is covered, as you know. We have found that the Department of Labor really does hear from small businesses as they put forward these regulations. For example, the overtime rule which is currently working through the process, we have conducted five roundtables around the country to bring small businesses together with the Department of Labor. They have heard the interests that have been expressed.

So, it is not—so, I am not sure that having the panel process is going to be even more information. If you had an agency that really was not soliciting the views of small business, then yes. But, I have found that in my experience, what I have seen thus far and what my staff has explained to me, that has not been a problem.

Chairman VITTER. Well, I know Labor is hearing from small business. I would disagree with any suggestion that they are listening to small business. It is two very different things.

Mr. DEPRIEST. Understood.

Chairman VITTER. I personally think the SBREFA process would force more of that, and certainly those rules I alluded to are very significant on small business.

Any wrap-up questions for Mr. DePriest?

Okay. Thank you very much. I appreciate it.

Mr. DEPRIEST. No, thank you. I appreciate it.

Chairman VITTER. We will now move on to our second panel, and as they get situated at the table, I will go ahead and introduce them. If I can just have everybody's attention, I want to go ahead and introduce our second panel.

Ms. Beth Milito serves as the Senior Executive Counsel with the National Federation of Independent Small Business Legal Center, a position she has held since March 2004. She has experience testifying before Congress, administrative agencies, and state legislatures on the impact of legislative and regulatory issues.

Mr. Frank Knapp is the President and CEO of the South Carolina Small Business Chamber of Commerce and the Board Chair of the American Sustainable Business Council.

And, finally, Mr. Rosario Palmieri is the Vice President for Labor, Legal and Regulatory Policy at the National Association of Manufacturers. In that capacity, he works with NAM members to develop and articulate the Association's position on regulatory, civil justice, antitrust, food, beverage, consumer product, and labor issues.

You will each have five minutes to present testimony. Of course, all of your written testimony will be made part of the record.

Ms. Milito, welcome.

STATEMENT OF ELIZABETH MILITO, SENIOR EXECUTIVE COUNSEL, SMALL BUSINESS LEGAL CENTER, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, WASHINGTON, DC

Ms. MILITO. Thank you very much, Chairman Vitter, Senator Ernst, and staff. Thank you all for your work on this hearing for today.

On behalf of the National Federation of Independent Business, I appreciate the opportunity to testify on the devastating impact that overregulation has on small business and highlight the critical need for Regulatory Flexibility Act reforms.

The costs of regulation are higher than ever, with the smallest firms bearing a disproportionate burden of the per employee costs. In short, small businesses are drowning and there does not appear to be a lifeguard on duty.

In his first Inaugural Address, Thomas Jefferson said that the sum of good government was one which shall restrain men from injuring one another and shall leave them otherwise free to regulate their own pursuits of industry. Unfortunately, the Federal Government has ignored this axiom.

The current regulatory system is broken. Onerous permitting requirements have made it extremely difficult, expensive, and time consuming to build much of anything today. According to the NFIB's Small Business Economic Trend Survey, last month, 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 business, federal agencies continue to churn out approximately ten new regulations each day.

With that as a backdrop, I would like to briefly discuss two regulations that are of particular concern to NFIB.

On June 29, 2015, the Environmental Protection Agency 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. Amazingly, EPA 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 Waters rule because of its potentially huge impact on small businesses.

In addition to the Waters of the U.S. rule, I want to discuss a proposed labor regulation that could impact a substantial number of small businesses and further demonstrates the need for RFA reform. For the small businesses, labor regulations are particularly 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 is looking for in a workforce. What he likely does not know are the best business practices regarding wage and overtime calculation, compliance with anti-discrimination laws, and best hiring practices.

On July 6, 2015, the Department of Labor published a proposed rule that would more than double the minimum salary that a worker must receive to be exempt from overtime, from the current $23,660 to over $54,000 annually. This rule is the epitome of an RFA analysis gone wrong. The nearly $750 million DOL's initial Regulatory Flexibility Act analysis estimates small businesses would face in new costs during the rule's first year grossly underestimates the true compliance costs for small businesses.

For example, DOL estimates it will take only one hour for businesses to become familiar with a new overtime rule, but this assumption disregards a basic reality of regulatory compliance. It is the small business owner who will be wading through the rule's text, not compliance specialists or outside counsel, like in large companies.

NFIB believes that DOL's proposed overtime rule and the EPA's Waters of the U.S. rule clearly demonstrate why Congress must enact regulatory reforms to level the playing field for small businesses.

Congress should expand Small Business Advocacy Review Panels to all agencies, including independent agencies. In so doing, all agencies, like DOL's Wage and Hour Division, would be in a better position to understand how small businesses operate and how the regulatory disproportionately impacts small businesses.

And agencies should be held accountable when they fail to give proper consideration to the comments of the Office of Advocacy, and a formal mechanism should be put in place for resolving economic cost disputes between the agency and Advocacy.

Small businesses are the forefront of our economy, employing nearly half of all private sector employees in this country. This is why NFIB will continue to push for transparency in the rulemaking process and fight back against regulations that create unnecessary burdens with unintended consequences. Agencies must

recognize that flexibility, as mandated by the Regulatory Flexibility Act, affords small employers the opportunity to treat their employees and their workers fairly and allow small businesses to become community leaders and the engines of our economy.

Thank you for holding this important hearing to shine light on the fact that regulatory reform needs to be a priority for Congress. I look forward to answering any questions you might have. Thank you.

[The prepared statement of Ms. Milito follows:]

Statement for the Record of Elizabeth Milito, Esq.
NFIB Small Business Legal Center

Before the

U.S. Senate Committee on Small Business and Entrepreneurship

Hearing on: "Drowning in Regulations: The Waters of the U.S. Rule and the Case for Reforming the RFA"

April 27, 2016

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

Dear Chairman Vitter and Ranking Member Shaheen,

On behalf of the National Federation of Independent Business, I appreciate the opportunity to submit for the record this testimony for the Senate Small Business and Entrepreneurship Committee's hearing entitled, "Drowning in Regulation: The Waters of the U.S. Rule and the Case for Reforming the RFA."

My name is Elizabeth Milito and I serve as the Senior Executive Counsel for 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,

[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

which is 30 percent higher than the regulatory cost burden larger businesses face.[6] 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. Beyond the burden of time and money, excessive regulation creates significant frustration and stress for many small business owners. It is impossible to put a price tag on stress, but it clearly adds to the cost of regulation.

During my twelve 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, The Hill, Politico,* or *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.

Small businesses are the forefront of our economy. In fact, small businesses make up 99.7 percent of U.S. employer firms, 63 percent of net new private-sector jobs, and 48.5 percent of private-sector employment.[7] In short, small businesses are employers of choice for nearly half of private-sector employees in this country. This is why NFIB will continue to push for regulations that target a problem and that do not create unnecessary burdensome rules with unintended consequences. Agencies must: (1) consider the unique structure of small businesses; (2) understand why one size fits all laws and rules don't work; and (3) recognize that flexibility – as mandated by the Regulatory Flexibility Act (RFA) - affords small employers the opportunity to treat their employees and their workers fairly and allows small businesses to become community leaders.

Unfortunately, as we come to the end of President Obama's administration, small businesses are scared. They are drowning in a regulatory avalanche, trying to wade through a number of new regulatory requirements with more mandates on the horizon.

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

[7] https://www.sba.gov/sites/default/files/FAQ_March_2014_0.pdf

While new environmental and financial regulations and regulatory proposals have definitely had a negative impact on small business over the last few years – as evidenced by EPA's Waters of the U.S. rule - today I also 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, I'd like to discuss several new and proposed regulations out of the Administration have been of particular concern to NFIB and its members.

Environmental Protection Agency Waters of the U.S. Rule

On June 29, 2015, the Environmental Protection Agency (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 acted outside of its authority under the Clean Water Act and violated the Regulatory Flexibility Act, and that 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. While NFIB is pleased with a stay, the drawn out legal proceedings add to the uncertainty caused by future regulation and continue to negatively affect small business' ability to plan for future growth.

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.

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.[8] 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 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.

Department of Labor Proposed Rule on 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 program, they will have to reconfigure the program to meet the highly prescriptive requirements of the proposed rule.

Department of Labor "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 (LMRDA), which will make it 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

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

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 (ABA) 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.

The Case for RFA Reform

Rules such as the ones I've discussed today demonstrate why Congress must take action to level the playing field by reforming 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 the proposed overtime 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 (SBAR) panel for rules of significant impact.

SBAR 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 EPA, 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.

Expansion of the Small Business Regulatory Enforcement and Fairness Act (SBREFA) and SBAR panels to all agencies — including independent agencies – would put agencies in a better position to understand how small businesses fundamentally operate, how the regulatory burden disproportionately impacts them, and how each agency can develop simple and concise guidance materials. Moreover, Congress and SBA Office of Advocacy should ensure agencies are following the spirit of SBREFA. There are instances where EPA and OSHA have declined to conduct a SBAR panel for a significant rule and/or a rule that would greatly benefit from small business input.

Congress should also demand that agencies perform regulatory flexibility analyses and require agencies to list all of the less-burdensome alternatives that were considered. Each agency should provide an evidence-based explanation for why it chose a more-

burdensome versus less-burdensome option and explain how their rule may act as a barrier to entry for a new business. To this end, the Prove It Act of 2016, would help to overcome poor agency RFA certifications. The bill would require a third-party review when the agency and the SBA Office of Advocacy disagree on small business impact. If the disagreement occurs then the analysis would be turned over to the Office of Information and Regulatory Affairs for review and a determination as to whether the agency must perform a better RFA analysis.

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.

Chairman VITTER. Thank you very, very much, Ms. Milito.

Now, we will hear from Mr. Knapp.

STATEMENT OF FRANK KNAPP, JR., PRESIDENT AND CHIEF EXECUTIVE OFFICER, SOUTH CAROLINA SMALL BUSINESS CHAMBER OF COMMERCE, COLUMBIA, SC

Mr. KNAPP. Thank you, Chairman Vitter 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 and Board Co-Chair of the American Sustainable Business Council, which through its network represents 200,000 businesses.

Clean water—everyone in this room wants it, small business owners want it, and they understand that the way we protect it is through regulations. National scientific polling commissioned by the American Sustainable Business Council found plenty of support by small businesses with fewer than 100 employees to protect our waters. The survey showed that 80 percent supported the WOTUS rule, 62 percent agreed that government regulations are needed to prevent water pollution, and 61 percent believe that government safeguards for water are good for businesses and local communities.

Now, there is no denying that any regulation will be a burden on small businesses directly impacted by the regulation. While we all want clean water, we want to achieve the goal of the Clean Water Act with as little burden as possible on small businesses.

In 1980, Congress passed the bipartisan Regulatory Flexibility Act, which was supposed to solve the problem of excessive burden on small businesses while allowing for needed regulations. The RFA worked.

Which brings us to the issue of the RFA and the WOTUS rule, which was intended to answer the loud call for clarification on what waters are and are not covered under the Clean Water Act. The EPA believed that it complied with the RFA, even though it did not conduct a Small Business Regulatory Enforcement Fairness Act panel. The Office of Advocacy disagrees. There are no bad federal agency actors here, only a significant disagreement that will be settled by the court. Should the EPA have conducted a SBREFA panel? The court will decide that.

However, the reality is that the Clean Water Act is a very complex law making the regulations to implement it very complicated and controversial. While the promulgation of almost all other regulations is managed with little problem, WOTUS is an anomaly. Therefore, it certainly does not justify significant changes to the RFA and certainly not to the changes of which I have seen proposed by the House or Senate. The regulatory reforms being offered either add more federal agencies to be subject to the RFA or add more administrative duties and requirements to those agencies already covered by the RFA without any additional resources.

The result is not going to benefit small businesses, which need fair, well crafted regulations produced in a timely fashion. Instead, the results will be better described as de-regulatory chaos. Federal agencies will take even longer than current years or even decades to promulgate regulations. There will be even more avenues for opponents of regulations to delay regulations through litigation. Busi-

nesses will face even more uncertainty due to longer time needed to promulgate regulations and increased litigation. The reality is that there is nothing wrong with the RFA, but here is what needs to be done to allow it to work in today's more complex and fast moving nation and government.

First, we have created the public impression that all regulations are evil, and if we would just get rid of them, the economy will thrive. Cost is all the public hears, never the benefits of regulations. For example, the EPA and the Corps of Engineers estimate that permitting and mitigation costs under the WOTUS rule will increase by tens of millions annually. These are direct costs and some believe that indirect costs should also be reported.

But there is no analysis showing how these direct costs are also direct benefits to the local economy because most of this money will go to local small businesses for goods and services. The money just does not disappear. It flows through the local economy directly and indirectly.

The economic health and social benefits of rules put in terms of dollars is not considered by the Office of Advocacy and the regulatory agencies. Whether this is by statute or custom, this must change if we are to get truly accurate data to make rulemaking decisions and give the public complete information about the value of regulations.

Second, everyone wants more outreach and better analysis of regulatory impact in promulgating a rule. So, let us invest in that. We have essentially starved the regulatory agencies and Advocacy while at the same time wanting both to do more. And then when the machine gets clogged up and controversial, we want to fix the wrong problem and make more problems. The RFA process we have today simply needs more resources so it can run more effectively and efficiently.

Third, once a rule has been promulgated, and hopefully the burden on small businesses has been reduced as much as possible, the job of the Federal Government is not done. Small businesses need to be educated about the new rule, and when necessary, provided regulatory compliance assistance. Congress has also set up a process for this, not only within the regulatory agency, but also through the SBA Office of the National Ombudsman.

Where the Office of Advocacy works on the front end of the development of significant regulations, the Office of the National Ombudsman is charged with helping small businesses on all regulation compliance on the back end. It serves as the conduit for small businesses to have their grievances about compliance problems or other issues with federal agencies heard directly by the agencies in question in an effort for successful resolution. In this way, the Office of the National Ombudsman and the agencies can detect patterns of compliance problems so that the agency can revisit the rule.

This is an important part of the rulemaking process that is woefully underfunded and, thus, underutilized. If Congress really wants to help small businesses deal with the new federal regulations, invest more in the small businesses outreach, support, and feedback loop.

Thank you for the opportunity to speak and I will be glad to answer any questions from the committee.

[The prepared statement of Mr. Knapp follows:]

Statement by Frank Knapp, Jr.

Before the Committee on Small Business & Entrepreneurship
United States Senate

"Drowning in Regulations: The Waters of the U.S. Rule and the Case for Reforming the RFA"

April 27, 2016

Thank you, Chairman Vitter, Ranking Member Shaheen and members of the committee. My name is Frank Knapp, Jr. I am 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.

We are here today to talk about the Waters of the United States rule and its impact on small businesses, the process that the Environmental Protection Agency undertook to promulgate that rule and whether WOTUS makes the case for reforming the Regulatory Flexibility Act.

Let's start with clean water. Everyone in this room wants it. Small business owners want it and they understand that the way we protect it is through regulations. Regulations aren't put in place to punish some businesses but to protect all of them, and the public, from the behavior of some that can negatively impact everyone else.

Ask the small businesses of Charleston, West Virginia, what happened to them after the 2014 chemical spill in the Elk River that shut down their water supply and their businesses costing the local economy $19 million a day. Ask the small business owners in Wisconsin along Six Mile Creek and Lake Mendota what happened when 300,000 gallons of manure spilled in 2013 contributing to algae blooms, unpleasant odors and bacteria-tainted water that forced beach closings.

That is the type of water pollution that worries Benjamin Bulis, President and CEO of the American Fly Fishing Trade Association, who testified before this committee almost a year ago in support of the Clean Water Act. His association supports protecting the headwaters of our nation and the fishing industry, which is made up of manufacturers, retailers, outfitters and guides to the tune of approximately 828,000 jobs with about an $115 billion economic impact every year.

And national, scientific polling[1] commissioned by American Sustainable Business Council found plenty of support by small businesses with fewer than 100 employees to protect our waters. The survey showed that 80 percent supported the Waters of the U.S. rule. Sixty-two percent agreed that government regulations are needed to prevent water pollution and 61% believe that government safeguards for water are good for businesses and local communities. Support for the clarification of federal rules under the Waters of the U.S. crossed political lines, with 78 percent of self-identified Republicans and 91 percent of self-described Democrats supporting the rule.

Now there is no denying that any regulation will be a burden on the small businesses directly impacted by the regulation. In the case of the Waters of the U.S. this burden is felt mostly by land owners and the agriculture, real estate, home builders, cattlemen, farmers and mining industries. While we all want clean water, we want to achieve the goal of the Clean Water Act with as little burden as possible on small businesses.

In 1946 Congress passed the Administrative Procedure Act to address this issue. Then in 1980 Congress passed the bi-partisan Regulatory Flexibility Act, which was supposed to solve the problem of excessive burden on small businesses while allowing for needed regulations.

The RFA worked and we in South Carolina passed our own Regulatory Flexibility Act with the support of my organization and our state chamber and NFIB. That was twelve years ago and our all-volunteer South Carolina Small Business Regulatory Review Committee looks at every promulgated regulation to see how it might be amended to be less burdensome on small businesses. Very few problems are found and when they are the Committee has worked well with state agencies to resolve the issues.

Which brings us to the issue of the RFA and the Waters of the U.S. rule. A rule that everyone apparently from the Court, to units of government, to the business community were calling for clarification on what waters are and are not covered under the Clean Water Act.

The Environmental Protection Agency believed that it complied with the RFA when it certified that the new WOTUS rule would not have a significant negative impact on a substantial number of small businesses and therefore it did not conduct a Small Business Regulatory Enforcement Fairness Act, or SBREFA, panel.

The Office of Advocacy, which is responsible for implementing the RFA and working with regulatory agencies to reduce the burden on small businesses, disagrees with EPA's decision and has asked the agency to withdraw the rule and conduct the SBREFA panels prior to promulgating the final rule.

There are no bad federal agency actors here, only a significant disagreement that will be settled by the court.

But to both agencies' credit, even without the formal panels they reached out for comments from the small business community. The EPA personnel in Washington and around the nation have participated in over 400 meetings with numerous impacted industries, individual businesses, local government, NGOs, and other associations before promulgating WOTUS in April of 2014. The agency did take into consideration the comments and made adjustments to the final rule as a result.

This significant outreach by EPA probably exceeded most regulatory outreach efforts. Even the Office of Advocacy might acknowledge this.

In addition, on October 15, 2015 the EPA convened a meeting of small entities for reviewing the new rule. The agency acknowledged that it was not intended to serve as a review panel under the RFA but stated in a summary report of the meeting that the "EPA is prepared to consider additional changes to the proposed rule in response to public comments, including any comments from small entities." It is important to point out that the organizations critical of the WOTUS rule do not have to wait for a SBREFA panel in order to achieve one of its objectives—offering alternative ways to lessen the burden on small businesses while meeting the goals of WOTUS.

For its part, the Office of Advocacy has been active in the rulemaking process leading up to and after the release of the WOTUS rule. Since 2011 it has worked with the EPA and the Corps of Engineers in holding small entity roundtables and meeting small businesses. Advocacy's outreach has included almost 150 small businesses and their representatives. Based on the concerns it heard and its own analysis of the rule's expected impact, Advocacy, as previously noted, would like formal SBREFA panel conducted.

Should the EPA have submitted to the RFA and conducted a SBREFA panel? The court will decide that.

However, had it done so several outcomes might have occurred. WOTUS wouldn't be tied up in court at least on this issue so the process might have gone smoother and faster. There might have been some more mitigation in the rules to further reduce the burden on small businesses. Advocacy might have ended up supporting the rule. And we wouldn't be here today making the incorrect conclusion that WOTUS is the poster child for significant changes to the RFA.

The reality is that the Clean Water Act is a very complex law making the regulations to implement it very complicated and controversial. While the promulgation of almost all other regulations is managed with little problem, WOTUS is unique.

The Waters of the United States rule is an anomaly among all regulations. Therefore it certainly doesn't justify significant changes to the RFA—and certainly not the changes of which I have seen proposed in the House or Senate.

In his testimony last year to this committee, the Senior Executive Counsel of the NFIB Small Business Legal Center acknowledged that the purpose of the new WOTUS rule was to clarify the jurisdiction of the Clean Water Act. He stated that the "NFIB believes action by Congress is necessary to ultimately provide the type of clarification that would allow small business owners to operate without fear of unknowingly violating the CWA (Clean Water Act)."

Just last week, the U.S. Chamber's Senior Vice President for Environment, Technology and Regulatory Affairs, in testimony to the Senate Committee on Homeland Security and Governmental Affairs concluded that the EPA is "the primary lawmaker on environmental issues, not Congress. This is a travesty and Congress must regain its role as the primary legislative body."

But the regulatory reforms being offered are not designed to put Congress in charge of clarifying past laws or recapturing its primacy over the intent of regulations.

Instead they either add more federal agencies to be subject to the RFA or add more administrative duties and requirements to those agencies already covered by the RFA without any additional resources.

The result is not going to benefit small businesses which need fair, well-crafted regulations produced in a timely fashion. Instead the results will better be described as "deregulatory chaos".

- Federal agencies will take even longer than the current years or even decades to promulgate regulations,
- There will be even more avenues for opponents of regulations to delay regulations through litigation,
- Businesses will face even more uncertainty due to the longer time needed to promulgate regulations and increased litigation.

The reality is that there is nothing wrong with the RFA as enacted in 1980. Some of the members of Congress that supported it at that time are still here today. They crafted a very good rulemaking process that worked well for a long time. Here is what needs to be done to allow it to work in today's more complex and fast-moving nation and government.

Balance the Balance Sheet

We have created a public impression that all regulations are evil and if we would just get rid of them the economy will thrive. That's the message the public hears but everyone here knows that regulations are needed for the benefits they yield.

So why do we never see the benefits of regulations in any agency analysis? For example the EPA and the Corps estimate that permitting costs under the WOTUS rule will increase over $19 million annually and mitigation costs will rise over $59 million. These are direct costs and some believe that indirect costs should also be reported. But there is no analysis

showing how these direct costs are also direct benefits to the local economy because most of this money will be go to local small businesses for goods and services. The money doesn't just disappear. It flows through the local economy directly and indirectly.

Even the U.S Chamber in its testimony to a Senate committee last week said that agencies are to analyze costs and benefits in the rulemaking process. The NFIB made a similar statement in its testimony last year.

However, the positive side of the ledger is always blank when the potential impacts of regulations are analyzed. The economic, health and social benefits of rules put in terms of dollars is not considered by the Office of Advocacy and the regulatory agencies. Whether this is by statute or custom, this must change if we are to get a truly accurate data to make rulemaking decisions and give the public complete information about the value of regulations.

Invest in Better Outreach and Analysis

Everyone, including the critics of the rulemaking process, wants more outreach and better analysis of regulatory impact in promulgating a rule. So let's invest in that. We have essentially starved the regulatory agencies and Advocacy while at the same time wanting both to do more. And then when the machine gets clogged up and controversial we want to fix the wrong problem and make more problems. The RFA process we have today simply needs more resources so it can run more effectively and efficiently. If you want agencies to cross every T and dot every I in the RFA process, give them the resources to do it so they can both perform their everyday tasks and conduct the quality rulemaking analysis and outreach we all want.

Help Small Businesses Understand the Rules and Provide Compliance Assistance

Once a rule has been promulgated and hopefully the burden on small businesses has been reduced as much as possible, the job of the federal government is not done. Small businesses need to be educated about the new rule and, when necessary, provided regulatory compliance assistance. Congress has also set up a process for this, not only within every regulatory agency, but also through the SBA Office of the National Ombudsman. Where the Office of Advocacy works on the front end of the development of significant regulations, the Office of the National Ombudsman is charged with helping small businesses on all regulation compliance on the back end. It serves as the conduit for small businesses to have their grievances about compliance problems or other issues with federal agencies heard directly by the agencies in question in an effort for successful resolution. In this way the Office of the National Ombudsman and the agencies can detect patterns of compliance problems so that the agency can revisit the rule.

This important component of the rulemaking process is woefully underfunded and thus underutilized. If Congress really wants to help small businesses deal with needed federal regulations, invest more in this small business outreach, support and feedback loop.

In conclusion, the current regulation promulgating process can produce good rules while protecting small businesses from unnecessary burdens if we provide the adequate resources for agencies to expeditiously carry out the requirements Congress has already put in place on the front end and back end of the process. The WOTUS experience is an outlier not justifying all the regulatory reform proposals which, while achieving the agenda of some seeking to delay and stop some regulations, will inevitably fail to help the vast majority of 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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[i] "Small Business Owners Favor Regulations to Protect Clean Water" results from a scientific national phone poll of small business owners, July 2014, http://asbcouncil.org/poll-small-business-owners#Water

Chairman VITTER. Thank you.
And now, Mr. Palmieri.

STATEMENT OF ROSARIO PALMIERI, VICE PRESIDENT, LABOR, LEGAL, AND REGULATORY POLICY, NATIONAL ASSOCIATION OF MANUFACTURERS, WASHINGTON, DC

Mr. PALMIERI. Chairman Vitter, Senator Ernst, it is an honor to testify before you today about the implementation of the Regulatory Flexibility Act.

The U.S. is the world's largest manufacturing economy, producing more than $2 trillion in value each year and directly employing nearly 12 million Americans and supporting 18 million jobs in the economy. Unfortunately, manufacturing jobs have not fully recovered since the last recession. We are still at a net loss of 1.5 million jobs. And to regain manufacturing momentum and return to net manufacturing job gains, we need improved economic conditions and improved government policies.

Excessive regulatory changes and uncertainty impose high costs, especially on small businesses, and small businesses bear a disproportionate burden of regulation because of the often high fixed costs 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. And unfortunately, agencies are not anxious to analyze these impacts.

A recent study showed that between 1996 and 2012, fewer than eight percent of rules were subject to the RFA's analysis requirements. And although we hope that is because agencies were making excellent decisions, let me share a quick list of the most expensive EPA rules: EPA's greenhouse gas limits on power plants; National Ambient Air Quality Standards for Ozone; Boiler MACT; NESHAP 6X; and certainly the one we have talked about the most today, the Waters of the U.S. rule. EPA has certified that each of them would not have a significant impact on a substantial number of small entities, and I think we—most of us would agree that that just is not the case. And I list several other examples from other agencies, and EPA is not alone in its avoidance of the requirements of the RFA.

SBA's Office of Advocacy has shared that it has saved small businesses $1.6 billion in first year regulatory cost savings and since 1998 has saved $130 billion. Imagine what could have been accomplished if fewer rules could evade these requirements.

Lawmakers have universally supported the RFA's provisions, but Congress needs to strengthen the law and close the loopholes that agencies use to avoid its requirements. Among the reasons for the small number of regulations requiring this analysis for the exclusion of indirect effects, if an agency can claim it is not directly regulating small entities because it is regulating further up the supply chain or just regulating governments, it will not conduct an RFA.

But this was not the original intent of the RFA. One of the original authors of the Act, Senator John Culver, a Democratic Senator from Iowa, clearly stated that the scope of the RFA included direct and indirect effects. Unfortunately, the courts disagreed and subsequent courts have found indirect effects to be outside the scope. But, this one change would bring many of the rules most costly to

small businesses under the Act's framework and result in significant cost savings for small businesses.

An example of an entire class of regulations exempted from the RFA because of this are Clean Air Act rules establishing National Ambient Air Quality Standards. Despite the fact that even the EPA acknowledges these rules often cost hundreds of billions of dollars to implement, no small entities are directly affected by these rules simply because the Clean Air Act only directly regulates states, which in turn regulate small businesses.

The simple clarification of law will have significant benefits to our small business economy, all the while ensuring the continued strong protection of air quality. After all, the RFA only requires the analysis of small entity impacts. It does not dictate how an agency will design its regulation.

Since the RFA was modeled on the National Environmental Policy Act, its consideration of effects is also helpful to understanding the original intent of the authors of the legislation and what Congress passed it. NEPA's implementing regulations define the term effect to mean direct effects and indirect effects which are caused by the action and are later in time or further removed in distance but are still reasonably foreseeable.

The House has already passed legislation which would close many of the loopholes that agencies exploit to avoid the RFA's requirements, including the addition of indirect effects within the scope of the law. The NAM encourages the Senate to take action on similar provisions to ensure these vital improvements.

Senate and House proposals importantly also address regulatory look-backs through an improved Section 610 of the RFA. While we have appreciated the administration's efforts on retrospective review of regulations, they have not resulted in significant cost savings or a change in culture in federal agencies. To truly build a culture of continuous improvement and thoughtful retrospective review of regulations, different incentives are needed. To incentivize these high-quality reviews, Section 610 must be reformed to clean up outdated or unnecessary regulatory accumulation.

I appreciate the opportunity to testify today on behalf of manufacturers around the country and I applaud you for holding today's hearing. I would be happy to respond to questions.

[The prepared statement of Mr. Palmieri follows:]

NATIONAL ASSOCIATION OF
Manufacturers

Leading Innovation. Creating Opportunity. Pursuing Progress.

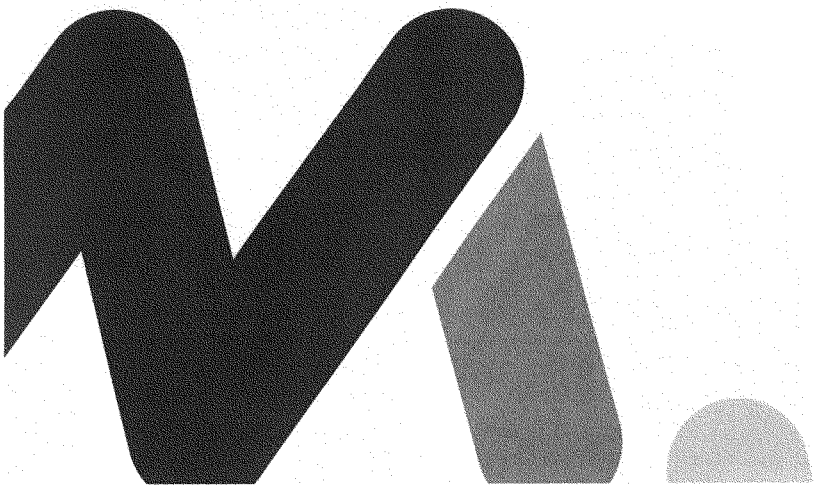
Testimony

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

before the Committee on Small Business and Entrepreneurship
U.S. Senate

on Drowning in Regulations: The Waters of the U.S. Rule and the Case for Reforming the RFA

April 27, 2016



TESTIMONY OF ROSARIO PALMIERI, VP, LABOR, LEGAL & REGULATORY POLICY OF THE NATIONAL ASSOCIATION OF MANUFACTURERS BEFORE THE COMMITTEE ON SMALL BUSINESS AND ENTREPRENEURSHIP U.S. SENATE

APRIL 27, 2016

Chairman Vitter, Ranking Member Shaheen and members of the Committee on Small Business and Entrepreneurship, thank you for the opportunity to testify about federal regulations and how the rulemaking process impacts U.S. small businesses, particularly small manufacturers.

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 appreciate your attention to the regulatory burdens that are impacting their competitiveness and growth. In particular, we thank the chairman for his efforts to increase agencies' sensitivity to regulatory effects on small businesses.

I. Manufacturing in the United States

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 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.

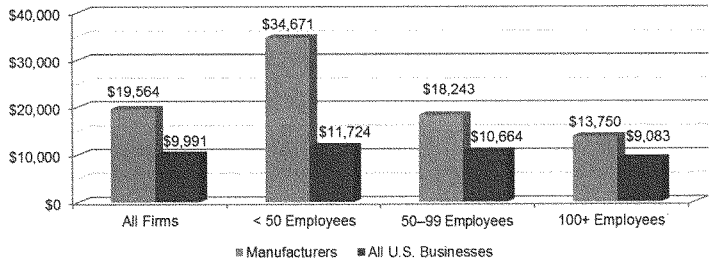
Manufacturing has the highest multiplier effect of any economic sector. For every $1.00 spent in manufacturing, another $1.40 is added to the economy. Manufacturers in the United States contributed $2.17 trillion to the economy (or 12 percent of GDP) and support an estimated 18.5 million jobs in the 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.

Nearly 95 percent of all manufacturers in the United States have fewer than 100 employees, and the Small Business Administration (SBA) defines a small manufacturer as a firm with fewer than 500 employees. To compete on a global stage, manufacturers in the United States need policies that enable them to thrive and create jobs. Growing manufacturing jobs will strengthen the U.S. middle class and continue to fuel America's economic recovery. Manufacturers appreciate the committee's focus on ways to reduce the regulatory burden imposed on small businesses. Unnecessarily burdensome regulations place manufacturers of all sizes at a competitive disadvantage with our global counterparts.

II. The Cost of Regulatory Burdens Facing Manufacturers

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[1] 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 1). The smallest 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 1: 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 2). 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.

In October 2013, the Manufacturers Alliance for Productivity and Innovation (MAPI) released an updated study[2] 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.

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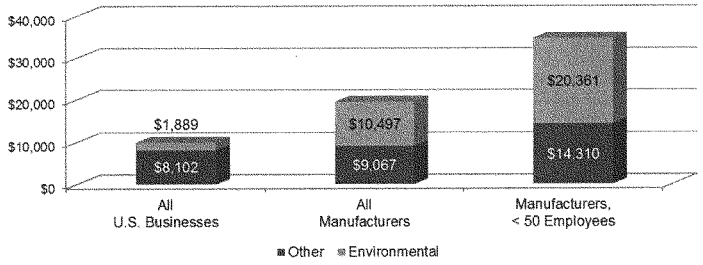
[1] NAM, "The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business" (September 2014), http://www.nam.org/Data-and-Reports/Cost-of-Federal-Regulations/Federal-Regulation-Full-Study.pdf.
[2] MAPI, *Growing Number of Federal Regulations Continue to Challenge Manufacturers* (October 2013), http://www.mapi.net/blog/2013/10/growing-number-federal-regulations-continue-challenge-manufacturers.

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. In a Federal Reserve Bank of Philadelphia report released this month, nearly 74 percent of manufacturing leaders in the region said that their state and federal regulatory compliance costs had increased over the past few years, with no one noting declines in this trend. In addition, they devoted 5.8 percent of their capital spending costs to regulatory compliance on average, more than what was spent on data and network security (4.7 percent) or physical security (2.8 percent).[3]

Figure 2: Environmental Regulatory Compliance Costs per Employee per Year, 2012 (in 2014 Dollars)



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 regulations should be designed to most effectively meet regulatory objectives while minimizing unnecessary burdens.

III. Regulatory Environment

Our regulatory system is 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

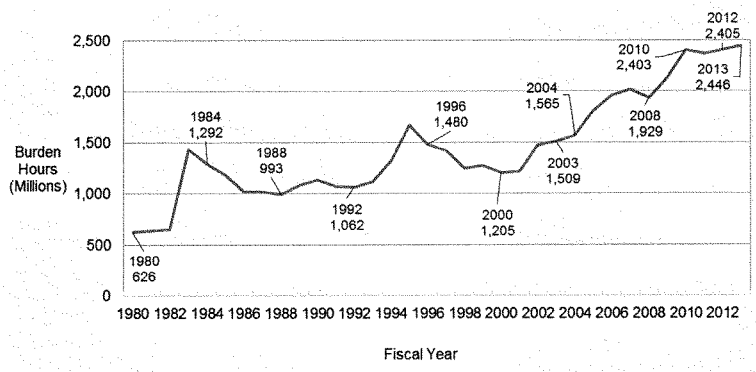
[3] Manufacturing Business Outlook Survey (April 2016), Federal Reserve Bank of Philadelphia, www.philadelphiafed.org/manufacturing-BOS.

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,[4] 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 3). 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.[5]

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



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.

As the modern federal regulatory state expanded, Congress grew increasingly concerned about the significant regulatory and paperwork burdens imposed on the public, particularly small businesses. In September 1980, the Regulatory Flexibility Act (RFA) was

[4] The Department of Treasury's burden estimates include the Internal Revenue Service and account for 75 percent of the total federal public burden imposed. Treasury's burden 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," https://www.whitehouse.gov/omb/inforeg_infocoll#icr.
[5] 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.

signed into law and requires federal agencies to thoughtfully consider small businesses and other small entities when developing regulations. If an agency determines that a regulation is likely to have "significant economic impact on a substantial number of small entities," the agency must engage in additional analysis and seek less burdensome regulatory alternatives. In addition to requiring improved regulatory analysis to better determine the small entity impact, the RFA attempted to improve public participation in rulemaking by small businesses. It also requires agencies to publish an agenda semiannually listing expected rulemakings that would impact small businesses and to conduct "lookback" reviews—required under Section 610 of the law—of regulations that affect small entities to identify rules in need of reform.

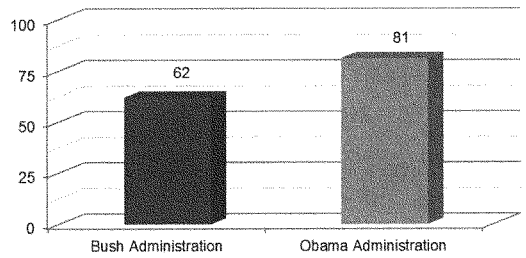
Despite the statutory requirements of the RFA and other reform measures, federal regulatory burdens continue to increase every year. Congress amended the RFA with passage of the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996. Importantly, SBREFA requires the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (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.

There have also been presidential directives aimed at improving the regulatory state. The NAM welcomed efforts by President Barack Obama 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.

The directives to reduce regulatory burdens 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,[6] 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 4).

[6] U.S. Government Accountability Office, Congressional Review Act Overview, http://www.gao.gov/legal/congressional-review-act/overview.

Figure 4: Major Regulations per Year, Through 2015



Regardless of the political party in charge, these regulations include significant burdens imposed on manufacturers and other small businesses and represent real compliance costs that affect our ability to expand and hire workers. There are numerous examples that highlight the regulatory challenges that manufacturers confront (see Attachment A). 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, especially on small businesses.

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, such as efforts put forth by Chairman Vitter, to strengthen the RFA and to ensure regulators are sensitive to the burdens placed on small businesses. 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 SBA's 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.

a. Increase Sensitivity to Small Business

The RFA requires agencies to be sensitive to the needs of small businesses when drafting regulations. Among a number of procedural requirements, agencies must consider less costly alternatives for small businesses and prepare a regulatory flexibility analysis when proposed and final rules are issued. 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] Attachment A of my testimony outlines some of the most significant regulatory challenges currently facing small manufacturers, and most of those rules failed to conduct any small entity analysis or were deficient in significant ways. Among the reasons for this small number of regulations requiring a regulatory flexibility analysis is the exclusion of "indirect effects." One of the original authors of the RFA, Sen. John Culver (D-IA), intended that the scope of the RFA include direct and indirect effects.[8] Unfortunately, the U.S. Court of Appeals for the D.C. Circuit in 1985[9] disagreed, and subsequent courts have found "indirect effects" to be outside the scope of the RFA. This one change in the RFA would bring many of the rules most costly to small businesses under the act's framework and result in significant cost savings for small businesses. One example of an entire class of regulations exempted from the RFA because of this decision are Clean Air Act rules establishing National Ambient Air Quality Standards. Despite the fact that even the EPA acknowledges these rules often cost hundreds of billions of dollars to implement, no small entities are "directly effected" by these rules—simply because the Clean Air Act only directly regulates states which, in turn, regulate small businesses. This simple clarification to the law will have significant benefits to our small business economy, all the while ensuring the continued strong protection of air quality. After all, the RFA only requires the analysis of small entity impacts; it does not dictate how an agency will design its regulation. Since the RFA was modeled on the National Environmental Policy Act (NEPA), its consideration of effects is also helpful to understanding the original intent of the authors of the legislation and the Congress that passed the law. The NEPA's implementing regulations define the term "effect" to mean "direct effects" and "indirect effects," which are caused by the action and are later in time or further removed in distance but are still reasonably foreseeable.[10]

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, including the addition of indirect effects within the scope of the law. The NAM encourages the Senate to take action on similar provisions to ensure vital improvements to the RFA are achieved in this Congress. 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

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[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).
[8] 126 Cong. Rec. 21,456 (1980).
[9] *Mid-Tex Elec. Coop. v. FERC*, 773 F.2d 327, 342-43 (D.C. Cir. 1985).
[10] 40 C.F.R. § 1508.8.

stakeholders, agencies can improve their rules for small entities, leading to improved regulations for everyone.

b. Streamline Regulations Through Periodic Review, Section 610

Section 610 of the RFA requires that agencies periodically review rules to determine significant impacts to small entities. The intent of Congress is clear: 5 U.S.C. §610(a) states, ". . . The purpose of the review shall be to determine whether such rules should be continued without change, or should be amended or rescinded, consistent with the stated objectives of applicable statutes, to minimize any significant economic impact of the rules upon a substantial number of such small entities. . . ."

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.

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 periodic review process should be the beginning of a bottom-up analysis of how agencies use their regulations to accomplish their objectives.

The current 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, the periodic review process must be strengthened. 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 reinforced throughout the government to ensure regulatory programs are thoughtful, intentional and meet the needs of our changing economy.

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."[11] 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.

c. Hold Independent Regulatory Agencies Accountable

The president does not exercise similar authority over independent regulatory agencies, such as the Federal Communications Commission, the National Labor Relations Board (NLRB), the Securities and Exchange Commission (SEC) and the Consumer Product Safety Commission (CPSC), as he does over other agencies within the executive branch. Independent agencies are not required to comply with the same regulatory principles outlined in executive orders and OMB guidance as executive branch agencies and often fail to conduct any analysis to determine expected benefits and costs.

Independent regulatory agencies are required to comply with the RFA, however, as Congress clearly intended that these agencies stand accountable and thoughtfully consider impacts of their rules on small businesses. Since independent regulatory agencies are not accountable to the OIRA nor do they participate in interagency review of their rules, accountability mechanisms to ensure executive branch agency compliance with the RFA do not exist for them. A stronger RFA is necessary because the courts are the only backstop to noncompliance by independent agencies.

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

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 businesses 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.

V. Conclusion

Chairman Vitter, Ranking Member Shaheen and members of the committee, thank you for the opportunity to testify today and your attention to these issues. Manufacturers believe that reforms to strengthen the RFA are necessary to create smarter regulations and minimize unnecessary burdens imposed on small businesses and others. The regulatory system can be improved while still enhancing our ability to protect health, safety and the environment.

In his January 2011 *Memorandum on Regulatory Flexibility, Small Business and Job Creation*,[12] President Obama established a goal "to eliminat[e] excessive and unjustified burdens on small businesses and to ensur[e] that regulations are designed with careful consideration of their effects, including their cumulative effects, on small businesses." However, that goal gets farther from our reach with the regulatory onslaught that businesses in this country must endure.

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[11] 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.

[12] 76 Fed. Reg. 3827

Manufacturers are committed to working toward policies that will restore common sense to our broken and inflexible regulatory system. Too many regulations that have significant effects on small businesses escape the RFA's requirements because unchallenged traditions enable agencies to exploit loopholes. The RFA must be strengthened to ensure all agencies carefully consider unintended impacts and costs and are sensitive to the needs of small businesses. The NAM urges the committee to move forward with legislation expeditiously. Jobs and growth for small manufacturers depend on your efforts.

Attachment A: Regulatory Challenges for Manufacturers

Compliance with the RFA is underlined for each rule where applicable.

a. Existing Regulations

The Department of Labor's (DOL) 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. OSHA's estimate relies upon data from a SBREFA panel that examined a draft rule in 2003, more than 13 years ago. Since 2003, significant changes in the economy and technological advances made in personal protective equipment demonstrate that the proposed changes are unnecessary and overly burdensome. During the rule's comment period and until it was made final in late March, the NAM and other industry stakeholders repeatedly asked OSHA to convene a new SBREFA panel so the most current analysis of costs and other impacts may be considered. These requests were rejected. Manufacturers will now be faced with a new regulation that could force some of our members to shut their doors.

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. During attempted RFA analysis, it was determined that economic impacts to small entities would follow; however, the department stated that it would not have significant impacts on a substantial number of small entities, and therefore, a full RFA analysis was unnecessary.

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. Guidance documents are not subject to the RFA.

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. Surprisingly, the Board determined that there would be no significant impact on small entities as the RFA would only require they determine the direct burden of compliance associated in cases of representation elections, and not that they consider the indirect cost associated with the rule impacting all companies that would hire legal advice to stay informed or ensure compliance.

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. NLRB adjudicatory decisions, even those with widespread effect on businesses, are not subject to the RFA.

b. Currently Proposed Regulations

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. OSHA determined that its proposed revisions would impose no cost burden and therefore would not require an RFA analysis. The rule imposes significant consequences, however, including reputational harm from publishing information that is often preliminary and does not reflect actual workplace incidents.

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 data 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. Information collections, even ones that institute vast, new regulatory programs, are not subject to the RFA.

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 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 are questionable and outdated and 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—four 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. An advanced notice of proposed rulemaking is not subject to the RFA.

Chairman VITTER. Thank you very much, Mr. Palmieri.

I want to pick up on a theme you mentioned and ask Milito to talk about the implications for small businesses from the fact that indirect impacts are not taken into account in any way, because certainly those can be very, very significant. Do you agree with Mr. Palmieri that they should be taken into account?

Ms. MILITO. I absolutely do. Thank you very much for that question. And as Mr. Palmieri mentioned, one of the rules that NFIB is concerned about, and I believe this is in my written statement, too, was the Clean Power Plan rule, too, and that is because of the indirect impact that that rule is going to have on energy costs for small businesses.

So, we—NFIB has for a long time advocated that agencies consider the indirect impact that the rules will have. And I know this is something that the Office of Advocacy has also raised, too, and it came up in the Department of Labor, the overtime rule, too, and it is something that I think is often brushed off by agencies. So, we would be very supportive of a reform that would require agencies to consider indirect impact.

Chairman VITTER. Okay. Ms. Milito, my second question is about small businesses having adequate time to hear about a rule and offer feedback through the public comment period. Do you think they, in general, have adequate time, and are agencies responsive or not, in general, to requests for extension of that comment period?

Ms. MILITO. In my opinion, agencies are—have not been particularly receptive to requests for additional time, and that has been very true, I would say, in the last 18 months, I think where the administration is on the clock and racing to get some rules out. Certainly, that was the case, unfortunately, with the overtime rule. Some economic studies could not be completed. I mean, NFIB's own economic study came in after the proposal closed, and at that point, we found out that the overtime rule will impact probably at least 40 percent of NFIB members. But we could not get that in the formal record because we just did not have time.

So, again, that is a problem that we just do not have enough time, and, you know, to get the word out to small businesses, too, that this rule is coming down and we want your input.

Chairman VITTER. Okay. Mr. Palmieri, you have been closely involved in this regulatory reform discussion for more than a decade. Over the period you have watched it, do you believe agencies have begun following the RFA less and less over time? Is that the trend line? I certainly think it is, unfortunately, and what do you think that is the result of?

Mr. PALMIERI. I think that every government agency wants to do its job extraordinarily well, but because of time factors or others finds work-arounds. And, so, work-arounds to the Regulatory Flexibility Act or others are simply avoiding them whenever possible. And, so, even if they feel like they are doing an excellent job of analyzing the impacts of a rule, they would rather not go through these procedural requirements if they do not have to, and the law review article I mentioned in my testimony by Connor Raso suggests that agencies have been excellent at avoiding procedural re-

quirements, especially the RFA, even more so than the Administrative Procedures Act.

So, it is very clear that agencies, whenever possible, will not conduct this analysis unless they are required to by Congress, and these loopholes, for lack of a better word, have allowed them to do so, and, I think, unfortunately, every few years, the RFA and other provisions which attempt to restrain agencies or correct their thinking in certain ways absolutely have to be reformed to improve the system.

Chairman VITTER. Okay. And, Mr. Palmieri, you mention a number of possible improvements. What would you list as the top three or so reforms needed to the RFA?

Mr. PALMIERI. I would say indirect effects is absolutely a number one. Some improvement to the process, whether it is rule writing authority for the chief counsel or some other third party certification process to assist agencies in correctly certifying these rules, the 610 process, and expansion of SBREFA panels.

Chairman VITTER. Okay. All right. Thank you very much.

Senator Ernst.

Senator ERNST. Yes, thank you, Mr. Chairman, and thank you to all three of you for appearing in front of our committee today.

Mr. Palmieri, I should not have to ask this, but I will. I think you have made your position clear on this. But, is it safe to say that you think WOTUS would have a direct significant economic impact on your manufacturers?

Mr. PALMIERI. Absolutely. I mean, so, even when it is not directly impacting a facility, the ability to transport their goods to market for export is another critical factor here and we know very clearly how significant an impact this will have on our infrastructure in many ways.

Senator ERNST. Can you list out for the record other impacts, other areas that might have an economic impact on those manufacturers or small businesses?

Mr. PALMIERI. Sure. I mean, energy prices, because of the transmission location and others, public infrastructure, roads, others on the transportation side, and then, certainly, depending on the type of manufacturing facility, its ability to expand its facility may be extraordinarily limited. Its ability to get permits, you know, we use a significant amount of water in manufacturing and send it back out cleaner than it came in, all of those industries would be heavily impacted.

Senator ERNST. Have you had the opportunity to discuss with some of your manufacturers—I just got this as a comment when I was in Iowa on part of my 99 county tour, but there was a manufacturer there that had questions about expanding and adding on to their facility. Have you had any indications of what a permitting process would be like for those that just simply wanted to add on a few thousand additional square feet onto a facility?

Mr. PALMIERI. I guess what I would say is that the permitting process is already so challenging on the air quality side as well as all of the other local challenges, that adding the length of time often associated with the Section 404 permitting process could add 18 months to two years plus to any type of facility expansion, and that is on top of the years that it already takes. And, so, for many

manufacturers, even the possibility that they might need a 404 permit is enough to say, I am not going to expand this facility. I am going to find other ways. I am going to think about a new facility in a different area that would not be affected. And, so, this harms many communities where these permits might be necessary.

Senator ERNST. Yes. And you mentioned the exact answer that I got from this manufacturer after they had looked into the permitting requirements, the impact of many of these rules and regulations, and they simply decided, as a small business, it is not worth our time or effort to attempt to expand our business and industry, and that is very unfortunate. That is not the answer that I want to hear from our economic engines out there. So, it has been very frustrating.

And, in Iowa—and I keep going back to WOTUS because I am familiar—very familiar—with WOTUS—in Iowa, the WOTUS rule as it is mapped out would impact 97 percent of our land in Iowa—97 percent. I know in Missouri it is 99.8 percent of the land in Missouri. So, God bless those three percent of the folks in Iowa that will not have to go through the permitting process, but this is the challenge that we have. And most of our small homeowners, small business owners, they simply cannot go through the regulatory burdens that so many of the large manufacturers can.

Again for you, Mr. Palmieri, in your testimony, you mentioned the need to enhance the abilities of Advocacy to improve the quality of regulation. Do you think that giving Advocacy an additional review flag in the form of requesting OIRA to prove an agency's analysis will promote more thoughtful consideration of small entities?

Mr. PALMIERI. Absolutely. I mean, we think that this decision is too important to be left purely to an agency that is, unfortunately, in its self interest to certify that it does not have to comply with the RFA.

Senator ERNST. Okay. Well, I thank you for your input. Thank you for being here today.

Thank you, Mr. Chair.

Chairman VITTER. Okay. I am going to go to a short second round, because I did not get to Mr. Knapp.

Mr. Knapp, for an entity that is self-proclaimed as a small business organization, you all take positions that are outliers, in my experience, in terms of small business organizations. You all supported Dodd-Frank. You supported increasing the EPA's budget, a big small business agenda item—I am saying that facetiously, in my experience—opposed tort reform, supported Waters of the United States rule. What do you think explains the fact that you take positions which I have never heard any other small business entity taking?

Mr. KNAPP. Thank you, Mr. Chairman. Thank you for the opportunity to actually have a question asked.

First of all, I do want to point out that we do not self-describe. We are no more self-descriptive than the National Association of Manufacturers represent the manufacturers and NFIB represents their members.

Look, we——

Chairman VITTER. Just to be clear, I was just referring to the name of the organization——

Mr. KNAPP. Yes.

Chairman VITTER [continuing]. Which is the South Carolina Small Business Chamber of Commerce.

Mr. KNAPP. That is correct, and we are, in fact, that. And, also, the American Sustainable Business Council, also representing about 2,000 businesses—200,000 across the country.

So, the question, then, is why are we outliers, and I do not disagree with that assessment of traditional business organizations. We in South Carolina are only concerned about small businesses. We do not have to worry about big businesses. They will take care of themselves. And it has been our experience in South Carolina that when organizations that represent businesses in general typically will come down on the side for whatever is in the best interest of big business, and I think it is very clear that whatever is in the—if things are in the interest of big business, that does not mean they are always in the best interest of small businesses.

So, yes, we do take positions that are often in disagreement with other business organizations, but we do back that up with research and we do back that up with logic and our experience. So, I appreciate your question, though.

Chairman VITTER. Okay. Well, just to be clear in terms of where I am coming from, I was not talking about U.S. Chamber of Commerce. I was talking about specific small business organizations that I am familiar with, still very, very different on all the issues I mentioned.

Mr. KNAPP. Yes, sir.

Chairman VITTER. To that point, how are you all funded?

Mr. KNAPP. How are we all funded? Well, if you are talking about the South Carolina Small Business Chamber of Commerce, we are funded with dues. We are not a very well resourced organization, and we do have dues. We do have other sources of income, working on special projects.

The American Sustainable Business Council is, again, a dues structured organization, both from the organizations that belong as well as the individual businesses and individuals that contribute to it. They often also are working on direct projects along with other organizations. So—which is not uncommon for most small business organizations to really have different sources of revenue stream, and we offer benefits and we derive some cash flow from those benefits we offer.

Chairman VITTER. And for the South Carolina entity, of all the dues and contributions of any kind for projects or anything else, what percentage do you think come from trial lawyers or people associated with trial lawyers?

Mr. KNAPP. Uh, no more so than anybody else. The Association for Justice is a trade association member.

Chairman VITTER. Well, you say no more so than anyone else——

Mr. KNAPP. No more so than any other trade——

Chairman VITTER. If anyone else means other small business associations, their answer would be zero, I guarantee you.

Mr. KNAPP. Yeah. Well——

Chairman VITTER. So, if your answer is anything above zero, that is very different, but go ahead. I did not mean to interrupt.

Mr. KNAPP. Well, let us put it this way. I disagree with this line of questioning, of questioning our organization and our authenticity and who we represent in the decisions we make and that business. We have a board of directors and they make the decisions. They are made up of small business people. So, however we cobble together our resources to operate, and we do not operate with a very large budget. We probably operate with less than three days' budget of the National Manufacturers Association. So, we do it because I can provide some resources to the organization that I have other sources of revenue through my small businesses, and so that is the way of life with small businesses. They are often under-resourced and overworked, but we do the best we can because we operate like a small business.

Chairman VITTER. Okay. So, again, what would that percentage be for——

Mr. KNAPP. I honestly cannot answer that question. I mean, I can if I go back, but I do not think it is relevant to this point of view.

Chairman VITTER. Okay. Well, this disagreement, I think, is very relevant.

But, thank you all very much for your testimony. This is a very important topic which we are certainly going to follow up on, and I am going to continue working with all the committee members on a bipartisan bill to find additional ways to protect small businesses and ensure their voice is heard in the rulemaking process.

So, with that, the hearing is adjourned.

[Whereupon, at 11:09 a.m., the committee was adjourned.]

APPENDIX MATERIAL SUBMITTED

Supplemental Statement by Frank Knapp, Jr.
Submitted May 2, 2016

Before the Committee on Small Business & Entrepreneurship
United States Senate

"Drowning in Regulations: The Waters of the U.S. Rule and the Case for Reforming the RFA"

April 27, 2016

I would like to place additional testimony into the record for the above referenced hearing. This has been necessitated by the line of questioning of Chairman Vitter.

Specifically, Chairman Vitter asked why the organizations I was representing at the hearing had taken the positions listed below and what would cause a small business organization to take such positions. Chairman Vitter believed that it was relevant to ask for information about the funding for the American Sustainable Business Council and the South Carolina Small Business Chamber of Commerce in order to understand why these organizations took the positions they do.

In regard to the South Carolina Small Business Chamber, Chairman Vitter wanted to know what percentage of all the organization's funding came from "trial lawyers" or people associated with "trial lawyers". I acknowledged that the South Carolina Association for Justice was a trade association member of the South Carolina Small Business Chamber but was not able at the hearing to answer the question of what percentage of all revenue came from "trial lawyers".

Chairman Vitter also stated that "trial lawyers" contribute no funding to any other small business organization. The implication was clear that Chairman Vitter believes that the South Carolina Small Business Chamber is unduly influenced by revenue from "trial lawyers" and thus does not truly represent the interests of small businesses.

This challenge to the integrity of the South Carolina Small Business Chamber of Commerce and to me personally as the president and CEO of this organization requires a thorough response.

Let me first provide my personal and professional qualifications as an advocate for small businesses.

-Founded the advertising/public relations firm, The Knapp Agency, in 1991which is ongoing today
-Co-founded the South Carolina Small Business Chamber of Commerce in 2000 and serve as its president and CEO
-Serve on the South Carolina Small Business Development Center Advisory Board
-Serve as co-chair of the American Sustainable Business Council Board of Directors
-Awarded the U.S. Small Business Administration 2014 South Carolina Small Business Financing Advocate of the Year
-Serve on the U.S. Small Business Administration Regulatory Fairness Board, Chair of Region IV.

Chairman Vitter questioned why the business organizations I was representing at the hearing took the following positions.

Supported Dodd-Frank. The Great Recession starting in 2008 was felt the strongest by small businesses, many of which did not survive, both because of the suppression of consumer demand and later because of lack of access to capital. Small businesses did not create the Great Recession and it was and still is a priority to protect small businesses from a future economic disaster resulting from an ineffectively regulated financial system. Both the American Sustainable Business Council and the South Carolina Small Business Chamber support Dodd-Frank in order to protect future generations of small businesses from the danger of another collapse of our nation's financial system.

Opposed Tort Reform. The South Carolina Small Business Chamber has a track record of leadership in assuring that the state civil courts are free of frivolous lawsuits, legal proceedings are less costly and small businesses maintain their rights to protect themselves against big business. It is the latter issue to which Chairman Vitter is possibly referring. The South Carolina Small Business Chamber successfully blocked legislative efforts to severely restrict the ability of small businesses to file a civil lawsuit against a bigger business regarding unfair trade practices. A civil lawsuit is often the only method of obtaining balance between a well-financed big business and a small business in trade matters where the big business has engaged in unfair trade practices resulting in financial harm to the small business. No record of the American Sustainable Business Council opposing "tort reform" is found.

Supported the Waters of the U.S. Rule. As outlined in my original written testimony, small businesses support regulations to protect clean water:

"And national, scientific polling commissioned by American Sustainable Business Council found plenty of support by small businesses with fewer than 100 employees to protect our waters. The survey showed that 80 percent supported the Waters of the U.S. rule. Sixty-two percent agreed that government regulations are needed to prevent water pollution and 61% believe that government safeguards for water are good for businesses and local communities. Support for the clarification of federal rules under the Waters of the U.S. crossed political lines, with 78 percent of self-identified Republicans and 91 percent of self-described Democrats supporting the rule."

Both the American Sustainable Business Council and the South Carolina Small Business Chamber support the Waters of the U.S. rule issued by the EPA.

Supported Increasing the EPA Budget. The American Sustainable Business Council and the South Carolina Small Business Chamber believe that the federal Regulatory Flexibility Act is a well- crafted procedure for protecting small businesses from unnecessary regulatory burden. However, all federal regulatory agencies, including the EPA, and Office of Advocacy need more financial resources for the RFA to work more effectively and efficiently. This is a pro-small business position that is outlined in my original written testimony.

In regard to the South Carolina Small Business Chamber, Chairman Vitter chose not to recognize the following:

-The South Carolina Small Business Chamber has been the only business organization to oppose workers' compensation rate increases successfully in court since 2005.
-The South Carolina Small Business Chamber has been the only general business organization to oppose electricity and gas rate hikes successfully at the S.C. Public Service Commission since 2002.
-The South Carolina Small Business Chamber proposed and led the successful effort to reduce the state income tax on small business profits by over 28 percent.
-The South Carolina Small Business Chamber proposed and led the successful effort to lower the eligibility for state job tax credits to targeted businesses from creating 10 new jobs to creating 2 new jobs thus making it easier for small businesses to qualify.
-The South Carolina Small Business Chamber proposed and led the successful effort to provide a $1000 state business tax credit per new Registered Apprentice of any business as an incentive for workforce development.
-The South Carolina Small Business Chamber proposed and led the successful effort to change the state procurement code to give bidding incentives to out-of-state contractors to subcontract with South Carolina small businesses for goods and services.

The South Carolina Small Business Chamber is able to take these strong actions in support of all small businesses because we represent only the interests of small businesses. We are not influenced by financial contributions from big business entities like utilities, insurance companies, big manufacturers, the fossil fuel industry and large banks. Thus the positions taken by the South Carolina Small Business Chamber, we believe, are truly in the best interest of small businesses and are considered outliers only in comparison to positions taken by organizations influenced by big business funding.

While I still disagree with Chairman Vitter's line of questioning about the revenue the South Carolina Small Business Chamber derives from "trial lawyers" or parties associated with "trial lawyers", the answer to his question is approximately 7 percent for 2016.

In regards to the value of the legal profession, "trial lawyers" are small businesses that employee workers and thus contribute to the local economy, provide needed services to individuals and businesses, and are active in their community schools, faith institutions, and other non-profits. The owners of small law firms are often in leadership positions with local chambers of commerce and provide significant funding to these small business associations through their dues. Like other small business owners, "trial lawyers" are concerned about a wide array of issues not just the ones that only impact their businesses.

Thank you for the opportunity to provide this additional testimony.

affta
AMERICAN FLY FISHING TRADE ASSOCIATION

Benjamin H. Bulis, President and CEO of American Fly Fishing Trade Association (AFFTA), for the Senate Committee on Small Business and Entrepreneurship hearing entitled, Drowning in Regulations: The Waters of the U.S. Rule and the Case for Reforming the RFA April 27, 2016.

Dear, Mr. Chairman and members of the Committee. I appreciate the opportunity to provide a statement for the record in support of The Waters of the U.S. Rule. I had the opportunity to testify before the committee last May in support of the Clean Water Act and the protections of our Nations headwaters. The rule will always be a priority for the small businesses that make up the American Fly Fishing Trade Association (AFFTA).

AFFTA represents the businesses of fly fishing including manufacturers, retailers, outfitters and guides across the nation, who all share the same bottom line: furthering the sport and industry of fly fishing. This cannot be accomplished without a strong rule protecting what is most vital for vibrant fisheries habitat: clean water. The formula that drives AFFTA is very simple: Access to healthy habitat creates recreational opportunity that drives economic activity and jobs.

To see how important clean water is to our members' businesses you can look at the recent devastating fish kills in the Gulf of Mexico in and around the Caloosahatchee River and also the Indian River Lagoon on the east coast of Florida near Stuart. Highly contaminated fresh water released from Lake Okeechobee produced devastating algae blooms and brown tides that unfortunately removed dissolved oxygen from the water and resulted in the fish kills. The small businesses in the area were devastated by beach closures and signs that warned people not to touch or eat any fish. This all occurred during their peak spring break season.

Fishing in America supports approximately 828,000 jobs, results in nearly $50 billion annually in retail sales and has an economic impact of about $115 billion every year (*Sportfishing in America an Economic Force for Conservation*, American Sportfishing Association, 2013). It stands to reason that the health of our nation's waters is vital to the continued success of our industry, and to the health of America's economy. The Waters of the U.S. Rule promotes water quality through improved protections for wetlands and headwater streams, and will be a boon to our members' businesses.

If we fail to protect our most important natural resource, clean water, we risk destroying the $200 billion annual economy of the hunting and fishing industry, as well as put 1.5 million people out of work.

Sincerely,
Benjamin H. Bulis

The Honorable Senator Shaheen
1589 Elm Street
Suite 3 Manchester, NH 03101

Dear Senator Shaheen,

As a small business owner who relies on clean water, I urge you to publicly support the administration's final Clean Water Rule to restore critical Clean Water Act protections to waterways nationwide.

From recreational business owners to restaurateurs, we all know that clean water is critical to our economy and the vitality of our communities. In addition, I personally depend on clean water for my business. From Lake Sunapee to New Hampshire's coast, our iconic waterways are integral to our economic success as well as our quality of life.

Yet misguided Supreme Court decisions opened up loopholes in the Clean Water Act, leaving streams and wetlands that feed and filter the lakes we love – and help provide drinking water for 503,000 New Hampshire residents -- at risk of unchecked pollution.

For this reason, the EPA and Army Corps of Engineers have now approved the Clean Water Rule that reestablishes protections to the intermittent streams, wetlands and rivers left in limbo by these loopholes. Restoring the Clean Water Act will help ensure that our communities are healthy and our local economies are strong.

I urge you to stand up as a leader for our rivers, lakes and streams and publicly support the proposed Clean Water rule so that this effort to protect the waterways our business depends on will become a reality.

Sincerely,

Paul Eja – Pauly's Pockets
51 Main St,
Durham, NH 03824

Stephen W – Tree Brew Barista
3 Bicentennial Sq.
Concord, NH 03301

Michelle Lees – Crackskull Coffee & Books
86 Main St.
Newmarket, NH 03857

Melissa Ruffini - Urban Mayhem Skate
1356 Elm St.
Concord, NH 03301

Jessica Gorhan - All Elements Healing
51 Main St.
Concord, NH 03301

Emily Galvin & Sue McCoo – Viking House
19 N Main St.
Concord, NH 03301

Christ Zuber – The Place Studio and Gallery
9 N Main St.
Concord, NH 03301

Alex Moody – Sub Style Vapors, LLC
6 N Main St.
Concord, NH 03301

Tressa Kosavicz – Little River Oriental Rugs
10 N Main St.
Concord, NH 03301

Amanda Hackett
Dos Amigos Burritos
46 N Main St.
Concord, NH 03301

Thomas Smith
Depot Antiques and Toys
30 N Main St.
Concord, NH 03301

David Lund – Express Jewelry Center
44 N Main St.
Concord, NH 03301

Gerry Mark – Caring Gifts
18 N Main St.
Concord, NH 03301

Melody Broider – Spank Alley Board Shop
59 S Main St.
Concord, NH 03301

Elizabeth Demarcus – Lizzy Stitch Quilts
249 Sheep Davis Rd.
Concord, NH 03301

Bill Lustig - Signarama of Concord
249 Sheep Davis Rd. Unit 4
Concord, NH 03301

Michelle Smart – Mattress Maker
80 S Main St.
Concord, NH 03301

Deb Moulpied – Bona Fide Green Goods
35 S Main St.
Concord, NH 03301

Hillary Killam - Sun Tan City
80 Storrs St.
Concord, NH 03301

Lia Liporto – New England Cupcakery
28 S Main St.
Concord, NH 03301

Don Const – Quick Water Canoe & Kayak
15 Hannah Dustin Dr.
Concord, NH 03301

Alicia Kingsbury – Little Pea Boutique
153 Manchester St.
Concord, NH 03301

Before the Senate Small Business Committee

Hearing Examining the Waters of the U.S. Rule and the Case for Reforming the RFA

Statement for the Record of the National Wildlife Federation

on the Clean Water Act "Waters of the United States" Rulemaking

April 27, 2016

The National Wildlife Federation (NWF) submits this statement for the hearing record in strong support of the Environmental Protection Agency ("EPA") and the Army Corps of Engineers ("Corps") Clean Water Rule defining "Waters of the United States" under the Clean Water Act.

As we document in our statement below, this rule clarifying and restoring Clean Water Act protections fosters strong local economies and millions of jobs. Healthy wetlands and streams are economic engines for local recreation-based economies. Every year 47 million Americans head to the field to hunt or fish. For example, the American Sportfishing Association reports that anglers generated more than $201 billion in total economic activity in 2011, supporting more than 1.5 million jobs.

In some rural, mountain communities, river recreation and related activities generate the largest share of the local economy. Indeed, throughout the headwaters states, river recreation, including boating, fishing and wildlife watching, represents billions of dollars in commerce. These fishing and river guides, outfitters, bait shops, hotels and coffee shops are true small businesses that form the backbone of many rural communities. And they depend upon clean water and healthy wetlands, lakes, and streams.

The National Wildlife Federation represents over 6 million conservation-minded hunters, anglers, and outdoor enthusiasts nationwide. Conserving our Nation's wetlands, streams, and rivers for fish, wildlife, and communities is at the core of our mission. We have been active in advocating for Clean Water Act protections since the Act was passed in 1972. For the past 15 years we have been actively engaged in the effort to clarify the definition of "Waters of the United States" that underpins the 1972 Clean Water Act in the wake of the controversial and disruptive *SWANCC* and *Rapanos* U.S. Supreme Court decisions issued in 2001 and 2006 respectively.

As we document in our statement below, the final Environmental Protection Agency ("EPA") and the Army Corps of Engineers ("Corps") Clean Water Rule:

- Responds to – and is consistent with – the U.S. Supreme Court's direction in *SWANCC* and *Rapanos;*
- Clarifies and limits – *but does not expand* – the historic scope of Clean Water Act

jurisdiction;

- Includes new clarifications and exemptions that expressly exclude some waterbodies previously deemed "waters of the U.S.";
- Strengthens the Clean Water Act's Federal-State cooperative federalism framework and empowers states to better protect state waters within this framework;
- Addresses many of the concerns raised by state, agricultural, and western water stakeholders during the extended and rigorous rulemaking process;
- Fosters a strong economy and millions of jobs that depend upon clean and abundant waters and healthy wetlands and waterways; and
- Enjoys widespread and bi-partisan public support.

The 1972 Clean Water Act has been successful at improving water quality and stemming the tide of wetlands loss in every state. However, Clean Water Act safeguards for streams, lakes and wetlands have been eroding for over a decade following two controversial Supreme Court decisions which cast doubt on more than 30 years of effective Clean Water Act implementation. Recent water pollution threats to drinking water from Ohio, West Virginia and Michigan to Iowa and Montana remind us of the high value of clean water, and crystallize the need to improve the Clean Water Act, not weaken it.

For more than a decade now, 60 percent of stream miles in the United States, which provide drinking water for more than 117 million Americans, have been at increased risk of pollution and destruction. Wetlands that provide essential water quality, flood protection, and fish and wildlife habitat are at risk as well. In fact, the rate of wetlands loss increased by 140 percent during the 2004-2009 period – the years immediately following the Supreme Court decisions. This is the first documented acceleration of wetland loss since the Clean Water Act was enacted more than 40 years ago during the Nixon administration.

When wetlands are drained and filled and streams are polluted, fish and wildlife suffer and we lose the ability to pursue our outdoor passions and pass these treasured traditions on to our children. Moreover, pollution and destruction of headwater streams and wetlands threaten America's hunting and fishing economy – which accounts for over $200 billion in economic activity each year and 1.5 million jobs, supporting rural communities in particular.

It is for these reasons that the National Wildlife Federation and our 6 million members and supporters across the country steadfastly support the final Clean Water Rule.

1. **The Clean Water Rule Responds to – and Is Consistent With – the Supreme Court's Direction in *SWANCC* and *Rapanos*.**

The Clean Water Rule revises the longstanding definition of "waters of the United States" subject to the Clean Water Act in response to the Supreme Court's decisions in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers ("SWANCC")*,[1] and *Rapanos v. United States.*[2] The Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps)

[1] 531 U.S.159 (2001).
[2] 126 S. Ct. 2208 (2006).

took on this historic rulemaking because at least two of the Supreme Court Justices clearly called for it in their *Rapanos* concurring opinions: Chief Justice Roberts[3] and Justice Breyer,[4] and a majority in *Rapanos* embraced the role of expert agency regulations to clarify which waters are – and are not – "waters of the United States."

The 2001 *SWANCC* decision was narrow. It simply precluded the Corps from asserting jurisdiction over certain ponds based solely on their use by migratory birds. It did not overturn any aspect of the existing waters of the U.S. regulatory definition, including the broad (a)(3) "other waters" provision. In 2006, in *Rapanos*, the Supreme Court issued a fractured (4-1-4) decision involving wetlands adjacent to non-navigable tributaries of traditional navigable waters. Importantly, the Court issued five opinions, none of which garnered a majority. In the ensuing litigation over which of the Court's opinions to apply, Justice Kennedy's opinion establishing the "significant nexus" test for Clean Water Act jurisdiction has been widely accepted by the U.S. Courts of Appeals. Justice Kennedy's "significant nexus" test requires a showing – through regulation or case-by-case – that the ecological linkages between smaller or more remote waterbodies and navigable waters, "alone or in combination," must be more than "speculative or insubstantial."

The Clean Water Rule closely tracks Kennedy's pivotal significant nexus test, grounding its definition of which waters are jurisdictional in science-based findings of significant nexus to traditionally navigable and interstate waters. The Federal Register preambles to the proposed and final rules include an extensive legal analysis documenting the rule's allegiance to the Kennedy significant nexus test. **As a binding rule, promulgated through a rigorous, transparent, and extended rulemaking process, the rule's revised definition of "waters of the United States" will provide greater certainty and consistency in jurisdictional determinations for landowners, federal and state agency field staff, and the courts. It will also ensure that longstanding clean water protections continue to safeguard millions of wetland acres and stream miles that have been in legal limbo for more than a decade.**

2. **The Final Clean Water Rule Clarifies and Limits -- But *Does Not Expand* – the Historic Scope of Clean Water Act Jurisdiction.**

The final rule clarifies and definitively restores Clean Water Act protection to two major categories of waters, while drawing clarifying and limiting boundaries:

1. Tributaries to traditionally navigable and interstate waters and the territorial seas. For example, intermittently-flowing headwater streams that have a defined bed and bank and ordinary high water mark, and flow to a traditionally navigable or interstate water body; and

2. Wetlands, lakes, and other water bodies located adjacent to these tributaries (i.e., within the 100-yr floodplain up to a maximum distance of 1,500 ft.).

Based on the best wetland science, the final rule also bolsters protections of specified wetlands

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[3] 547 U.S. at 757-58.
[4] 547 U.S. at 812.

located beyond river floodplains: prairie potholes in the Dakotas, western vernal pools in California, Carolina and Delmarva bays and pocosins along the Atlantic coastal plain, and Texas coastal prairie wetlands along the Gulf of Mexico. Each of these types of wetlands function together — i.e., are "similarly situated" — to provide fish and wildlife habitat, important flood storage and drought resistance, and critical pollution filtration, and therefore warrant Clean Water Act protection.

While these clarifications remove uncertainty, and better protect many wetlands and streams that have been at risk for the last decade, the fact is that the final Clean Water Rule actually *narrows* the historic scope of Clean Water Act jurisdiction, excluding protections for some wetlands and other waters protected for almost 30 years prior to 2001.

First and foremost, the rule deletes the pre-existing and longstanding "other waters" provision that provided Clean Water Act jurisdiction over many types of waters based on their potential effect on interstate commerce. Given the breadth of the federal commerce clause power, and the Clean Water Act legislative intent to regulate to the full extent of that power, this provision provided for Clean Water Act jurisdiction over millions of wetland acres protected for almost 30 years prior to 2001. In response to the Court's questioning of this commerce link to jurisdiction without regard to the water's ecological links to navigable waters, EPA and the Corps deleted this section and instead expressly linked all jurisdictional "waters of the U.S." determinations to science-based findings of significant nexus to navigable waters. As a result, many of the intrastate, non-navigable, geographically "isolated" wetlands, lakes, and ponds previously covered by the Clean Water Act will no longer be covered under the final Clean Water Rule.

Second, the definition of "waters of the U.S." includes – for the first time -- a clear definition of "tributary" that both clarifies and limits Clean Water Act jurisdiction over streams, ditches, and other tributaries. To be found a jurisdictional tributary, a waterway must have a bed, bank, and ordinary high water mark. To further clarify what is *not* a jurisdictional tributary, the final rule expressly excludes – again for the first time – several types of ditches, as well as gullies, rills, non-wetland swales, and lawfully constructed grassed waterways.

In further response to concerns from agricultural and water treatment and delivery sectors, and in addition to existing exemptions for prior converted cropland and waste treatment systems, **the final rule also explicitly excludes from the definition of waters of the U.S. other water features, including artificially irrigated areas, stormwater control features, and wastewater recycling systems**.

In addition, the final rule adds physical and measurable limits to adjacent and nearby waters, further narrowing jurisdiction and excluding wetlands and other waterbodies previously covered by the Clean Water Act.

And, of course, the final rule reiterates the Clean Water Act exemptions for the following activities that are important for farming, forestry and mining from applicable permitting requirements:

- Most common farming and ranching practices, including "**plowing, cultivating, seeding,**

minor drainage, harvesting for the production of food, fiber, and forest products;"

- "Construction or maintenance of **farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches**;"
- "**Agricultural stormwater discharges and return flows from irrigated agriculture**;"
- "Construction of **temporary sediment basins** on a construction site;" and
- "Construction or maintenance of **farm or forest roads or temporary roads for moving mining equipment.**"

3. **The Clean Water Rule Strengthens the Clean Water Act's Federal-State Cooperative Federalism Framework and Empowers States to Better Protect State Waters within this Framework**.

In 2006, more than 30 state attorneys general filed an amicus brief in *Rapanos* recognizing the essential Federal-State cooperative federalism framework for protecting the Nation's waters and supporting the Bush Administration's broad view of Clean Water Act jurisdiction to meet the goals of the Clean Water Act. In 2014, the States of New York, Connecticut, Delaware, Illinois, Maryland, Rhode Island, and Washington, and the District of Columbia reiterated the importance of broad Clean Water Act jurisdiction to protecting the waters of their states and the health and welfare of their citizens. In 2015, the States of New York, Connecticut, Hawaii, Massachusetts, Oregon, Vermont, and Washington, and the District of Columbia, reiterated these views when they moved to intervene in court in support of the Clean Water Rule.

The state attorneys general explained their interest in the Clean Water Rule as follows:

> *"First*.... The health and integrity of watersheds, with their networks of tributaries and wetlands that feed downstream waters, depend upon protecting the quality of upstream headwaters and adjacent wetlands. Moreover, watersheds frequently do not obey state boundaries, with all of the lower forty-eight states having waters that are downstream of the waters of other states. Thus, coverage under the Act of ecologically connected waters secured by the Rule is essential to achieve the water quality protection purpose of the Act, and to protect Proposed Intervenor States from upstream pollution occurring outside their borders.
>
> *"Second*, by clarifying the scope of "waters of the United States," the rule promotes predictability and consistency in the application of the law, and in turn helps clear up the confusing body of case law that has emerged in the wake of the Supreme Court's *Rapanos* decision. The Rule accomplishes this by reducing the need for case-by-case jurisdictional determinations and, where such determinations are needed, by clarifying the standards for conducting them. Each of the Proposed Intervenor States implements programs under the Act. Thus, the rule is of direct benefit to movants because it helps alleviate administrative burdens and inefficiencies in carrying out those programs. In addition, the rule would help the States in administering the federal dredge-and-fill program if they choose to do so. *See* 33 U.S.C. §1344 (allowing States to implement a permitting program for dredge and fill material).
>
> *"Third*, the rule advances the Act's goal of securing a strong federal "floor" for water

pollution control, thereby protecting the economic interests of Proposed Intervenor States and other downstream states. The Rule allows movants to avoid having to impose costly, disproportionate, and economically harmful limits on instate pollution sources to waters within their borders, in order to offset upstream discharges that would otherwise go unregulated if the upstream waters are deemed to fall outside the Act's jurisdiction and are not otherwise regulated by upstream states. **The Rule protects the economies of Proposed Intervenor States because it serves to "prevent the 'Tragedy of the Commons' that might result if jurisdictions can compete industry and development by providing more liberal limitations than their neighboring states."** *NRDC*, 568 F.2d at 1378 (quoting *Train*, 510 F.2d at 709)."[5]

On a practical level, the 2008 Guidance has resulted in delays, confusion and uncertainty for applicants seeking permits along with increased workloads for Corps and EPA officials. EPA's costs to enforce CWA 402, 404, and 311 have increased significantly due to the incremental resources required to assert jurisdiction post *SWANCC* and *Rapanos*.[6] Because it can be difficult to establish where the CWA applies after the Supreme Court's decisions in *SWANCC* and *Rapanos*, enforcement efforts have shifted away from small streams high in the watershed where jurisdiction is a potential issue. Post-*Rapanos* uncertainty and added time and expense is undermining Clean Water Act enforcement and the overall effectiveness of the Clean Water Act in maintaining and restoring the nation's waters.

A key attribute of the Clean Water Rule is its additional clarity, relieving federal and state agencies and landowners alike of the confusing and burdensome case-by-case jurisdictional determinations required under the guidance for plans to discharge pollutants into most wetlands and streams. Ironically, the Clean Water Rule litigation and the current stay of the final rule not only extend but actually contribute to confusion and delay by precluding EPA and Corps efforts to provide field level training, workshops, supplemental clarification, and transparency in the implementation of the rule.

4. **The Final Clean Water Rule Addresses Many of the Concerns Raised by State, Agricultural, and Small Business Stakeholders during the Extended and Rigorous Rulemaking Process**.

The final Clean Water Rule is the product of four years of rigorous and transparent scientific and public policy deliberation. See the attached Timeline 2001-2016. In 2011, in the face of congressional inaction, EPA and the Corps formally launched an administrative effort to clarify the "waters of the U.S." The 2011 Proposed Guidance was the subject of extensive interagency review, economic analysis, and public notice and comment. Approximately 250,000 comments were submitted on the guidance, and these overwhelmingly supported the revised guidance.

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[5] NY et al Motion to Intervene (6th Cir. August 28, 2015) (emphasis added).

[6] *See* 2014 EPA Economic Analysis at 30-31, at: http://www2.epa.gov/sites/production/files/2014-03/documents/wus_proposed_rule_economic_analysis.pdf.

In 2011-2012, on a parallel track, the EPA Office of Research and Development compiled a draft science report, *The Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (Connectivity Report).[7] This scientific report, based on peer-reviewed literature and an additional review by independent scientists, was prepared to inform the Administration's proposed rule clarifying which waters are protected under the Clean Water Act. In July 2013, the EPA Science Advisory Board (SAB) launched an SAB Expert Scientific Peer Review of the Connectivity Report.[8] In September 2013, the agencies released the Draft Connectivity of Streams and Wetlands Science Report for public comment. Also in September 2013, after holding up action on the Clean Water guidance in the Office of Management (OMB) for almost two years, the Administration sent its draft proposed Clean Water Rule to OMB for interagency review.

In March 25, 2014, after months of interagency review, the EPA and the Army Corps of Engineers jointly proposed the formal rule clarifying and partially restoring the historic scope of waters protected under the Clean Water Act. The 2-page proposed rule text in the federal register was thoroughly explained and supported by a lengthy preamble, including both scientific and legal appendices, the publicly available Connectivity Science Report, and a thorough Economic Analysis. **The 200-day public comment period ended November 14, 2014.[9] Americans submitted over 1 million comments on the proposed rulemaking, and these comments were overwhelmingly in support of the rulemaking.**

In late September-early October 2014, the SAB issued reports affirming the scientific basis for the proposed rule (SAB Rule Letter) [10] and affirming – with recommendations for enhancing – the scientific accuracy of the Connectivity Report (SAB Connectivity Peer Review Letter).[11] The Connectivity Report was revised and strengthened in accordance with the SAB recommendations

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[7] *See* *https://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=296414&CFID=56176401&CFTOKEN=47329782*

[8] *See* SAB Peer Review process at: http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/Watershed%20Connectivity%20Report!OpenDocument&TableRow=2.1#2.

[9] *See* EPA Waters of the U.S. rulemaking process materials at: http://www2.epa.gov/uswaters.

[10] EPA SAB letter to Administrator McCarthy, *Science Advisory Board (SAB) Consideration of the Adequacy of the Scientific and Technical Basis of the EPA's Proposed Rule titled "Definition of Waters of the United States under the Clean Water Act"* (September 30, 2014) (SAB Rule Letter) at: http://yosemite.epa.gov/sab/sabproduct.nsf/518D4909D94CB6E585257D6300767DD6/$File/EPA-SAB-14-007+unsigned.pdf

[11] EPA SAB letter to Administrator McCarthy, *SAB Review of the Draft EPA Report Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (October 17, 2014) (SAB Connectivity Peer Review Letter) at: http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/AF1A28537854F8AB85257D74005003D2/$File/EPA-SAB-15-001+unsigned.pdf

and was released in final form in January 2015.[12] **Both the SAB report and the Final Connectivity Report inform the agencies' final "waters of the U.S." rule.**

Throughout 2014, EPA held hundreds of stakeholder meetings, including repeated meetings with agricultural, municipal, small business entities, and other stakeholders seeking improved clarity in the rulemaking. This rigorous and transparent rulemaking process offers the best opportunity in a generation to clarify which waters are – and are not – waters of the U.S. subject to the Clean Water Act in a manner that provides more clarity than ever before.

5. **The Clean Water Rule Fosters Strong Local Economies and Millions of Jobs that Depend upon Clean and Abundant Water and Healthy Wetlands and Waterways**.

EPA's economic analysis demonstrates that this rule to clarify and restore clean water protections is good for the economy. EPA estimates that the change in benefits of CWA programs exceeds the costs by a ratio of greater than 1:1. The economic analysis finds that the rule will provide at least $339 million and up to $572 million annually in benefits to the public, including reducing flooding, filtering pollution, providing fish and wildlife habitat, supporting hunting and fishing, and recharging groundwater. [13]

Healthy wetlands and streams are economic engines for local recreation-based economies. Every year 47 million Americans head to the field to hunt or fish. For example, the American Sportfishing Association reports that **anglers generated more than $201 billion in total economic activity in 2011, supporting more than 1.5 million jobs**.[14] The U.S Fish and Wildlife Service estimated that duck hunting in 2006 had a positive economic impact of more than $2.3 billion, supporting more than 27,000 private sector jobs.[15]

In some rural, mountain communities, river recreation and related activities generate the largest share of the local economy. Indeed, throughout the headwaters states, river recreation, including boating, fishing and wildlife watching, represent billions of dollars in commerce.[16] In the Colorado River Basin portion of Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming, 2.26 million people participated in water sports in 2011, spending $1.7 billion that generated $2.5 billion in total economic output.[17]

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[12] *Final EPA Report: Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (January 2015) at: http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=296414#Download

[13] *See* Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. at 37101 (June 29, 2015).

[14] American Sportfishing Association, *Sportfishing in America* (January 2013).

[15] Economic Impact of Waterfowl Hunting in the United States, Addendum to the 2006 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation, November 2008. US Fish and Wildlife Service.

[16] Western Resource Advocates 2014 Rule Comments.

[17] SOUTHWICK ASSOC., ECONOMIC CONTRIBUTIONS OF OUTDOOR RECREATION ON THE COLORADO RIVER & ITS TRIBUTARIES (May 3, 2012) (Table E-3), *available at*

The same holds true in New Hampshire, where protecting small streams and wetlands supports fish and wildlife and a vibrant recreational industry. The U.S. Fish and Wildlife Service reports that in 2011, $554 million was spent on wildlife recreation in New Hampshire, including $209 million on fishing, and more than three-quarters of a million people participated in these recreational activities throughout the state. New Hampshire's thriving brewing industry relies on clean water. New Hampshire breweries contribute almost $250 million to the economy every year and support more than 3,100 jobs.

Another indication of the economic implications of protecting the Nation's water resources is revealed in the example of the actions taken by New York City to initiate a $250 million program to acquire and protect up to 350,000 acres of wetlands and riparian lands in the Catskill Mountains to protect the quality of its water supply rather than constructing water treatment plants which could cost as much as $6-8 billion. (Dailey et al. 1999). In South Carolina, a study showed that without the wetland services provided by the Congaree Swamp, a $5 million wastewater treatment plant would be required (http://water.epa.gov/type/wetlands/people.cfm).

The algal blooms that cause health problems also come at high economic costs. For example, Dodds et al (2009) estimated that the total annual cost of the eutrophication of U.S. freshwaters was $2.2 billion. This estimate included recreational and angling costs, property values, drinking water treatment costs, and a conservative estimate of the costs of the loss of biodiversity. Polasky and Ren (2010) cited research that estimated that if two lakes (Big Sandy and Leech) in Minnesota had an increase in water clarity of three feet, lakefront property owners would realize a benefit of between $50 and $100 million.

By any measure, clarifying and restoring clean water protections for America's waters is a good investment for healthy communities and a healthy economy.

6. **The Clean Water Rule, like the Clean Water Act, Enjoys Widespread, Bi-Partisan Support**.

Poll after poll shows broad public support for clean water, the Clean Water Act, and the Clean Water Rule. In 2015, the bi-partisan team of Public Opinion Strategies and Greenberg Quinlan Rosner Research found that **83% of hunters and anglers supported using the Clean Water Act to protect small streams and wetlands.**[18] Forty-nine percent (49%) of the sportsmen polled identified with the Tea Party. Support for this policy was strong across the political spectrum with 77 percent of Republicans, 79 percent of Independents and 97 percent of Democrats in favor. **Fully 89 percent said that the Clean Water Act has been "more of a good thing" for the country, with majorities of every single demographic sub-group echoing this sentiment.** It comes as no surprise, then, that the Clean Water Rule enjoyed overwhelming public support through the extended rulemaking process.

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http://protectflows.com/wp-content/uploads/2013/09/Colorado-River-Recreational-Economic-Impacts-Southwick-Associates-5-3-12_2.pdf.

[18] http://www.nwf.org/~/media/PDFs/Water/2015/2015-Sportsmen-Poll/National_NWF-Sportsmen-Water-Survey_2015.pdf

Clean water and the Clean Water Act have traditionally received strong bipartisan support. EPA Administrators serving Republican Presidents, from Russell Train (1973-1977) to William Reilly (1989-1993), have strongly supported broad protections for wetlands and streams. Republican leader Senator Howard Baker of Tennessee echoed these words of support when the Clean Water Act was amended in 1977: "[t]he once seemingly separate types of aquatic systems are, we now know, interrelated and interdependent. We cannot expect to preserve the remaining qualities of our water resources without providing appropriate protection for the *entire resource*."[19] In 1986, the Reagan administration developed the broad definition of waters of the United States[20] and President George H.W. Bush confirmed "no net loss" of wetlands as his administration policy in January, 1989.

In 2003, in the face of strong opposition, the Bush Administration's EPA was forced to withdraw an advanced notice of proposed rulemaking to potentially remove from Clean Water Act jurisdiction many non-navigable, intrastate wetlands, streams and other waters. That spring, 39 state agencies and hundreds of thousands of individuals and organizations submitted comments urging the EPA and the Corps not to reduce the historic scope of waters protected under the Clean Water Act. Later that year, over 200 members of Congress from both parties (including Rep. Paul Ryan among others) wrote a letter to President Bush urging him "not to pursue any policy or regulatory changes that would reduce the scope of waters protected under the Clean Water Act."

The Clean Water Rule, like the Clean Water Act, enjoys widespread, bi-partisan public support.

CONCLUSION

The National Wildlife Federation strongly supports this historic "waters of the United States" rulemaking as necessary, good for the economy, and the best chance in a generation to clarify which waters are – and are not – "waters of the United States" protected by the 1972 Clean Water Act. The final Clean Water Rule, once affirmed by the Courts, will provide greater long-term certainty for landowners, better protect important streams and wetlands and the fish, wildlife, and communities that depend on them, and advance our collective efforts to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."

Respectfully Submitted,

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[19] 123 Cong. Rec. 26,718 (Aug. 4, 1977) (emphasis added).
[20] See http://www2.epa.gov/sites/production/files/2015-06/documents/epa-hq-ow-2011-0880-20862.pdf at 37056.

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ATTACHMENTS:

Clean Water Rule Timeline 2001-2016

Clean Water Rule Timeline: 2001 – 2016

- **January 2001 Supreme Court decides *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers (SWANCC)*:** The Supreme Court held (in a 5-4 opinion) that the use of "isolated" non-navigable intrastate ponds by migratory birds was not by itself a sufficient basis to find Clean Water Act jurisdiction over such waters.

- **2002 Introduction of the Clean Water Authority Restoration Act**: A bill to amend the 1972 Clean Water Act to clarify the jurisdiction of the United States over the Waters of the United States. Essentially this same legislation was introduced in each congressional session from 2002 through 2010.

- **January 2003 Advanced Notice of Proposed Rulemaking (ANPRM) and SWANCC Guidance:** The Bush Administration's EPA issues SWANCC guidance (immediately effective without advance public notice and comment) with an advanced notice of proposed rulemaking.

- **Spring 2003 Comments Opposing ANPRM:** 39 state agencies and hundreds of thousands of individuals and organizations submitted comments urging the EPA and the Corps not to reduce the historic scope of waters protected under the Clean Water Act.

- **November 2003 Congress Opposes Narrowing CWA Jurisdiction:** Over 200 members of Congress from both parties (including Rep. Paul Ryan among others) wrote a letter to President Bush urging him "not to pursue any policy or regulatory changes that would reduce the scope of waters protected under the Clean Water Act."

- **December 2003 Withdrawal of ANPRM:** The Bush Administration abandons its rulemaking to reduce the scope of waters covered by the Clean Water Act, but retains the SWANCC Guidance, effectively removing CWA protections for an estimated 20 million so-called "isolated" wetland acres.

- **June 2006 Supreme Court decides *Rapanos vs. the United States* and Carabell v. United States:** The Supreme Court issues a fractured (4-1-4) decision involving wetlands adjacent to non-navigable tributaries of traditional navigable waters. A four justice plurality found that "waters of the U.S" covers "relatively permanent, standing or continuously flowing bodies of water" (including some seasonally flowing rivers) that are connected to traditional navigable waters, as well as wetlands with a "continuous surface connection" to such relatively permanent waters. Justice Kennedy's concurring opinion disagrees with the plurality opinion, and concludes that "waters of the U.S." includes wetlands that possess a "significant nexus" with navigable waters. He finds that wetlands possess the requisite significant nexus if they "either alone or in combination with similarly situated [wet] lands in the region, significantly affect the chemical, physical, and biological integrity" of other covered waters more readily understood as navigable. Three of the various opinions urged the agencies to initiate a rulemaking clarifying the "waters of the U.S". The decision was a 4-1-4 ruling.

- **2006-2014: Federal Court Litigation on "Waters of the U.S" Mounts Post-Rapanos, adding to costly litigation, uncertainty, delay, and hampered Clean Water Act enforcement.**

- **2007-2008 Bush Administration Rapanos Guidance:** The Bush EPA issues immediately effective Rapanos Guidance without advance public notice and comment. This guidance largely ignores the Kennedy direction to base significant nexus determinations based on the combination of similarly situated waters and imposes a confusing and burdensome case-by-case jurisdictional requirement on most wetlands and streams. Modest revisions were made to the Bush Administration Guidance in 2008.

- **2009 Clean Water Restoration Act (CWRA) is favorably reported to the Senate Floor by the Senate Environment and Public Works Committee, but is stalled in Congress through 2010.** CWRA would have restored the historical scope of the Clean Water Act to those waters protected by the Act prior to the 2001 SWANCC decision, but not expanded the scope of jurisdiction beyond those covered at that time.

- **April 2011 Proposed Guidance:** EPA and the Corps proposed guidance for determining CWA jurisdiction to replace guidance issued in 2003 and 2008. The proposal also announced the agencies' plans to proceed with rulemaking. The 2011 Proposed Guidance was the subject of extensive interagency review, economic analysis, and public notice and comment. Approximately 250,000 comments were submitted on the guidance, and these overwhelmingly supported the revised guidance. The proposed guidance would provide more certain and predictable protections for many streams and wetlands by comparison to the existing 2003 and 2008 guidance documents. The 2011 guidance still required a case-specific finding of significant nexus, but it found that based on the combined downstream effects of tributaries and adjacent waters within a watershed, significant nexus and CWA jurisdiction were highly likely to be established for these categories of waters.

- **2011-2012: EPA Office of Research and Development compiles a draft science report, *The Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*.** This scientific report, based on peer-reviewed literature and an additional review by independent scientists, informs the Administration's proposed rule clarifying which waters are protected under the Clean Water Act.

- **July 2013: EPA Science Advisory Board (SAB) Launches an SAB Expert Scientific Peer Review of the Connectivity Report.** SAB peer review process and substance available throughout process at: https://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/Watershed%20Connectivity%20Report!OpenDocument&TableRow=2.2#2.

- **September 2013: Administration Releases Draft Connectivity of Streams and Wetlands Science Report for public comment.**

- **September 2013: Administration Sends Proposed Clean Water Rule to OMB:** After holding up action on the Clean Water guidance in the Office of Management (OMB) for almost two years, the Administration sent its draft proposed Clean Water Rule to OMB for interagency review.

- **March 25, 2014: Administration Formally Proposes Clean Water Rule**: The EPA and the Army Corps of Engineers jointly propose the formal rule clarifying and partially restoring the historic scope of waters protected under the Clean Water Act. The 200+-day comment period ended November 14, 2014.

    - **EPA held over 100 meetings with state entities as well as many with agricultural and other stakeholders during the comment period:**
        - EPA Headquarters Proposed Rule Meetings/Events For Docket EPA-HQ-OW-2011-0880 (following the release of the proposed rule): http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-13183
        - 2014 EPA Regional Proposed Rule Meetings/Events for Docket EPA-HQ-OW-2011-0880: http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-13182

- **Summer 2014: Connectivity Report Peer-Review Wraps Up:** affirming the scientific synthesis and concluding that the scientific synthesis provides a sufficient scientific foundation for the Proposed Clean Water Rule.

- **October 17, 2014:** The Science Advisory Board's final peer review report supporting the draft Connectivity Report is formally issued.

- **November 14, 2014: Clean Water Rule public comment period ended, with over 1 million comments submitted.**

    - **EPA held dozens of meetings with stakeholders before finalizing the Clean Water Rule:** EPA Headquarters Stakeholder Meetings for Docket EPA-HQ-OW-2011-0880 Occurring After the Close of the Comment Period (November 14, 2014): http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-20870

- **May 27, 2015: EPA and the Army Corps of Engineers signed the final Clean Water Rule.** The final rule was published in the federal register on June 29, 2015, available at https://www.epa.gov/sites/production/files/2015-06/documents/epa-hq-ow-2011-0880-20862.pdf and became effective on August 28, 2015.

- **October 9, 2015:** The Sixth Circuit U.S. Court of Appeals, ruling on the consolidated petitions from multiple circuits, issued a nationwide stay of the Clean Water Rule pending further resolution of the multi-district litigation challenging the rule.

- **February 22, 2016:** The Sixth Circuit panel found jurisdiction to review the merits of the Clean Water Rule. A petition to review en banc is under consideration.

- **Pending lifting of stays of the Clean Water Rule, the 2003 and 2008 guidance documents requiring cumbersome and confusing case-by-case jurisdictional determinations remain in effect.**

April 26, 2016

Honorable David Vitter, Chairman
Honorable Jeanne Shaheen, Ranking Member
Senate Committee on Small Business and Entrepreneurship
428A Russell Senate Office Building
Washington, DC 20510

Dear Chairman Vitter and Ranking Member Shaheen:

On behalf of the Natural Resources Defense Council, please accept this letter and enclosed materials for the record of your hearing scheduled for April 27, 2016, titled "Drowning in Regulations: The Waters of the U.S. Rule and the Case for Reforming the RFA."

Based on the hearing's title, NRDC is concerned about the fairness of the examination of the economic impacts of the Clean Water Rule developed by the Environmental Protection Agency and the U.S. Army Corps of Engineers, as well as the process that led to its adoption last year. We write to assure the Committee, however, that there is good news on both fronts; the Clean Water Rule both helps protect a resource critical to the national economy and to small businesses – clean water – and was developed through a process that provided ample opportunity for small businesses to be heard.

The Clean Water Rule addresses a major problem. Legal uncertainty spawned by a pair of Supreme Court rulings and subsequent administrative policies left more than half of the nation's stream miles and tens of millions of acres of wetlands without guaranteed protection from pollution and other harms. The importance of clean water to numerous businesses is difficult to overstate; for instance, the hunting and fishing economy – much of which is linked to resources the Clean Water Rule would help protect – is an approximately $200 billion proposition, supporting about 1.5 million jobs.[1] Similarly, the economic analysis published with the final rule estimates that the public benefits (not all of which could be quantified) will be as high as $572 million per year and will outweigh the rule's costs.[2]

To address the Supreme Court's decisions and to update the Clean Water Act regulations, EPA and the Corps initiated a rulemaking process – something that numerous stakeholders requested.[3] EPA produced an

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[1] Fact Sheet, "The Clean Water Rule: Fueling the Fishing & Hunting Industry," available at http://protectcleanwater.org/wp-content/uploads/2015/08/Sporting-Industry-Fact-Sheet-CWR-7.14.15.pdf; *see also* Fact Sheet, "The Clean Water Rule: Crucial for Small Business," available at http://protectcleanwater.org/wp-content/uploads/2015/08/Clean-Water-Rule-Fact-Sheet-Benefits-to-Small-Business.pdf.

[2] U.S. EPA & U.S. Army Corps of Engineers, Economic Analysis of the EPA-Army Clean Water Rule, at x-xi (May 20, 2015), available at https://www.epa.gov/sites/production/files/2015-06/documents/508-final_clean_water_rule_economic_analysis_5-20-15.pdf.

[3] *See* U.S. EPA, "Persons and Organizations Requesting Clarification of Waters of the United States by Rulemaking," available at http://www.epa.gov/cleanwaterrule/persons-and-organizations-requesting-clarification-waters-united-states-rulemaking.

extensively peer-reviewed scientific report confirming that streams and wetlands are connected to downstream waters in significant ways.[4] The agencies then developed a rule that relies on this strong scientific basis and on the Supreme Court's direction about the kinds of waters the Clean Water Act can protect. But the rule was not developed in a vacuum; the agencies took comment on the proposal from April 21-November 14, 2014, a long comment period that itself followed years of public engagement on potential new policy guidelines and on the scientific report. During the comment period, EPA met with more than 400 stakeholders.[5]

Opponents of the Clean Water Rule will undoubtedly make much of the fact that the Small Business Administration Office of Advocacy criticized the development of the rule and specifically disagreed with the certification of the rule as not having "a significant economic impact on a substantial number of small entities," under the Regulatory Flexibility Act. However, the agencies' response to comment document discusses the certification decision at some length, and also explains the significant small business outreach that has occurred about this issue over several years.[6] One commenter even described the Office of Advocacy's analysis as resting on an "obviously shaky legal foundation...."[7]

In addition, the Office of Advocacy's opposition to an important environmental initiative comes as little surprise to environmental stakeholders. Too often, Advocacy unfortunately echoes the criticisms lodged against environmental safeguards made by regulated industries.[8] In the case of the Clean Water Rule, for instance, Advocacy repeated industry claims about the likely impacts of the rule on normal farming practices and on utility line construction, and called on the agencies to withdraw the rule.[9] The idea of retreating on the rule contrasted with the views expressed by the American Sustainable Business Council, which said, "Scientific polling of independent small businesses commissioned by ASBC about the business need for clean water contradicts the

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[4] *See generally* 80 Fed. Reg. 37,054, 37,061-65 (June 29, 2015) (final Clean Water Rule summary of science report findings).

[5] *See* EPA Headquarters Proposed Rule Meetings/Events For Docket EPA-HQ-OW-2011-0880 (following the release of the proposed rule), available at http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-13183; 2014 EPA Regional Proposed Rule Meetings/Events for Docket EPA-HQ-OW-2011-0880, available at http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-13182; EPA Headquarters Stakeholder Meetings for Docket EPA-HQ-OW-2011-0880 Occurring After the Close of the Comment Period (November 14, 2014), available at http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-20870.

[6] U.S. EPA & U.S Army Corps of Engineers, Clean Water Rule Comment Compendium Topic 11: Costs/Benefits (Volume 1), at 111 (section titled "RFA/SBREFA"), available at https://www.epa.gov/sites/production/files/2015-06/documents/cwr_response_to_comments_11_econ_vol1.pdf.

[7] James Goodwin, Senior Policy Analyst, Center for Progressive Reform, "SBA Office of Advocacy Continues to Carry 'Water' for Big Business" (Oct. 2, 2014), available at http://www.progressivereform.org/CPRBlog.cfm?idBlog=D265AD26-0AC0-2141-1D40DF38449E0A54.

[8] *See, e.g.*, Sidney Shapiro & James Goodwin, Distorting the Interests of Small Business: How the Small Business Administration Office of Advocacy's Politicization of Small Business Concerns Undermines Public Health and Safety, (Jan. 2013), available at http://www.progressivereform.org/articles/sba_office_of_advocacy_1302.pdf; Katie Weatherford & Ronald White, Center for Effective Government, Gaming the Rules: How Big Business Hijacks the Small Business Review Process to Weaken Public Protections (Nov. 2014), available at http://www.foreffectivegov.org/files/regs/gaming-the-rules.pdf; "Small Business, Big Nuisance," onEarth (Nov. 14, 2014), available at https://www.nrdc.org/onearth/small-business-big-nuisance.

[9] Letter from Winslow Sargeant, Ph.D., Chief Counsel for Advocacy, to Gina McCarthy, EPA Administrator & Maj. Gen. John Peabody, Deputy Commanding General for Civil and Emergency Operations, U.S. Army Corps of Engineers (Oct. 1, 2014), available at https://www.sba.gov/advocacy/1012014-definition-waters-united-states-under-clean-water-act.

position taken by SBA Advocacy. Eighty percent of small business owners favor federal rules to protect upstream headwaters, as proposed in the EPA's new 'Waters of the U.S.' rule."[10]

Despite a diversity of views in the business community about the Clean Water Rule, Advocacy appears to us to have been most interested in the views of opponents of the rule. When Advocacy held a "roundtable" about the rule, the agenda included a presentation about the proposed rule's requirements from the agencies, but the discussion of "Small Business Implications" was to be led by an attorney representing the "Waters Advocacy Coalition," a group of organizations made up of some of the leading opponents of the Clean Water Rule. Although NRDC advised Advocacy that there were also significant small business supporters of the rule, and asked whether they would be given equal opportunity during the Roundtable presentation to explain why, that request was refused. Specifically, staff of the Office of Advocacy initially said that there was insufficient time before the Roundtable to add someone to the presentation. When the Roundtable was later rescheduled, providing additional time to change the agenda, staff responded to a renewed request for balanced business participation in the presentation by indicating that the agencies could speak in support of the rule. That, of course, is no response at all – the point is not that the agencies supported the rule they proposed; the more important fact is that small businesses did as well, and it is unfortunate that Advocacy did not allow for a balanced presentation by business groups.

In the end, NRDC believes that EPA and the Army Corps' consideration of small business interests in developing the Clean Water Rule was robust, and we believe that the Office of Advocacy's contrary perspective is incorrect. Thank you for the opportunity to present our views on this important matter. If NRDC can be of any further assistance in your consideration of these matters, please do not hesitate to contact me at (202) 289-2361 or jdevine@nrdc.org.

Sincerely,

Jon P. Devine, Jr.
Senior Attorney
Water Program
Natural Resources Defense Council

[10] American Sustainable Business Council, Business Leaders Question SBA Advocacy's Comments on EPA's Water Rule (Oct. 2, 2014), available at http://asbcouncil.org/news/press-release/business-leaders-question-sba-advocacys-comments-epas-water-rule.

The Honorable Barack Obama
The White House
1600 Pennsylvania Ave. NW
Washington, DC 20500

February 3, 2015

Dear Mr. President,

As small business owners in Oregon, we urge you to continue moving forward with a rule to restore critical Clean Water Act protections to Oregon's waterways and waters nationwide.

From recreational business owners to restaurateurs, we know that clean water is critical to our livelihoods and the vitality of Oregon's communities. We depend on clean water for thriving businesses and the wellbeing of our families. The health of iconic waterways like the mighty Rogue River and stewardship of Oregon's water resources is integral to our economic success.

The Rogue is a hallmark of Oregon and provides our state with drinking water and valuable recreation opportunities. It's where generations of Oregonians have gone to swim, raft and fish. But the health of the Rogue and other waterways across Oregon is at risk.

Shortsighted Supreme Court decisions opened up loopholes in the Clean Water Act, leaving the smaller waterways that feed into the Rogue and the drinking water for 1.7 million Oregonians at risk of unchecked pollution. Our major waterways are only as clean as the streams and wetlands that feed into them, and 53 percent of streams across Oregon are now inadequately protected.

To protect our waters in Oregon, we urge you to move forward with a rulemaking to restore critical protections to these waters under the Clean Water Act.

We believe that, by restoring the Clean Water Act, your administration can help ensure that our communities are healthy and our local economies continue to grow.

We appreciate your commitment to protecting Oregon's waterways, and we hope you will move swiftly to ensure they are protected for years to come.

Sincerely,

Stumptown Coffee
Worthy Brewing Co.
Depoe Bay Winery
World Class Wines
Advanced Vineyard Systems
Harvester Brewing
Humble Brewing
Lucky Labrador Brewing
Columbia River Brewing
Gilgamesh Brewing
Nossa Familia
Plew's Brews
Vagabond Brewing
Thump Coffee
Salem Ale Works
Wasson Brothers Winery
Rose City Coffee Co.
Oregon Coast Coffee
Oblique Coffee Roasters
Lone Pine Coffee Roasters
Capt Beans Coffee
Kyra's Bake Shop
Carl's Coffee
Case Study Coffee
Water Ave. Coffee Company
Anna Bananas
Green Plow Coffee
Blue Moon Café
Dragonfly Farm
Horton Road Organics
Chang Family Farm
Crooked Furrow Farm
Camas Swale Farm
Lost Creek Farm

River Bend Farm & Pleasant Hill Orchard
Up & Down CSA Farm
Square Peg Farm
The Mushroomery
Home Grown Food Products
Outback Farms
Flying Onion Farm
Maryhill Orchards
Lively Organic Farm
Farmageddon Growers Collective
Picklopolis
Spring Water Farm
InTown Ag
HeidiHo Veganics
LiveForestFarms
Oberst Family Farm
Rick Steffen Farms
Fraga Farm
Lincoln City Liquor
Carter's Nursery
101 Plants, Inc.
Elk Pass Nursery
Buddies Flowers
Garden Fever!
City Farm
Wild Oak Native Plants
AF Nursery LLC
Lotus Grotto Gifts
Realty on the Rogue
Olde Towne Seafood and Market
The Cobbler's Bench
Earthkeeper Landscaping
Emerald City Locksmith
Food Waves
Sandbar & Grill
De Garde Brewing
Heart
Green Acres Landscape
Wallace Books
Tre Bone
Zumbido de Portland
Etcetera
LifeSource Natural Foods
DeSantis Landscapes
Dr. Bruce A. Olson
Fleet Feet Sports
Sunriver Fishing Center
Fireside
Mountain Supply of Oregon
Mazama Fishing Pro Shop
Caddis Fly Angling Shop
Everybody's Bike Rentals
Cha! Cha! Cha!
Lardo
Que Pasa Cantina
Proper Eats Market & Cafe
Chowdah
Zakwell Inc. dba Crave Catering
Lounge Lizard
Slims Restaurant and Lounge
Cat Hospital of Portland
Ammies Goodie's
Jonathan H. Warmflash DMD PC
Hardcore Florist
Yarn Garden
Flying Fish Co.
Black Swan Events
Robert Harker Piano Service
Trilibrium &Trilibrium Wealth Management
Hydrophix Systems
North Pacific Sign
Ruby Jewel
Peninsula Station
H.E.L.P. Group, Inc.
St. John's Booksellers

U.S. SMALL BUSINESS ADMINISTRATION
OFFICE OF ADVOCACY
REGULATION • RESEARCH • OUTREACH

May 26, 2016

VIA EMAIL

The Honorable David Vitter
Chairman
Committee on Small Business and Entrepreneurship
428A Russell Senate Office Building
Washington, DC 20510

Dear Chairman Vitter:

This letter is in response to your letter dated May 12, 2016, which included additional questions for the record for the hearing titled, "Drowning in Regulations: The Waters of the U.S. Rule and the Case for Reforming the RFA" held on April 27, 2016. Enclosed you will find our responses.

The Office of Advocacy appreciates the opportunity to provide the Committee with more information about the office's activities. If you or any member of the Committee has any questions regarding these responses, please do not hesitate to contact me or Elle Patout, Congressional Affairs and Public Relations Manager. She can be reached at (202)205-6941 or Elle.Patout@sba.gov.

Sincerely,

Darryl L. DePriest
Chief Counsel for Advocacy

SBA OFFICE OF ADVOCACY
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Post-Hearing Questions for the Record
Submitted to Mr. Darryl L. DePriest

From Chairman David Vitter

QUESTION 1:
Do you believe the Office of Advocacy would be able to better perform its mission and serve as a source of accountability for federal agencies, if it were given more options in the rulemaking process when it disagreed with a certification?

No, I believe that the Office of Advocacy is well served with its current options. Advocacy serves as a public advocate for the interests of small business, a role that is not limited to the four corners of the RFA. For this reason, Advocacy prefers that agencies be held accountable for the RFA by the President, through Executive Order 12866 review; Congress, through oversight; the public, through public comment; and the courts, through judicial review. Advocacy provides insight and advice to each of these parties on the interests of small entities, including as it relates to RFA compliance, but does not seek greater authority to intervene in rulemakings. The ability to delay or deny rulemaking activity might diminish Advocacy's role as a broader advocate.

QUESTION 2:
You have cited the success of SBREFA panels in including small businesses to be a part of the discussion during the rulemaking process, specifically recommending the Fish and Wildlife Service to be required to conduct them. How did you come to this conclusion, and what do you look for in agency when considering whether they should be required to conduct a SBREA panel or not?

The Fish and Wildlife Service (FWS) does not notify the Office of Advocacy of its rules or respond to the Office of Advocacy's comments as required by the Small Business Jobs Act of 2010 and Executive Order 13272. The Fish and Wildlife Service contends that critical habitat designations under the Endangered Species Act (ESA) have little to no impact on small entities. FWS rationalizes that most or all of the costs are incurred at the time a species is listed under the ESA, and that the ESA does not allow cost to be considered at the time of listing. As a result, critical habitat designations are certified. Advocacy disagrees with FWS's position. If FWS's reasoning was what was contemplated by Congress when it enacted the ESA, there would have been no need for the ESA to require that the costs of a critical habitat designation be a factor in that designation. It is clearly the case that restricting the use of large swaths of land may have an impact on the owners and users of that land. Advocacy looks for an accurate estimation and description of small entity impact when reviewing agency regulations. Advocacy continues to encourage FWS to make a full accounting of the costs of critical habitat designations in their economic analysis and to perform an Initial Regulatory Flexibility analysis where required.

QUESTION 3:
You mentioned that SBREFA panels did not necessarily need to be expanded to the Department of Labor (DOL), citing they voluntarily did several roundtables with small businesses over the controversial overtime rule. How many voluntary roundtables did the Environmental Protection Agency (EPA) and Corp of Engineers

do on the Waters of the United States (WOTUS) Rule? Do you believe the EPA and the Corps' roundtables on WOTUS were helpful to small businesses since they still did not certify a significant economic impact on a substantial number of small businesses?

Advocacy always encourages agencies to reach out to small businesses. Congress has imposed specific requirements on certain agencies, including EPA, which requires specific outreach to small businesses under SBREFA when there will be a significant economic impact on a substantial number of small businesses. The SBREFA panels allow small businesses the opportunity to weigh in on what a rule should look like before the agency has drafted the rule and discuss and address issues that can be avoided. Small businesses appreciated the opportunity to share their concerns with EPA regarding the WOTUS rule. However, the failure to hold SBREFA panels meant that small businesses did not have the opportunity to weigh in on the problems with this rule prior to the agency drafting it and committing to certain aspects of the rule. While we do not know the exact number of roundtables the EPA held on this issue, Advocacy held two roundtables, one in Washington, DC and the second in Los Angeles, CA, both of which were attended by EPA officials.

QUESTION 4:
Based on your many letters requesting extensions, do you believe agencies often do not give small businesses enough time to offer constructive feedback in the public comment period?

Yes, I believe there are frequently situations where small businesses need additional time to provide constructive feedback to agencies in response to proposed rules. However, I do not believe the right amount of time is the same in every situation. Shorter comment periods may be appropriate for rulemakings that are not highly technical, that will not impose significant economic costs, or for which the agency has conducted broad public outreach. I believe that it is reasonable for agencies to publish most proposed rules with significant impact with a public comment period of 60 days and, later, to provide for more time based on public input. My primary concern is when a small business can demonstrate the need for more time and the agencies deny that request.

QUESTION 5:
Should agencies be required in the general notice of a proposed rule to provide an explanation for the public comment period time frame it chose and what factors the agency considered in the process?

No, I do not believe this would be productive. Agencies are generally willing to grant additional time for public comment when requested. Agencies frequently respond favorably to simple one-paragraph requests. I do not agree with a requirement to document consideration of factors in advance.

I believe it reasonable for agencies to be guided by the following recommendations made by the Administrative Conference of the United States in Recommendation 2011-2 when setting an initial public comment period:

"As a general matter, for 'significant regulatory actions' as defined in Executive Order 12866, agencies should use a comment period of at least 60 days. For all other rulemakings, they should generally use a comment period of at least 30 days. When agencies, in appropriate circumstances, set shorter comment periods, they are encouraged to provide an appropriate explanation for doing so."

QUESTION 6:
Would it be helpful for small businesses to require agencies to have a minimum day 60 public comment period when conducting an IRFA and thus certifying a significant impact on a substantial number of small businesses?

Perhaps, but I believe a case-by-case determination remains preferable. The RFA should work within the timeframes allowed by the Administrative Procedure Act, not extend them.

An IRFA is not a certification that a rule would have a significant economic impact on a substantial number of entities. It is the analysis required of all proposed rules, except those for which the agency knows that there will NOT be a significant economic impact on a substantial number of small entities. For example, the IRFA may include a significant level of uncertainty and identify a large number of unknowns about the impacts on small entities such that the agency could not certify, but the overall rulemaking is relatively uncomplicated and would not otherwise require a 60-day public comment period.

Similarly, Advocacy encourages public scrutiny and comment on agency certifications. Some of these certifications may reasonably require more time than some IRFAs.

From Senator Scott

QUESTION 1:
But I believe they should also be listening to stakeholders, and giving their concerns credence by conducting economic analysis to see how this rule is actually going to affect them and their employees. Does your office agree that DOL should make economic analysis available before the rule is finalized?

Based on small business feedback, Advocacy believes that DOL's proposed overtime rule would add significant compliance costs and paperwork burdens on small entities, particularly businesses in low wage regions and in industries that operate with low profit margins. In our public comment letter, Advocacy recommended that DOL publish a Supplemental Initial Regulatory Flexibility Analysis to reanalyze small business impacts. Advocacy recommended that DOL be more transparent regarding the numbers of small businesses impacted and the costs of this rule on these small businesses. DOL should have released this extra information as a supplemental document so that commenters could provide more robust comments, and develop and propose alternatives that would minimize the impact of this rule on small entities.

On Wednesday, May 18, 2016, DOL released the final overtime rule. DOL did not publish a Supplemental IRFA. However, DOL was more transparent in the Final Regulatory Flexibility Analysis regarding the numbers of small businesses impacted and the cost of the rule on these businesses; and also provided more information on how it arrived at this data. Based on our feedback from our roundtables, Advocacy continues to believe that DOL is underestimating the

cost of this rule on small entities. Due to these low cost estimates, DOL's evaluation of appropriate alternatives to lower the impact on small businesses may not be comprehensive.

In the final rule, DOL adopted some regulatory alternatives recommended by Advocacy that may minimize some of the economic impact. For example, DOL has considered regional impacts of the salary threshold, has considered bonuses and other compensation in the salary threshold test, and has changed the updates to the salary threshold to every three years (instead of every year). In addition, DOL did not change the duties test as a result of small business comments. The final rule was only released last week, but we have heard from small businesses that they remain concerned that the salary threshold is still set too high at over $47,000. While DOL did consider the regional impacts of the salary threshold by choosing to set the threshold at the 40th percentile of the lowest wage region (the South), selection of this broad region includes the wages of 17 states (including Washington, DC, and Virginia). Advocacy will continue to seek feedback from small businesses on the final rule.

QUESTION 2:
How can we ensure that DOL effectively considers comments on proposed rules from SBA or any other administrative agency? Do you believe that the roundtables fulfilled their purpose? Senator Vitter mentioned requiring DOL to conduct SBREFA panels as an option-are there other ways that we can ensure that regulatory bodies are effectively considering input from stakeholders?

The Regulatory Flexibility Act was updated by the Small Business Jobs Act of 2010 to require that Final Regulatory Flexibility Analyses to be more detailed and to respond directly to Advocacy comments to the proposed rule. We believe the Department of Labor (DOL) did hear from small businesses during this process. For example, we conducted five roundtables around the country that included representatives from the DOL and small businesses. Advocacy believes that small businesses did need more time to respond to this important rule. Our office submitted a public comment letter to DOL during the comment period to seek an extension of the comment period; this request was not granted. Advocacy does not believe the panel process would provide any more information to DOL. While we may not agree with some of the other agencies' policy decisions on rules that have small business impacts, we believe they have done a significant amount of small business outreach.

QUESTION 3:
If the rule were to go into effect, do you believe that the Department should be required to conduct economic analysis before any automatic increases in the income threshold go into effect?

In our comment letter, Advocacy recommended that DOL analyze the impact of the annual salary updates on small businesses. DOL did analyze the impact of the automatic increases on small businesses in the final rule (see table 46 in the FRFA). However, Advocacy is also concerned that DOL's analysis still underestimates the costs of these automatic increases on small entities. For example, DOL has estimated that each small business will spend only five minutes every three years on regulatory familiarization to understand how the new threshold

will impact their business. Advocacy still recommends that DOL continue to update their RFA analysis every three years, when this threshold is updated.

QUESTION 4:
Moving forward, how will you support the interests of small business owners throughout implementation of the overtime rule?

Advocacy is available to help DOL in getting the word out to small businesses on how to comply with this regulation. DOL has published a Small Business Compliance Guide, and Advocacy will make sure that this document is distributed to the small business community. Advocacy will continue to gather feedback on how this rule is affecting small businesses, and bring back this vital information to DOL, the White House and Congress.

From Senator Fischer

QUESTION 1:
Does the final rule to redefine the scope of federal jurisdiction under the Clean Water Act succeed in clarifying the scope? Would the proposed rule lead to more litigation, including more citizen suits?

The rule does not clarify the scope of jurisdictional waters. The rule is currently the subject of litigation in the 6th Circuit.

QUESTION 2:
How could the final rule to redefine the scope of Federal jurisdiction under the Clean Water Act affect our nation's economy and the ability of industry to grow and create jobs?

The rule introduces uncertainty in the Clean Water Act regulatory scheme. Businesses may choose not to pursue projects because they do not have confidence that they will be able to get a permit in a timely or economical fashion. Small businesses have commented that the scope of the rule is too broad and would potentially bring every body of water under federal jurisdiction.

NFIB
The Voice of Small Business.

May 18, 2016

The Honorable David Vitter
Chairman, U.S. Senate Committee on Small Business and Entrepreneurship
428A Russell Senate Office Building
Washington, D.C. 20510

Attn: Kathryn Eden

Dear Chairman Vitter:

This letter is in response to your May 12, 2016, letter submitting a question for the record from Senator Fischer. Senator Fisher asked the following question and below is my response.

QUESTION: Do you believe that the rule will have a direct impact on small businesses? How?

Yes. I do believe the Waters of the United States rule will have a direct adverse impact on many small businesses. The United States Environmental Protection Agency and the U.S. Army Corps of Engineers (the Agencies) are pursuing a significant expansion of federal CWA jurisdiction, which will necessarily exert more government control over private properties—including many owned by small businesses. As a result, the rule will have severe practical and financial implications for many. This is because a business owner cannot make economically beneficial uses of his or her land once it is considered jurisdictional. And if an owner proceeds with a project on a portion of land that might be considered a water of the U.S., the owner faces the prospect of devastating fines—up to $37,500 per day.

Consequently, most landowners—especially small businesses—will be forced into keeping their properties undeveloped. If the purported jurisdictional water covers the entire property, the owner may well be denied the opportunity to make any productive or economically beneficial use of the property. In some cases, it may be possible for the owner to obtain a permit to allow for development; however, there is no guarantee a permit will be issued. Moreover, for small business owners and individuals of modest means, such a permit is usually cost prohibitive.

While multinational corporations with tremendous capital resources might be able to afford permitting costs, most small businesses are without recourse. Usually, their only option is to swallow their losses and forgo any development plans. Unfortunately, these small businesses suffer greatly because they have usually tied up much of their assets into their real estate investments and can neither afford necessary permits, nor legal representation to challenge improper jurisdictional assertions. And lawsuits challenging these assertions are fact intensive and extremely costly to litigate.

National Federation of Independent Business
1201 F Street NW * Suite 200 * Washington, DC 20004 * 202-554-9000 * Fax 202-554-0496

Thank you again 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.

Sincerely,

Elizabeth Milito
Senior Executive Counsel
NFIB Small Business Legal Center

National Federation of Independent Business
1201 F Street NW * Suite 200 * Washington, DC 20004 * 202-554-9000 * Fax 202-554-0496

Rosario Palmieri
Vice President
Labor, Legal & Regulatory Policy

May 26, 2016

The Honorable David Vitter
Chairman
Committee on Small Business & Entrepreneurship
U.S. Senate
Washington, DC 20510

Dear Chairman Vitter:

Thank you for the opportunity to testify before your committee. Below is a response to the question for the record.

Senate Committee on Small Business and Entrepreneurship Hearing
April 27, 2016
Follow-up Question for the Record

Question from Senator Fischer:

Would the final rule's expansion of federal powers create an unreasonable burden to small developers and other private property owners, especially given that the states are best positioned to assume jurisdiction and protect on a local level the water quality of small and intermittent bodies of water?

Response from Mr. Palmieri:

Yes, if the final rule were to be fully implemented, it could create an unreasonable burden on many private property owners, especially small businesses. Federal regulations are making it harder for businesses to grow and Americans to work. Rules that should help our communities thrive are instead making life harder for job creators, workers and their families.

Two years ago, the EPA and the Army Corps of Engineers (Corps) announced they would attempt to redefine the words in the Clean Water Act (CWA) that define what is regulated by the federal government rather than state and local governments. By law, the CWA applies to "navigable waters," which is in turn defined as "the waters of the United States, including the territorial seas."[1] However, in the four decades since enactment of the CWA, stakeholders have grappled with what that phrase actually means.

For example, there have been times when some tried to call isolated gravel pits "waters of the United States."[2] In other instances, the application of CWA jurisdiction prevented

[1] 33 U.S.C. § 1362(7).
[2] *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).

landowners from preparing their land to build a home.[3] Fortunately, the judicial system has operated as a buffer to these sorts of misinterpretations of the law. It has not, however, resolved the need for clarity. And an expensive and lengthy legal battle is often not an option for a small family farm or a start-up company.

Manufacturers therefore would welcome a clear rule that resolves disagreement over the scope of the CWA. The official policy of the NAM is that the term "waters of the United States" should be interpreted to mean waters that are navigable in fact or that have a relatively permanent surface connection to a water that is navigable in fact.

Unfortunately, the final "waters of the United States" regulation fails to clear up existing jurisdictional problems and may even create new ones. The regulation expands the scope of the CWA to areas that are not always wet, but also fails to provide clear exclusions to determine specifically which waters qualify. Manufacturers will face increased regulatory uncertainty, permitting costs, and supply and customer chain disruptions. Ambiguities in the new regulation will give rise to third-party lawsuits, even in cases where the EPA decides a water is *not* a water of the U.S. This is an unreasonable burden to small developers and other private property owners.

The EPA and the Corps claim the final rule does not expand CWA jurisdiction. Consider the following, however:

- Relatively minor activities such as clearing sediment from stormwater basins or moving stormwater drains now require additional permitting and reviews. This increases time and money required to complete work;

- Ditches, including roadside ditches that have perennial flow, are regulated. The rule includes exemptions for certain ditches, but there are many other types of ditches that are now regulated as tributaries. Even dry ditches that are either a relocated tributary or were excavated in a tributary are now regulated by the EPA. It is up to landowner to prove that their ditches do not excavate or relocate a historic tributary. This allows the federal government to assert jurisdiction based on past conditions, not present;

- Increased stream numbers and tributary lengths could prevent critical nationwide permits in some cases. This stalls transmission line maintenance, infrastructure expansion, and other projects that currently rely on nationwide permits;

- At a minimum, energy exploration and production companies expect the number of permits required to double. Managing the nine- to eighteen-month individual permitting process is difficult and could lead to loss of leases and associated product sales. For the increases in permitting, site delineations, and modified construction practices, one NAM member informs us that costs could increase in the range of 100 to 750 percent.

- Breweries worry about how this rule will impact their ability to get the grains they need to make beer. When homebuilders face increased site costs, homeowners could be forced to sacrifice other items to stay within budget;

- If a manufacturer needs to install a larger loading dock and some additional space to manufacture products, the new rule could force the manufacturer to seek permits and

[3] *Sackett v. United States Environmental Protection Agency*, 132 S. Ct. 1367 (2012).

potentially put major systems in place to treat stormwater unless certain exemptions are met; and

- A heavy equipment manufacturer's site for testing equipment and moving dirt has rain flow, and as a result may now be covered. Even if the agencies say it is not a problem, citizen suits could hamper operations and maintenance work or prevent clearing out ponds and holes used for testing.

The final "waters of the U.S." rule substitutes the new definition into all CWA programs and regulations across the entire country, which in turn changes the jurisdictional application of all other CWA rules. Implementation will be difficult: in the past, typically only CWA Section 404 dredge-and-fill permits sought jurisdictional determinations, but now other programs will start seeing the need for more determinations. An influx of new requests will mean more delay. And applicants with pending permits will have to start over based on the new rule.

Ultimately, this translates into greater legal costs and fewer profits to reinvest into communities. It means consumers pay more, but get less. For manufacturers, more money will be spent on permitting instead of innovation, and projects that create jobs in communities could be delayed or shelved.

Sincerely,