

**REGULATORY REFORM AND ROLLBACK: THE
EFFECTS ON SMALL BUSINESSES**

HEARING

BEFORE THE

COMMITTEE ON SMALL BUSINESS

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HOUSE OF REPRESENTATIVES

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REGULATORY REFORM AND ROLLBACK: THE EFFECTS ON SMALL BUSINESSES

WEDNESDAY, MARCH 7, 2018

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

The Committee met, pursuant to call, at 11:04 a.m., in Room 2360, Rayburn House Office Building, Hon. Steve Chabot [chairman of the Committee] presiding.

Present: Representatives Chabot, Kelly, Blum, Comer, Fitzpatrick, Marshall, Norman, Curtis, Velázquez, Evans, Murphy, Lawson, Adams, Espaillat, and Schneider.

Chairman CHABOT. Good morning. I am going to go ahead and call the hearing to order.

We have been contacted by the ranking member who has indicated she is speaking right now in Financial Services and she has given our authorization to go ahead and move ahead. I know she is probably very anxious to hear my opening statement and will be very disappointed not to hear it but we can provide her with a copy of it.

We have some of our other most distinguished democratic colleagues here as well to make sure that if I do anything wrong they will call me on it, so I won't.

The Small Business Committee is here today to examine how the current regulatory reform and rollback efforts by Congress and the President have affected small businesses. As this Committee knows all too well, federal regulations continue to be one of the biggest challenges facing America's small businesses, and this impacts their abilities to grow.

Every day, millions of small business owners across the country are working hard to provide jobs and grow the economy. But no matter what industry these small business owners are in, they must navigate what is often a tangled web of complex, confusing, and costly regulations. In fact, according to the National Small Business Association, the average small business owners spends at least \$12,000 every year to deal with the costs of regulation.

Even worse, a start-up company will spend on average over \$83,000 in regulatory costs alone in their first year. Small business owners also spend a substantial amount of time navigating regulations, with nearly half of them spending over 40 hours every year to handle new and existing regulations.

The evidence is clear: federal regulations continue to be a problem for America's small business owners and they need to be addressed.

There are federal laws in place that are designed to ensure that agencies do not issue new regulations without careful consideration. One is the Regulatory Flexibility Act, which requires agencies to consider how their proposed regulations will impact small entities. Another is the Congressional Review Act, a tool that Congress can use to rescind a regulation on an expedited track.

We have used the Congressional Review Act to overturn 15 regulations from the final months of the previous administration that were rushed through the rulemaking process as midnight regulations. Unfortunately, despite these established procedures, small businesses are not being adequately considered in the regulatory process.

The President has also taken important steps to reduce the regulatory burden on small businesses, such as requiring two regulations be repealed for every new regulation, which we understand is actually quite more than two. I have heard it is up to 22 for every new regulation coming out of here, so that is definitely a step in the right direction. And establishing regulatory reform task forces to force agencies to take a hard look at regulations already on the books. And we are seeing results. In the first 8 months of the President's tenure, federal agencies added zero new regulatory costs and created over \$8 billion in cost savings.

That is a good start, but permanent, meaningful regulatory reform needs to come from Congress. For too long, Federal agencies have ignored their obligations and inappropriately used loopholes in the rulemaking process to avoid considering how their regulations will impact small businesses.

That's why I sponsored H.R. 33, the Small Business Regulatory Flexibility Improvements Act of 2017, which would strengthen the Regulatory Flexibility Act and ensure that federal agencies actually examine how their new regulations would impact small businesses and require them to consider alternatives to reduce unnecessary costs and burdens.

This bill was included in a larger bill, H.R. 5, the Regulatory Accountability Act of 2017, which passed the House with a bipartisan vote. The Senate's counterpart bill, S. 584, was voted out of Committee and is awaiting action by the full Senate, as are many other things. I encourage the Senate to vote on this critical, common sense legislation as soon as possible, so we can provide meaningful regulatory relief to America's small businesses.

Our witnesses today will provide important insight into how the current regulatory reform and rollback efforts have been working for America's small businesses.

I would normally now yield to the ranking member. I would assume that my colleagues do not want to give her opening statement, so we will let her opening statement be given at the point that she gets here.

So I will then, let's see here. Let me get the appropriate next thing here.

Okay. Well, we will go right into—I would assume that no other Committee members have opening statements. If they do, I would ask that they be submitted for the record.

Without objection, so ordered.

And I will take just a moment at this point to explain our lighting system. The ranking member is very familiar with that so this is not going to put her at any disadvantage I am sure.

We operate under the 5-minute rule. It is pretty simple. There is a lighting system there. The green light will be on for your first 4 minutes. And then the yellow light will come on to let you know you have got a minute to wrap up, and then the red light will come on at the end of 5 minutes, and we ask you to stay within that time if at all possible. We will give you a little leeway if you need to go on, but try to wrap up if you see the light come on.

And I will now introduce our distinguished panel here this morning.

Our first witness is Karen Harned, who is the Executive Director of the Small Business Legal Center at the National Federation of Independent Business (NFIB). Ms. Harned comments regularly on small business cases before federal and state courts. She has also written and testified before Congress, including this Committee, on how regulations impact small businesses and provides compliance assistance for small business owners across the country.

Our next witness is Patrick Hedren, who is Vice President for Labor, Legal, and Regulatory Policy at the National Association of Manufacturers (NAM). NAM is the largest manufacturing association in the country and represents small manufacturers in all 50 states. Mr. Hedren advocates on behalf of the Nation's manufacturers on specific regulations, regulatory reform, and labor and employment policies.

Our third witness is Randy Noel, who is the current Chairman at the National Association of Home Builders. Mr. Noel also founded a custom homebuilding company in—is it La Place or La Place?

Mr. NOEL. La Place.

Chairman CHABOT. La Place, okay. Louisiana, which has built more than 1,000 custom homes in the greater New Orleans area. He brings more than 30 years of experience to the residential construction industry, and we appreciate all the testimony.

And I would ask my colleagues, would they like me to introduce our final witness?

Okay. I will go ahead and do it.

Our final witness is Ms. Lisa—is it Heinzerling? It is? Okay. Heinzerling.

Ms. Heinzerling is the Justice William J. Brennan, Jr., Professor of Law at Georgetown University Law Center. She specializes in administrative law, environmental law, and food law, and has several publications on these topics.

We welcome Ms. Heinzerling today as we do all our witness.

Ms. Harned, you are recognized for 5 minutes.

STATEMENTS OF KAREN HARNED, EXECUTIVE DIRECTOR, SMALL BUSINESS LEGAL CENTER, NATIONAL FEDERATION OF INDEPENDENT BUSINESS; PATRICK HEDREN, VICE PRESIDENT, LABOR, LEGAL & REGULATORY POLICY, NATIONAL ASSOCIATION OF MANUFACTURERS; RANDY NOEL, CHAIRMAN, NATIONAL ASSOCIATION OF HOME BUILDERS; LISA HEINZERLING, JUSTICE WILLIAM J. BRENNAN, JR., PROFESSOR OF LAW, GEORGETOWN LAW

STATEMENT OF KAREN R. HARNED

Ms. HARNED. Thank you, Chairman Chabot and Ranking Member Velázquez.

On behalf of National Federation of Independent Business, I appreciate the opportunity to testify today regarding the positive impact deregulation is having and regulatory reform can have on small business. Overzealous regulation is a continuous concern for small business. The uncertainty caused by future regulation effectively acts as a boot on the neck of small business, negatively impacting their ability to grow and plan for the future.

Since January 2009, government regulations and red tape have been listed as among the top three problems for small business owners according to NFIB Research Center's monthly Small Business Economic Trends Survey. And in a small business poll on regulations, NFIB found that almost half of small businesses surveyed viewed regulation as a very serious or somewhat serious problem.

Compliance costs, difficulty understanding regulatory requirements, and extra paperwork are the key drivers of the regulatory burdens on small business. Understanding how to comply with regulations is a bigger problem for those firms with one to nine employees, since 72 percent of small business owners in that cohort try to figure out how to comply themselves, as opposed to assigning that task to somebody else.

Finally, NFIB's research shows that it is the volume of regulations that poses the largest problem for 55 percent of small employers, as compared to 37 percent who are most troubled by a few specific regulations.

America's small business owners view President Trump's commitment to rolling back unnecessary burdensome and duplicative regulation as one of his administration's greatest accomplishments in his first year. Every president has contributed to the problem of overregulation, with tens of thousands of pages being added to the Federal Register every year, yet the Trump administration, to its great credit, has reversed that trend, reducing the number of pages in the Federal Register by 36 percent.

For fiscal year 2017, President Trump promised to eliminate two regulations for every new one proposed, but the administration exceeded that goal, eliminating 22 regulations for every new regulatory action.

The Office of Information and Regulatory Affairs Administrator Neomi Rao has directed each Federal agency to have a net reduction in total incremental regulatory costs for fiscal year 2018. Congress has also provided significant relief by rejecting 15 burdensome regulations using its authority under the Congressional Review Act.

NFIB commends this Committee and the House of Representatives for passing several regulatory reforms, including H.R. 5, the Regulatory Accountability Act which, as the chairman mentions, contains important reforms for small business and Title III, the Small Business Regulatory Flexibility Improvements Act.

As H.R. 5 requires, NFIB supports the following regulatory reforms that we believe would make the regulatory process more effective, transparent, and accountable. NFIB believes that every agency should be required to comply with SBREFA and convene a Small Business Advocacy Review Panel before every economically significant rule is promulgated.

NFIB supports reforms that would account for the indirect cost of regulation on small business. Federal agencies often proclaim the indirect benefits of their proposals but they decline to analyze and make publicly available the indirect cost to consumers. NFIB believes judicial review of RFA compliance should be available during the proposed rule stage.

NFIB also supports reforms that would waive first-time paperwork violations, require agencies to conduct more vigorous cost-benefit analysis, end Chevron Deference, provide for third-party review of RFA analyses, codify Executive Order 13563, and increase agency focus on compliance assistance.

Finally, much work still needs to be done to ensure that agencies comply with existing law and do not view SBREFA as simply just another box to be checked.

Small businesses are the engine of our economy, yet over the last several years, the crushing weight of regulation has used up valuable human and financial capital which is in short supply for America's small business owners. NFIB looks forward to working with Congress to pass regulatory reforms that would improve current law and level the regulatory playing field for small business.

Thank you for inviting me to testify, and I look forward to answering any questions you may have.

Chairman CHABOT. Thank you very much.

The ranking member has indicated to me that she would like to give her opening statement after all the witnesses have testified.

So Mr. Hedren, you are recognized for 5 minutes.

STATEMENT OF PATRICK HEDREN

Mr. HEDREN. Chairman Chabot, Ranking member Velázquez, and members of the Committee, thank you very much. It is an honor to testify in front of you today about the impact of regulatory reform on small manufacturers in the United States.

Thank you, Mr. Chairman, for the kind introduction earlier.

I would like to focus my remarks on three key messages.

First, when it comes to small business impacts, it is not just the heat, it is the humidity. Small manufacturers worry about the accumulation over time of overlapping and even conflicting rules, not just the big ticket items.

Second, reducing burdens on small manufacturers, it is not about the number of rules that come off the books, but it is about the way the executive branch approaches regulation.

And third, right now is an ideal time for Congress and the executive branch to reflect on what works and to reform the things that do not work.

Today's hearing comes at a very interesting time for regulatory policy in general. Last year saw some of the biggest shifts in regulatory policy that I am aware of. Congress passed, Mr. Chairman, as you mentioned, and the President signed 15 Congressional Review Act resolutions. That is about 15 times as many as ever before. The President issued Executive Order 13771, which calls on agencies to remove two regulations for each new one that they issue and to adhere to a net zero budget. And while agencies begin to reevaluate their existing rules with an eye toward reform, new major rulemaking has slowed dramatically.

The truth as we see it is that reforming ineffective and costly regulations is painstaking work, and we see care and deliberation as a good thing. But our members are optimistic because of relatively calmer waters in this space and they are investing as a result.

In our most recently quarterly outlook survey at the end of 2017, 94.6 percent of NAM's members said that they were positive about their own company's outlook. That is an all-time high for that survey. That number actually made headlines.

For regulatory geeks like myself, the fourth quarter survey also highlighted some interesting points. Over a third of respondents said that they spend at least 7 hours per week on regulatory paperwork, and almost a quarter spend over 10 hours. Four in 10 felt like they had enough guidance on how to comply with the regulations to which they are subject. Over half need to retain a law firm to help them keep up with paperwork. And at the same time, manufacturers are not anti-regulation. Over three-quarters told us that smart regulations are essential to ensure a level playing field.

Our members want to see regulations that make sense for how small and medium-size manufacturers work in the real world, and we know that this is a bipartisan goal.

Regulatory policy is always contentious, however, because the benefits of regulation are usually diffused while the burdens are usually concentrated. Some sectors like our own bear a major share of overall regulatory costs in the economy and our smaller members experience regulation on almost a personal level, and certainly to a greater degree.

Despite bipartisan agreement that we need to do a better job in this space, we worry that both sides are talking past each other. Rulemaking by its nature should be about finding the right balance between the goals to be achieved and the price to be paid. So reforming the regulatory system is really about putting in place basic procedures to ensure that agencies do their best to achieve that balance. They should understand the parties they are regulating. They should evaluate meaningful alternatives. And they should try to maximize the net benefits of their rules.

Executive Order 13771 has been in effect for about a year now, and since then, agencies have issued about half as many significant rule documents as under Presidents Bush and Obama in a similar time period. In fact, last year, the administration published 23 de-regulatory actions with estimated cost savings.

Through the end of fiscal year 2017, the administration wrapped up 67 deregulatory actions all together. These numbers do not really show a slash-and-burn approach to deregulation. Instead, they show a more methodical approach taking place through the rule-making process, and that approach takes time.

But maybe the most noteworthy number from last year is three, and that is the number of new final rules with over \$100 million in burdens on industry which is a historic low.

So in light of what we have seen in the past year, we believe there are plenty of opportunities to implement further reforms, and now is an ideal time to do so. This Committee has done great work this year, last year, and in prior years, to propose necessary reforms that would close loopholes in the Regulatory Flexibility Act. This work is critical for small and medium-size manufacturers because agencies too often avoid analyzing small burden impacts or business impacts despite the original intent of Congress.

But beyond legislation such as the Small Business Regulatory Flexibility Improvements Act, Congress should also focus on meaningful bipartisan reforms that may not be explicitly focused on small business but would nevertheless have an important impact on those businesses by driving better regulatory outcomes overall.

The NAM urges the Committee to continue developing and promoting sensible, bipartisan legislation that will give small business a true voice and seat at the table. Thank you for your invitation again to speak today and for your attention on small and medium-size manufacturers across the country.

I look forward to answering any questions you may have.

Chairman CHABOT. Thank you very much.

Mr. Noel, you are recognized for 5 minutes.

STATEMENT OF RANDY NOEL

Mr. NOEL. Thank you. I am pleased to be here on behalf of the National Association of Home Builders on Regulatory Reform and Rollback: The Effects on Small Businesses.

My name is Randy Noel, and I am a second-generation home builder from La Place, Louisiana, with more than 30 years of experience. I understand how difficult and costly it can be to comply with government regulations. But it is not just costly for me and my business. These costs also deny Americans the opportunity to own a home.

Government regulations account for nearly 25 percent of the cost of a new single family home, and that places 14 million American households out of the market for a new home.

I am happy to report that things are getting better. In its first year, the administration has taken major steps to reduce the relentless and costly overregulation of American industry. We have seen more than 20 significant regulatory changes that will benefit homeowners and home buyers.

I wish to focus on the progress that has already been made in reducing regulatory burdens for small businesses in our industry, the regulatory headwinds that still linger, and what steps should be taken to fix our broken regulatory rulemaking system.

I would like to highlight one particularly unnecessary regulation the administration has ended. The previous administration issued

an executive order creating a new Federal flood risk management standard, which required agencies to develop new regulations based on an expanded floodplain zone. The owners would have had no way of knowing if they had to comply with the new floodplain rules because maps of the expanded floodplain did not exist. They still do not exist.

Although FEMA deals with flood insurance, this would have greatly affected HUD's mortgage programs. Specifically, homeowners within these unknown, unmapped, potential flood plains may have lost access to FHA mortgage insurance, jeopardizing affordable housing opportunities for low to moderate income working class families. We are grateful for this administration's decision to rescind the executive order, and HUD has withdrawn its proposed regulations.

Even with the progress we have seen this year, significant work remains to peel back and revisit the accumulated layers of regulations. Let me highlight one of these regulations from my written statement.

EPA's Lead Renovation Repair and Painting program. This rule addresses lead-based paint hazards created by renovation, repair, and painting activities that disturb lead-based paint in homes built before 1978. We all recognize the need to protect the health of our children, but this regulation is needlessly burdensome. For example, does it not make sense to ensure that homeowners and remodelers have an easy method to test their older home for lead paint? Yet, more than 5 years after the EPA said a test kit would be ready, we still lack a reliable, commercially available testing kit. This means remodelers may have to assume that a home has lead paint, which means a more costly bill to their client, which in turn may discourage homeowners from using a professional remodeler, one that has been trained. Or perhaps do the jobs themselves and risk exposure to lead paint.

We should and must make fixes to existing regulations. But at the end of the day, that amounts to little more than a Band-Aid. We need to reform our regulatory process to deal with these problems before, not after, the regulation is crafted. And we need to increase the level of congressional oversight over those agencies. This is the only sure way to safeguard against future bad regulation.

Fortunately, there is a solution. Legislation has already passed this chamber that would fix our regulatory system. The Regulatory Accountability Act, the Regulatory Flexibility Improvements Act, and the Regulations from the Executive in Need of Scrutiny Act, more commonly known as the REINS Act. NFIB will continue to urge the Senate to take up these important bills.

I personally believe enacting the REINS Act is a lynchpin to reforming our regulatory process. It restores much needed congressional oversight to the rulemaking process. Without meaningful congressional oversight, poorly crafted rules often go into place, and businesses are forced to divert precious resources to lengthy and uncertain legal challenges.

While the REINS Act returns control of the regulatory process to the people, the Regulatory Accountability Act repairs the process of developing regulations. And the Regulatory Flexibility Improvement Act ensures that agencies are considering the full impact of

a proposed regulation on small businesses. Taken together, these reforms will ensure we protect the environment and our workers while also adding fuel to the engine of economic growth that America's small business represents.

Thank you again for the opportunity to testify.

Chairman CHABOT. Thank you very much.

Ms. Heinzerling, you are recognized for 5 minutes.

STATEMENT OF LISA HEINZERLING

Ms. HEINZERLING. Thank you for the opportunity to testify before you today.

President Trump has made deregulation a central goal of his domestic policy. He has directed agencies to take an ax to existing regulations and has placed strict limits on the development of new regulations.

Agencies have responded by delaying, suspending, and revoking existing regulations. All across the government, rules and policies that took years to develop have been put off or wiped out. These rules and policies address issues as important and diverse as climate change, consumer deception, airline safety, chemical accidents, food safety, sexual assault, and more. In a great many cases, the rules and policies have been put off or rejected with little of the legally required attention to statutory constraints, factual records, or procedural frameworks. As a consequence, Federal courts have rejected the administration's attempts to delay or suspend existing rules on such matters as lead paint, energy efficiency, and methane emissions from oil and gas facilities.

Two weeks ago, for example, a Federal district court in California granted a preliminary injunction against the Department of Interior's suspension of a rule that was intended to reduce waste of natural gas from oil and gas facilities on public lands. Particularly pertinent in today's hearing, the court found that the Department's attempt to justify the suspension based on the rule's purported effects on small businesses was not supported by the factual evidence.

Agencies have also responded to the President's deregulatory agenda by putting off or canceling new regulatory initiatives. Under the two-for-one executive order, the Office of Management and Budget is empowered to set regulatory budgets for the executive agencies. These are not ordinary budgets in which agencies have a limit on what they can spend to do their work. With regulatory budgets, agencies have a limit on what they can require private parties to spend to alleviate the problems the agencies have been charged by statute with addressing. For fiscal year 2018, OMB has given the agencies regulatory budgets that are in every case zero or negative.

At the current rate of annual cost savings from all deregulatory efforts across all agencies, it would take the entire executive branch 2 or 3 years to accumulate cost savings sufficient to offset the cost of just one specific rule from one agency.

Under this executive order as well, a reduction in regulatory costs is considered a success no matter how dearly we pay for it in benefits far gone. Consider again the regulatory budgets OMB has set for this fiscal year. The Department of Energy takes one

of the biggest hits in OMB's regulatory budget. It must find \$80 million in savings from discarded rules before it may spend a single dollar on new regulation, at which point it must still offset each dollar spent with reductions elsewhere. However, according to OMB itself, the Department of Energy is one of the star performers in the government when one compares the regulatory costs it imposes to the regulatory benefits it reaps for the public. The Department's regulations on energy efficiency over a 10-year period produced net benefits of as much as \$31 billion. Consider, too, the example of the Environmental Protection Agency, no agency in this administration has taken a bigger ax to existing regulatory programs than the EPA. Yet, OMB has reported that EPA rules outperform the rules of all other agencies combined in the Federal government in terms of producing net monetized benefits. OMB estimates from 2006 to 2016, EPA regulations provided as much as \$750 billion in benefits measured in terms of lives saved, illnesses averted, and environmental degradation reduced, while imposing no more than \$65 billion in costs. These are the kinds of programs the administration has slated for especially deep cuts. It makes no sense.

As for the effects of the deregulatory surge on small businesses, make no mistake. The war on regulation is being conducted at the behest of some of the largest corporations in this country and its benefits are being delivered primarily to them. In fact, many of the administration's deregulatory actions not only fail to target their savings to small businesses, but they affirmatively harm small entities by withdrawing regulatory protections that would have benefited them. In evaluating the deregulatory initiatives of this administration, one cannot simply assume that small entities are benefited when regulations are withdrawn. Thank you.

Chairman CHABOT. Thank you very much.

And before I recognize the ranking member, I have noticed that one of our former members of Congress here who had a very distinguished career representing the state of Missouri, Kenny Hulshof is in the back of the room over here. So Kenny, welcome.

And I would now like to recognize the ranking member for the purpose of making her opening statement before we move to regular order on questions.

Ms. VELAZQUEZ. Thank you, Mr. Chairman. And thank you to all the witnesses for being here today.

Regulations serve an important purpose in the world we live in. From the food we eat to the air we breathe, government regulations serve the primary purpose of helping to keep us all safe.

Yet, some regulations, even those with noble public safety reasons, also place an added burden on the public. Most prevalent among them are regulations which place an excessive compliance burden on small business owners.

Small businesses face a greater burden of federal regulatory costs than their larger competitors, something federal agencies must consider when crafting regulations.

On this committee, we are here to help ensure small businesses and entrepreneurs have an economic environment where they can grow and flourish.

That is why we take very seriously the responsibility posed by the Regulatory Flexibility Act and the Small Business Regulatory Enforcement Fairness Act.

It is critical that agencies are considering the economic impact of their regulations and paperwork requirements on small firms. At the same time, Congress needs to know what steps are needed to help agencies achieve this goal.

Transparency and communication are the key to an effective system of regulation. To have efficient regulations, we must have a strong dialogue between regulators and the businesses before rules are promulgated. An open line of communication can ensure that regulations are written in a common sense way which minimizes unnecessary burdens for small businesses.

We need to be sure small firms have an opportunity to weigh in on any changes made to the rulemaking process.

Whether it is embracing technology, working to synchronize and coordinate at all levels of government, or improving communication, it is an important discussion we must have.

Congress plays a critical role in ensuring regulations are not too burdensome, while at the same time protecting the American public. It is therefore irresponsible for the legislative or the executive branch to recklessly change or get rid of regulations without thoroughly looking at the impact and the long-term consequences.

Although on its face, Executive Order 13771, which says that for every new regulation issued, at least two prior regulations should be identified for elimination, may seem like a good idea, it has very real impacts on the lives of consumers and small business owners. For instance, offshore drilling on our coasts not only harms the environment; it leaves small businesses that rely on tourism subject to potential harm and lost revenue. Immediately we saw the governor of Florida sending a letter to President Trump regarding how opening offshore drilling will have an impact on a major industry activity, tourism, in not only Florida, but also New Jersey.

We must collaborate to thoughtfully produce streamlined regulations for small firms, while keeping in mind our ultimate goal, to protect consumers and public safety.

I look forward to hearing from each of you about how we can improve our current regulatory system and promote long-term economic growth.

I once again thank the witnesses for being here.

And I yield back.

Chairman CHABOT. Thank you very much. The gentlelady yields back.

And I will now recognize myself for 5 minutes to begin the questioning. And I will begin with you, Ms. Harned.

In your testimony, you stated that small business owners are frustrated by federal regulations and that early engagement in the process is key for small business owners. What are the current tools that small business owners can use to engage in the regulatory process? And are your members usually aware of these tools?

Ms. HARNED. Right. So really SBREFA I guess has provided the best tools in that, you know, especially for the significant regulations where SBREFA applies EPA and OSHA, there is a chance for small business owners to participate on the Small Business Ad-

vocacy Review panels and really walk the regulators how a regulation is going to impact them. We think that is a great model that honestly needs to be replicated. We have had members that have done that and seen good results because really why we are so supportive of early engagement is we find still to this day, I mean, I have been at NFIB 16 years, that the biggest challenge all of us face is trying to educate the regulators on what it actually means to be a small business owner and understanding that they do not have a general counsel if they have got five employees. They may not even have an attorney they could call to figure out what is going on. More broadly beyond where SBREFA applies currently, you know, obviously there is the comment process. We will comment on their behalf at NFIB, and we do again have a number of members that will engage that as well if they find out about it.

Chairman CHABOT. Thank you very much.

Mr. Hedren, I will go to you next.

We know that notice and comment is an important tool that small businesses can use to ensure their concerns are being heard during the rulemaking process. Do you believe that notice and comment is enough? Or are there still other problems that prevent small businesses from being able to fully participate in the rule-making process?

Mr. HEDREN. Thank you, Mr. Chairman, for that question.

I would first start by echoing what Karen said. I think that this is a challenging issue because with notice and comment, everybody in the country, and in fact, even if you are not in the country you have an ability to put a comment into the record for review by the agency and later, potentially, by a court. That is an incredibly important part of the engagement process.

For smaller businesses, however, they are facing a lot of different issues just to kind of get to that point. And one of them is even understanding that something is taking place. So folks like ourselves at this table may have an advantage in hearing when an agency starts to act and undertake a new rulemaking that small businesses just are not really watching for. I mean, they are watching their bottom line. They are investing. They are growing. And not hopefully reading the Federal Register each day like we do.

So the tools I think that we need and will benefit from are about greater outreach and SBA Office of Advocacy does an awesome job with reaching out to companies around the country and pulling together roundtables and helping them jump into the process. But we also need tools that enable and encourage and even force agencies to pay attention to these impacts and to affirmatively go out, find them, and incorporate them into their decision-making.

Chairman CHABOT. Thank you very much.

Mr. Noel, I will go to you next here. In your testimony, you mentioned the Waters of the United States rule as an example of a rule that was deeply flawed but has been withdrawn and is currently being rewritten. What advice do you have for the agencies to make sure small business owners are heard while they are rewriting various rules? This rule in particular, actually.

Mr. NOEL. Well, it is important that, of course, they be part of the rewriting of the definition of the Waters of the U.S. It is a pretty murky subject to begin with. But the flipside of that is you need

to make sure that they have access to property so they can continue to have their business.

I have participated in some roundtables and discussions about issues like Waters of the U.S., and one of the things from a frustrating point of view from somebody in the industry is it seems that it falls on deaf ears when it comes time for the rule or regulation to come out. There does not seem to be a whole lot of accountability to reacting to the information that they receive, which discourages people to give them the information.

Clearly, Waters of the U.S. impacts our industry in particular, and we are having a very, very difficult time getting to a point where we have affordable housing folks, so much so that most of the large urban areas across the country are beginning to talk about the affordable housing crisis that they are having. And a big piece of that was the definition of the Waters of the U.S. When you have to go through a 404 permit to get a wetlands permit to develop a piece of property, it is an expensive and long piece of work you have to do. So it is very important that the EPA listen to us. They have been listening to us. We are real proud that Secretary Pruitt has allowed us to participate in that discussion, and we think we can get to a place where it works for everybody.

Chairman CHABOT. Thank you very much.

Ms. Heinzerling, unfortunately, my time has run out, so I apologize for not getting a question to you. But as I say, my time has expired, and the ranking member is recognized for 5 minutes.

Ms. VELAZQUEZ. Thank you. Professor, when we go through the regulations, whether on this committee or when we hear about a discussion or debate on regulations, it seems like the focus is always on the complying costs associated with them. But many regulations benefit small businesses, both large and small, especially when it comes to increasing the productivity of their employees. Can you elaborate on this perspective?

Ms. HEINZERLING. Yes. There is a distressing focus these days on costs alone and not on the benefits of regulation. And those benefits can take a huge variety of forms. And sometimes the regulations, in fact, directly pit large businesses against small businesses. And in that case, we miss, if we simply take a cleaver to the regulation, we miss the benefits for small businesses.

So just to give you one example, the Department of Agriculture had been in the midst of developing a rule that would have protected small farmers against the anticompetitive practices of the large meat industry, and that rule has been withdrawn. And that is just one example of a case where we have regulations that not only indirectly benefit small businesses, which I would say a wide variety of regulations do, just like the tourism effects that you were talking about, but that directly are aimed at protecting them.

Ms. VELAZQUEZ. Thank you.

Mr. Noel, Hurricane Harvey devastated Texas where there are very relaxed building codes. In fact, it is just one of four states along the Gulf and Atlantic Coast with no mandatory statewide building codes and no program to license building officials. That has put insurers, who favor stricter building codes and fewer homes in risky locations against homebuilders who want to ease rules. How do we balance these competing regulatory demands to

protect small construction firms, small insurance companies, and consumers at the same time?

Mr. NOEL. Sure. Thanks for that question. As you know, I am from right outside of New Orleans, and we actually had that issue after Katrina. And I actually was actively involved with the Louisiana Home Builders Association passing a statewide uniform building code that was enforced thanks to a great deal of help from the Federal government to help fund the standup issues.

Texas does have codes in certain areas. They have adopted the International Residential Code, particularly those on the coast are building to that. Floodplain maps, they comply with that. Builders do not oppose building codes. They want reasonable building codes that achieve what they want to achieve. You want to keep a house safe. You want to make sure that the homeowner has a place to go home to after a storm. But the flipside of that is to do it as affordable as you possibly can because what we do not want to have is to make housing so unaffordable that they are living in substandard housing that is not built—

Ms. VELAZQUEZ. But do you not think that it does not provide a level playing field? We are not talking about not supporting rules or codes, but it eased those rules. And for insurance to take the risk of providing insurance for construction that might not provide a steady home, how do you reconcile that?

Mr. NOEL. Well, in Louisiana, we passed the code so that would not happen. And the insurance companies were a large driver of that.

Texas has a building code, and I suspect there may be some states that do not. I could get back to you on that. But for the largest part, the National Association of Home Builders, in particular, are very, very active in the adoption of building codes across the country because exactly what you say is the level playing field is not there if you have some people who are not building to codes and people building to codes.

Also, most of our members across the country support licensing of builders, and actually, I think Texas had that at one time and they undid it. But the same thing as you point out. Let's have some consistency so the insurance companies know what their actuarial risk is basing their premiums on.

Ms. VELAZQUEZ. Thank you.

Mr. NOEL. So for the most part I think our members would support building codes across the country.

Ms. VELAZQUEZ. Thank you.

Professor, do you have any comment on that question?

Ms. HEINZERLING. No.

Ms. VELAZQUEZ. Thank you.

Mr. Chairman, I yield back.

Chairman CHABOT. Thank you very much. The gentlelady yields back.

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

Mr. KELLY. Thank you, Mr. Chairman. And thank you to the ranking member. Thank you, witnesses, for testifying today. And thank you, Mr. Noel, for not having an accent.

During my 3 years in Congress, I have never once had small businesses—and I stayed very active in my district and very active with my small businesses, and I have been on this Committee my entire time. And not once have I heard any of my small business owners say I wish you guys in Congress or I wish administrative agencies would enact more rules and regulations. Not once have I heard that. I have heard the opposite of that many, many times. In my opinion, every rule that is enacted should have to get congressional approval and should not be—so I would go further than the REINS Act. I think any rule should have to be approved by Congress. I think we have advocate our responsibility to rule-making organizations which are not elected by the people.

The costs to comply for small businesses are extremely over burdensome. They do not know what rules they have to. They do not have the staff, the training. They cannot afford to hire professionals to do those things, so they become really, many times I feel the administrative agencies, when they enact rules, are making regulations or solutions in search of a problem. They do not have a problem that they are trying to fix.

That being said, Mr. Hedren, you note in your testimony that there is a record high optimism in the manufacturing industry. Is the reduction in new regulations part of the reason for that optimism?

Mr. HEDREN. Thank you very much for that question, congressman. I think, from our perspective, there certainly is a component of that. I think that manufacturing optimism is supported by the general regulatory environment right now. And what we see I think most notably in that is there is a slowdown. So for particularly small and medium-size manufacturers, they have an opportunity to catch their breath and understand a little bit about what is going on and what is coming at them. And before, you know, you may have periods of time in which there are four or five new rules a month that might impact you that you have to learn how to comply with. And while our members completely understand the benefits that those rules may bring, it is still pretty tough to keep up with.

Mr. KELLY. Mr. Noel, as a small business owner, do you feel like your voice is being adequately heard in the Federal rule-making process through the comments and things? Do you feel like yours is properly heard?

Mr. NOEL. From a personal perspective, I have dealt with placement of levies with the Army Corps of Engineers, the overtime rule. We sat on some roundtables for those things, and I have got to be honest. When I got the reports, because we participated they sent us reports, and I read the reports, I was a little disappointed that very little of what the community had said was overshadowed by all these outside entities that have never been to our area, comments in that same report, and that the agency reacted to not the community as much as they did to those outside entities.

Normally, the way a small business in my industry finds out about a rule or regulation is the Federal employee walks onto the jobsite and cites them because they do not have the proper poster up or they do not have the proper paperwork in a file. Not that they have polluted anything but because they do not follow this

long list of rules they do not have time to read because they are trying to work for a living. That is how they usually find out about it.

Mr. KELLY. Thank you. And my experience has been comments are not properly paid attention to, and that in many cases, agencies have improperly influenced certain groups to comment so that they can get the correct comments for the rule that they want to enact.

Ms. HARNED, if I can ask you a question. Do you feel like, or what do you think new can do that would require the agencies to analyze the impact on small businesses better? I think many times they do look at the large business because they can afford to, so it puts small business out. What can we do to analyze the second and third order effects to small businesses of all regulations?

Ms. HARNED. Yeah. This is something I have thought about a lot because it is hard, especially with the small businesses we are trying to get out, the 10 and unders, because they are busy running their business. I think we need to look at it is 2018, new technologies, ways to, you know, conference calls. People do not necessarily have to show up for a meeting. But also, help them understand here is what this rule is going to do, because many times they may not even understand they are impacted until after the fact. And so I think we need to just be much more aggressive in outreach, quite frankly. And if there are ways to make the agencies accountable to do just that, that is going to have a better result where you are not going to have unintended consequences with so many of these rules that you see.

Mr. KELLY. Thank you.

Mr. Chairman, I yield back.

Chairman CHABOT. Thank you very much. The gentleman yields back.

The gentlelady from North Carolina, Ms. Adams, who is the ranking member of the Subcommittee on Investigations, Oversight, and Regulations, is recognized for 5 minutes.

Ms. ADAMS. Thank you, Mr. Chairman. And thank you, Ranking Member Velázquez, for hosting the hearing today. And thank you to our folks here for your testimony.

Ms. Heinzerling, is that correct?

Ms. HEINZERLING. Yes.

Ms. ADAMS. Okay. What are the implications for OMB's plan giving agencies regulatory budgets of zero or subzero for fiscal year 2018?

Ms. HEINZERLING. They are dire.

Ms. ADAMS. Okay.

Ms. HEINZERLING. And I think that here in Congress, one of the things that can go unremarked sometimes is that agencies are entirely created by statutes. The problems that they address are identified by Congress. Agencies are created by Congress. They are funded by Congress. They are charged by Congress. And so if we have a year in which we are on pace to have no major rules enacted, that means that some instruction from Congress is going unheeded by the agencies. And so to talk about accountability on the part of agencies without talking about the vast amount of unaccountability that is happening today because instructions are not being followed I think is one sided. And so I think the con-

sequences are dire both in terms of attention to legal requirements and more profoundly in terms of attention to the kinds of concerns about public health and safety and the environment and consumer deception and on down the line that rules are intended to serve.

Ms. ADAMS. All right. Is it possible that a very important regulation will not get implemented or will get implemented at the cost of two other regulations that should also stay in effect?

Ms. HEINZERLING. I believe it is a certainty. If they follow those regulatory budgets, as I said, it is hard to find a major rule that could be achieved within this year given the level of cost versus—

Ms. ADAMS. Okay. You know, we hear a lot about the regulatory environment in this Committee and I know that there are some areas that can be improved. Can you speak to the overlap between the state and Federal regulations and which has a greater impact on small firms?

Ms. HEINZERLING. I think this is a hugely important question, and I think one of the striking features of many of the studies that talk about the effects of regulation on small businesses is that they do not separate out what are the regulatory costs from the Federal government versus what are the costs by the state government, or indeed, even local governments. And many of the costs that we see are actually imposed by those other entities.

Ms. ADAMS. Okay. And this question will be for any of the other panelists that want to speak to it.

The Paperwork Reduction Act was amended in 1995 to require OMB to set specific goals for reducing the burden from the level it had reached in 1995 and preventing those from growing in future years, but those goals were not met and the paperwork burden continues to increase. So what are the biggest challenges that agencies face in reducing the overall paperwork burden?

Ms. HARNED. The challenges that agencies face?

Ms. ADAMS. Yes.

Ms. HARNED. I mean, honestly, I cannot speak to that. I can assure you though that is still very much a problem for my members. And I would just like to go back to something you were discussing. Our regulation study that NFIB did and released early 2017 indicated that 50 percent of respondents found Federal regulations to be the most problematic. We did break that out. State was 30 percent; local was 15. So I just wanted to state that for the record.

Ms. ADAMS. Okay. Would anybody else like to respond?

Mr. HEDREN. Sure. Congresswoman, I think that is an incredibly important question, and one that is actually a little bit tough to get to because paperwork is relatively less transparent in terms of how it is prepared, reviewed, and eventually sent out to the public as a paperwork collection request, information collection request. But there are certainly cases in which agencies are collecting the same information as other agencies but may not be aware of that. There may be instances, for example, in collecting generalized data about business operations that over collect, that are kind of collecting data for the sake of it.

So there is always opportunity there, and I think what we saw in 2017 is really a lot of the impressive reductions in regulatory

burdens came from the paperwork side because you can kind of get your arms around it.

Another angle on this which is very important, and which the Committee has actually dealt with very well with the Small Business Regulatory Flexibility Improvements Act, is getting into agencies like the IRS, which have a disproportionate share of the paperwork collection volume.

Ms. ADAMS. Okay. Thank you very much. I am out of time. Mr. Chair, I yield back.

Chairman CHABOT. Thank you very much. The gentlelady yields back.

The gentleman from South Carolina, Mr. Norman, is recognized for 5 minutes.

Mr. NORMAN. Thank you, Mr. Chairman. I just want to echo what General Kelly mentioned.

Small businesses are sick and tired of needless regulations, and it has been a pleasure for this last year to get regulations off the books that unelected bureaucrats who have never run a small business—and I am a contractor. I am a real estate developer. We are sick and tired of people who do not really know, have field experience, and yet they are trying to read a book and pass a regulation. So thank God it is changing. That is why you are seeing the economy do what it is doing, and it will do greater things.

Mr. Hedren, let me ask you specifically, we have got a company in our area, Composite Resources. How would they get notice of a regulation? Would they have to sift through thousands of papers to see what they have to comply with? And what is the cost of trying to dig through what bureaucrats have written to hopefully apply to a particular company?

Mr. HEDREN. Congressman, thank you for that question.

I think to start in reverse order, the cost is time. And in many cases, small and medium-size businesses do not have a specific regulatory official. It may just be the president of that business. So for Composite Resources that may be the senior leadership team taking their time to understand how they want to implement something in their facility. And in our experience, certainly those facility leaders take this very seriously and they will dedicate the time to do a good job.

In terms of how they find out when things are changing, it is not always the cleanest process. And as others have mentioned, there is a state and Federal dynamic to this. There is an executive department, an independent agency dynamic to this, but when you really boil it down, there is no truly effective way to push this information out to people who may be affected, and that truly is one of the core issues at stake when we talk about getting small and medium-sized enterprises engaged in this process effectively.

Mr. NORMAN. Thank you.

Mr. Noel, you are in the field. You are in the business. What can we do to get the career development opportunities available that will foster people getting into the business, and what can we do to, I guess, influence that so that we can have our carpenters, we can have our brick masons, we can have our land developers?

Mr. NOEL. I am speaking a lot in a lot of different venues about trying to change the mindset of the parents across the country that

working with your hands is a noble pursuit. We have for so long told our children, and parents think that it is more important to go a 4-year college to be a success in life, and we have got to somehow reverse that. We have worked with counselors at schools. We are in a big push nationwide now to put vo-tech school classes back into the high schools.

I was in Johnson City, Tennessee, recently, and watched some high school students that had vo-tech schools build some things, and it was remarkable. And those children loved it. It is a good pursuit, and we need to change that mindset across the country. And it is going to take a big advertising campaign of some sort to get to the parents to let them know, you know, how important it is to be able to work with your hands and create things. We are working on it. And if you can help, please help.

Mr. NORMAN. We will do it. And keep up the good work. It is something, you know, the best social program we can pass is a job.

Mr. NOEL. Yes, sir.

Mr. NORMAN. And by helping people find their niche and doing it.

Mr. Chairman, I yield back.

Chairman CHABOT. Thank you. The gentleman yields back. You made some very good points there I would say.

The gentleman from Florida, Mr. Lawson, who is the ranking member of the Subcommittee on Health and Technology is recognized for 5 minutes.

Mr. LAWSON. Thank you.

One of the questions I wanted to ask you centers around the BP oil spill. When the regulation that we had in place then, or lack of regulation, how did it really hurt small businesses in the Louisiana area?

Mr. NOEL. The results of the oil spill and the corresponding moratorium on drilling that happened, there were multiple layoffs in our area in South Louisiana, so there were a lot of people who worked in the oilfield that suddenly did not have a job so they did not want to build a home, clearly. Down the coast into Florida where the tourists were, the tourism just dropped off because of all the negative publicity across the country. People thought the beaches—you are from Tallahassee; right?

Mr. LAWSON. Right.

Mr. NOEL. Were covered with oil, and it was wonderful for me. My son lives in Destin. We did not have all the traffic problems and the beaches looked pretty well.

My understanding, and I do not know this for a fact, but the BP oil spill was as much about enforcing the rules on that group of people that were responsible for that as it was anything. But it did have a negative impact on the economy down there, clearly.

Mr. LAWSON. Okay. My other question would be from an attorney. How do you get people to participate in these regulations at agencies actually make them because it really affects the bottom line of a lot of different things. When we are talking about home building, people do not seem to realize that it really is going to be passed down to the consumer, and the consumer will not have the opportunity to purchase a home. But you see the regulation over and over. From a legal standpoint, how do you get them involved

with some of the agencies when they are making these type regulations?

Ms. HEINZERLING. Well, I think just to back up for one second, one of the things we have to have is to make sure that we actually go through that process that would allow them to comment, and in many of the activities we are seeing today we actually do not see that being followed, and that means they do not get a chance to comment because there is no process afforded with that opportunity.

Secondly, to allow more people or encourage more people to comment. I think the agencies are making use of social media in a way that they did not before. I think that they have come under criticism, sometimes from the same people who like to have public comment and like to have the widest range of voices as possible, but they are using I would say a variety of modern tools to get as much input as possible in their rules. I have to say, having worked at the Environmental Protection Agency for 2 years, we did see things from another perspective which was we saw the amazing number of comments that we got on any significant proposal, and we felt our obligation to respond to those comments. Maybe at the end of the day the outcome was not what everybody wanted, but we felt it was our legal obligation to respond to the significant comments.

Mr. LAWSON. Okay, thank you. And, you know, earlier, I think Mr. Harden was speaking about the rollback regulation. I have been in the insurance industry for 36 years. You have not seen any regulation unless you have been in the insurance industry. It is a lot of regulation. These rollbacks, when you say it is going to stimulate—that we have seen, I have seen them on the floor. Being a first timer, the rollbacks are going to stimulate the economy and you see it working in the economy now. From your perspective, and I do not have much time, how did the business community respond?

Ms. HARNED. Right. Like Mr. Hedren's members, our members have been very positive about the rollback because it really did for so many of them, so many regulations coming at once, which is how they felt like they were living the last several years, was paralyzing. And as a result, they were sitting on their business the way it was. They were not growing. They were not moving forward. And now they do have a chance to catch a deep breath and know, okay, well, I do not have to worry right now about a ton more coming out of Washington at the moment. Let me get the decks cleared and figure out what is going on and that sort of thing, because it really was overwhelming. And our data has shown since the beginning that has been one of the key drivers to them growing.

Mr. LAWSON. Okay. I have another question but my time is running out, so Mr. Chairman, I yield back.

Chairman CHABOT. If you would like I can extend the gentleman a little additional time if you would like.

Mr. LAWSON. Just a little additional time.

Chairman CHABOT. The gentleman has another minute.

Mr. LAWSON. Okay. Thank you very much. And anyone can answer it.

A lot of these regulations come down to partisan issues, and you have one group who is saying it is the best thing to do the rollback,

and the other group is saying that we are going to hurt the consumer. You know, how do you respond to that?

If anybody cares to respond.

Mr. NOEL. Well, let me see if I can try.

You know, the parties change in the admonition ever soft. You know, we just had a change. The bureaucrats in those agencies, the people that work, not necessarily secretaries, et cetera, are not changing. And so they perpetuate a rule and then that continues on regardless of whose party is in power. Then it was all talk about, okay, are we going to roll back? Are we going to put more? You know, whatever. But the American people elect the Congress. They put them in office to safeguard their lives here in America, and I think it is important that those same elected officials safeguard that the laws that they pass are being implemented correctly, which is why I think we should have congressional oversight over the agencies in their rulemaking.

Mr. LAWSON. I yield back, Mr. Chairman.

Chairman CHABOT. Thank you very much. The gentleman yields back.

The gentleman from Utah, Mr. Curtis, is recognized for 5 minutes.

Mr. CURTIS. Thank you. I appreciate all of you being here today.

I have listened with great interest. Having been a former small business owner, I would like to speak and echo some of the comments that have been made. I believe small business owners wake up in the morning and they just pray that nobody gets hurt, none of their employees get hurt. They pray that their employees handle any sexual harassment claims appropriately in the way that they were taught to do. They pray there are no new lawsuits by their customers. This is what is on their mind and on their agenda. And then they worry about sales, and they worry about paying taxes. And then you have what we have alluded to. You have cities, you have counties, you have states, and you have the Federal government. Each one of them, all the things that they think are important for them to do that day when they wake up. And it is overwhelming.

And I guess one of my questions is, and I will ask Ms. Harned—did I pronounce that correctly—is it possible that fewer regulations will actually lead to better compliance with existing regulations because we filtered out some of these things that they just cannot pay attention to and allow them to really focus on the things that are most important?

Ms. HARNED. Absolutely I would agree with that because that is a huge problem. As Mr. Hedren said—or maybe it was Mr. Noel—so often, unfortunately, small business owners find out about a requirement when the inspector is at their business. There is just no way for them to keep up.

I have friends that are very well heeled, small business owners, but they said, “Karen, I learn about a new requirement every time I see you.” And it is because I do this for full time. They are busy running their business, and I do think we need to prioritize. What is most important? What is most important for public safety? What is most important for environmental? And get rid of the regulatory

underbrush. I am actually hopeful that the executive order the President put forward last year will do just that. Get rid of those regulations that have not been enforced in decades. If they have not been enforced in decades, why are they on the books? Just for a game of gotcha? I mean, that is not helpful.

Mr. CURTIS. Yeah. We heard in testimony today that the war on deregulation is waged by big business. Would you address the disproportionate burden on small business of regulation and why it is harder for them actually than big business to comply?

Ms. HARNED. Yes. Again, our research has shown that 72 percent of those small business owners with less than 10 employees are the ones actually reading that Federal Register notice once they find out about it to try to figure out what that rule is they are going to have to comply with and how to do so. And so that is a complete time burden for them because they are not an expert on that regulation or that area of the law. And for those that have more employees, they are farming that out but they are paying significant costs to do so. And so, again, not all regulation is bad, but we do need to prioritize and limit how much there is so that we can get—I really do again agree with you. We can get better compliance if people know what they are actually supposed to comply with.

Mr. CURTIS. Right. Mr. Hedren and Mr. Noel, you are shaking your head. Would either of you care to comment on that?

Mr. NOEL. Love to.

Mr. CURTIS. All right.

Mr. NOEL. You know, the National Association of Home Builders represents 140,000 building companies across the country. Every one of them find out about Federal regulations from us. And we have to take pages and pages of regulations and rules and condense them down into something they can digest and comply with. And then when you begin to comply with it you find, okay, the end goal, what the law is is one thing, but now I have got to do all this paperwork. I have to literally hire somebody and pay them anywhere from \$500 to \$1,200 a house to do the paperwork. You know, and most of our members are three people. So you raise the cost of housing every time you do this.

Mr. CURTIS. Which is where the disproportionate burden comes on the small guy because the big guy can hire the lawyers?

Mr. NOEL. He has already got the guy.

Mr. CURTIS. Yeah.

Mr. Hedren?

Mr. HEDREN. Congressman, it is a great question, and we represent 14,000 members, of which some are larger and the vast majority of them are smaller. And I think the best way to think about our members is really an ecosystem of manufacturers. They supply to each other. They compete with each other. They grow together. And at times you might find that when a big business engages in advocacy in the process, the net outcome of that may be that they put whatever comes down from the agency in a final rule into bid requirements and the small businesses will get the bid requirements and shake their head thinking I have no idea why they are asking for this. And they did not see it coming. Did not really have

a chance to connect with that. But it is a resource issue. It is an awareness issue.

And to get to your opening thoughts. These business leaders do take this seriously. Having an injury on your worksite is awful. And people take it personally and they do what they can to avoid that. But the rules sometimes are prescriptive and they do not connect all the way through.

Mr. CURTIS. Yeah. I find with small businesses a lot of times that injury is a very close friend. Right? These people are family in many cases.

So I am out of time. I yield my time.

Chairman CHABOT. Thank you.

Mr. CURTIS. Thank you.

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

The gentlelady from Florida, Ms. Murphy, who is the ranking member of the Subcommittee on Contracting and Workforce is recognized for 5 minutes.

Ms. MURPHY. Thank you all for being here. I found the conversation very interesting, especially since I am married to a small business owner and live vicariously through his dealing with regulations.

I also represent a district in Central Florida that is home to a vibrant hub of entrepreneurial activities and numerous innovators and creators and small businesses. We have created an environment that has allowed entrepreneurs to take chances and pursue their passions in Central Florida, and that is why it is one of the Nation's fastest growing regions. But nonetheless, I continue to hear from many of the entrepreneurs in my district that burdensome regulations have hindered the growth of their businesses. While I believe that reasonable regulation is essential to protecting our economy and public health and our environment, I do think as some of the witnesses have noted today that excessively burdensome regulations, while perhaps well intentioned, can do more harm than good in practice.

With that in mind, my question to the panel is how can we better ensure that Federal agencies sufficiently understand the activity they are tasked with regulating? You will find that many of those bureaucrats have never actually worked in the industries that they are trying to regulate, and so while it may be well intentioned, there are quite a bit of unintended consequences.

And then kind of a second part of that is how do we encourage agencies to regulate in a way that does not adopt a "one size fits all" for regulation and instead uses approaches that acknowledge that there are differences in firm sizes and sophistication, especially as it relates to startups and second stage businesses?

Ms. HEINZERLING. I think it would be useful, if you do not want the "one size fits all" approach, it would be useful for Congress to write laws in that way because many times statutes do not do that. They take on a problem, even a really important problem—air pollution, workplace safety, and so on—and they do not differentiate among different entities. If you want an agency to do that, you need to tell the agency to do that because in many cases there are legal problems associated with differentiating if the stat-

ute does not allow it. So I would recommend that kind of differentiation if that is what you want.

Ms. MURPHY. Okay, thanks.

Ms. HARNED. I also think that in addition to so much of what is in the Small Business Regulatory and Flexibility Improvements Act, which I think would all be very helpful in that. I mean, NFIB is very supportive of all the provisions in that.

One idea I have heard that I think has been used in the UK is to have regulators shadow businesses. I really again think, and your husband has probably seen this, they just do not understand. And you cannot until you actually see a day in the life. And maybe there are ways that we can do that. I do really encourage Congress to consider these solutions that are more creative and also will get the regulators again to understand who they are regulating. And I just do not think that can happen without somebody having a real personal connection with that person and have the small business owner show them their business, but also really engage in the process. That is again why we are such big fans of the SBR panels and getting those for other rules.

Mr. NOEL. In the perfect world we would have that done before the regulation ever goes in place.

We took a gentleman that is in OSHA to a jobsite. We have to tether people so they do not fall off of roofs. And when you stand trusses up, which are the things that hold the roof up, there is nowhere to hook them to. So their solution was we build the roof on the ground and get a crane and put it on the top. So we took this gentleman to a jobsite and let them watch how they put together—and actually, this was a two story. And it dawned on him the things that they were requiring of our guys did not work. Now, unfortunately, the rule is already in place, so he had to go back and fix the rule. However Congress can have the agencies involved with the people that it is going to affect early in by seeing it on the ground, the better this will all be.

Ms. MURPHY. Great. Thank you.

Mr. HEDREN. Congresswoman, that is a great question. And actually, I would agree with Professor Heinzerling in saying that a big portion of how to address this problem is to give agencies the tools that they need in law to actually do that. And so this Committee has considered several bills that do that. But in our opinion, there is no shortage of ideas on how to improve this process, and I think that there is more to discuss here.

Ms. MURPHY. Great. Thank you.

I yield back.

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

The gentleman from Pennsylvania, Mr. Fitzpatrick, is recognized for 5 minutes.

Mr. FITZPATRICK. Thank you, Mr. Chairman. And thank you to the panel for being here. Thank you for being the voice of small business, which creates 7 out of every 10 new jobs in this country. The work you are doing is very important. So thanks for being here.

A couple things I wanted to touch on, which may have been addressed earlier. Number one is the process. We took up something

called the REINS Act early on in this session, which I believe to be very important because it goes to who decides. The administrative agencies under the executive branch obviously executing their constitutional authority to promulgate rules by giving the House of Representatives and Congress oversight over that. Because we are the body closest to the people, we get to consult with you all and hear the real road impact that these regulations are having. I hope that the Senate will take up consideration of that bill in short order because I think the process piece is very important.

But then it becomes a question, if it is brought to us, how best can we find that point of equilibrium, that sweet spot, if you will, between overregulation and under regulation? We certainly talked about a lot during the tax reform debate, about finding that point of equilibrium where you are not—rates are low enough so that we are competitive and it is not costing us jobs, but they are not so low that we are bleeding revenue to the U.S. government. The same with regulations. It is a matter of finding that point of equilibrium that under regulation, which we cannot tolerate either because that poses a threat in a whole host of areas, but not overregulating where we are strangling businesses and hurting small businesses' ability to create jobs.

And lastly, if you could, for our purposes, identify one or two agencies where you think are the biggest culprits, if you will, of overregulation that are hurting small business.

Mr. NOEL. Okay, I will try that. You know, many times when there is a problem that needs to be addressed, the stakeholders who are in the middle of the problem, will not address the problem, probably have the best answers. They need to help craft how that rule or regulation goes in place. Homebuilders typically do not like building codes, but we passed the statewide building code in Louisiana because we were going to lose all our insurance companies. There was a problem defined and the builders helped pass those codes. That is just an example of how you take the stakeholders and tell them we have a problem with something and we need to address it.

When I was in high school, you never met an oilfield worker that did not have an arm missing or something. Well, we created workman's compensation programs across the country that do loss control, help people, teach people how not to get hurt because it affects their bottom line when they have to pay more premium because they had an injury. So the more you bring this closer to the people that actually are involved, I think the better the rules and regulations are going to be, and the problems will get solved.

Ms. HARNED. I would echo that. That really has been something I consistently have heard from small business owners all over the country, is that really, they do not have as much of a problem with their state regulators because they know them, there is a relationship there, and they can get to where everybody wants them to be quicker. And I really think a lot of study would be required, quite frankly, and hard work by the regulators to figure out what all agencies are regulating on a specific issue. Because, you know, just as Patrick had pointed out on paperwork, two agencies with the same paperwork, this is not a good situation. That is happening across the government. That is happening with Federal and

state. Why can you not have a situation where if somebody is doing well with state OSHA, for example, that, you know, stamp of approval by them, no issues, then that means that they do not have to worry about Federal OSHA. I mean, I just think there is so much more that can be done cooperatively with the different governments, the state and Federal, and also just, again, pairing everything down so that you are really getting the priority issues addressed and not just having a lot of regulatory underbrush that could really just be used for a "gotcha game" for small businesses.

Mr. HEDREN. Sure. I will jump in as well. And congressman, thank you for that question.

I would echo the comments of others. It is about rigor. It is about awareness. It is about building cooperation and relationship and understanding between agencies and the parties that they regulate. I would probably stop short of picking on a particular agency. We are a very broad group of manufacturers, and I think everybody sort of lives in their own environment in that regard. But that is why we advocate for regulatory reform measures that really get to the core essence of rulemaking itself rather than a particular agency or another.

Mr. FITZPATRICK. Thank you. I yield back.

Chairman CHABOT. Thank you very much. The gentleman yields back and his time has expired.

And we want to thank our panel for being here today. And as this hearing comes to a close, I would just note that while progress has been made to address the regulatory burden on America's small businesses, it is clear that we have work to do. Small business owners should be allowed to focus on growing their businesses instead of spending countless hours navigating through a confusing mess of federal regulations.

I look forward to working with my colleagues to make sure that we provide meaningful regulatory relief and reform the current process to give small business owners a stronger voice in the regulatory process.

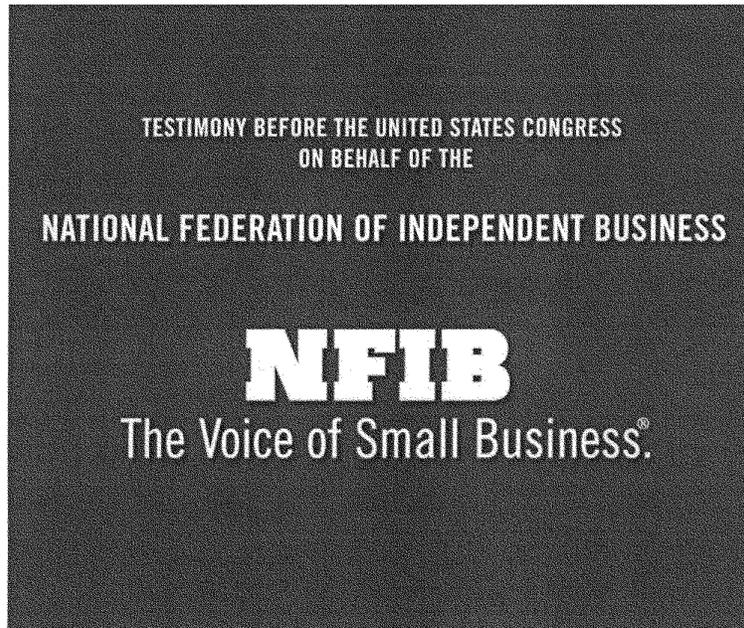
I would ask unanimous consent that all members have 5 legislative days to submit statements and supporting materials for the record.

Without objection, so ordered.

And if there is no further business to come before the Committee, we are adjourned. Thank you very much.

[Whereupon, at 12:25 p.m., the Committee was adjourned.]

A P P E N D I X



Statement for the Record of Karen R. Harned
Executive Director, NFIB Small Business Legal Center

Before the

Committee of Small Business
United States House of Representatives

Hearing on: "Regulatory Reform and Rollback: The Effects on Small Business"

March 7, 2018

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

Chairman Chabot and Ranking Member Velázquez,

On behalf of the National Federation of Independent Business (NFIB), I appreciate the opportunity to submit for the record this testimony for the House Committee on Small Business hearing entitled, “Regulatory Reform and Rollback: The Effects on Small Business.”

My name is Karen Harned, and I serve as the executive director of the NFIB Small Business Legal Center. NFIB is the nation’s leading small business advocacy association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB’s mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB proudly represents hundreds of thousands of members nationwide from every industry and sector.

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 continuous concern for small business. The uncertainty caused by future regulation effectively acts as a “boot on the neck” of small business – negatively impacting a small business owner’s 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 Center’s monthly Small Business Economic Trends survey.¹ Within the small business problem clusters identified by the NFIB’s Small Business Problems and Priorities report, “regulations” rank second only behind taxes.²

When it comes to regulations, small businesses bear a disproportionate amount of the regulatory burden.³ 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 complies 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 federal regulation is one less hour she has available to service customers and plan for future growth.

In a Small Business Poll on regulations, NFIB found that almost half of small businesses surveyed viewed regulation as a “very serious” (25 percent) or “somewhat serious” (24 percent) problem.⁴ NFIB’s survey was taken at the end of 2016, and, at that time, 51

¹ *Small Business Economic Trends*, NFIB Research Center (Jan., 2018), 18, available online at <https://www.nfib.com/assets/SBET-January-2018-1.pdf> (last visited March 1, 2018).

² Holly Wade, *Small Business Problems and Priorities*, NFIB Research Foundation, 17, (August, 2016), available online at <https://www.nfib.com/assets/NFIB-Problems-and-Priorities-2016.pdf> (last visited March 1, 2018).

³ Babson, *The State of Small Business in America 2016*, Crain, Nicole V. and Crain, W. Mark, *The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business*, (September 10, 2014), available online at <http://www.nam.org/Data-and-Reports/Cost-of-Federal-Regulations/Federal-Regulation-Full-Study.pdf> (last visited March 1, 2018).

⁴ Holly Wade, *Regulations*, Vol. 13, Issue 3, 2017, 6, available online at <http://411sbfacts.com/files/Regulations%202017.pdf> (last

percent of small business owners reported an increase in the number of regulations impacting their business over the last three years.⁵

Compliance costs, difficulty understanding regulatory requirements, and extra paperwork are the key drivers of the regulatory burdens on small business.⁶ Understanding how to comply with regulations is a bigger problem for those firms with one to nine employees, since 72 percent of small business owners in that cohort try to figure out how to comply themselves, as opposed to assigning that responsibility to someone else.⁷

Finally, NFIB's research shows that it's the volume of regulations that poses the largest problem for 55 percent of small employers, as compared to 37 percent who are most troubled by a few specific regulations.⁸

Small Business Applauds Deregulation Under Trump Administration

With that as background, it is not surprising to learn that America's small business owners view President Trump's commitment to rolling back unnecessarily burdensome and duplicative regulation as one of his Administration's greatest accomplishments in his first year in office. Every president has contributed to the problem of overregulation, with tens of thousands of pages added to the Federal Register every year.

Yet, the Trump Administration, to its great credit, has reversed that trend -- reducing the number of pages in the Federal Register by 36 percent (61,949 pages in 2017 as compared to 97,110 pages in 2016).⁹ For the fiscal year 2017, President Trump promised to eliminate two regulations for every new one proposed. But the Administration exceeded that goal -- eliminating 22 regulations for every new regulatory action.¹⁰ Indeed, agencies undertook sixty-seven deregulatory actions and levied only three regulatory rules.¹¹

And the Trump Administration promises even more deregulation in 2018.¹² To that end, on September 7, 2017, Office of Information and Regulatory Affairs (OIRA) Administrator Neomi Rao issued a memorandum to the regulatory reform officers at all federal agencies directing each agency to propose "a net reduction in total incremental regulatory costs for FY 2018."¹³ The Administrator noted that this instruction carries out "the regulatory policies and priorities set forth in Executive Orders 13771 and 13777,

visited March 1, 2018).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 10.

⁸ *Id.* at 9.

⁹ Records provided by Law Librarians Society of D.C., *available* online at <http://www.llsdc.org/assets/sourcebook/fed-reg-pages.pdf>

(last visited March 1, 2018).

¹⁰ Budget and Spending Fact Sheet: "President Donald J. Trump is Delivering on Deregulation," *available* online at <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-delivering-deregulation/> (last visited March 1, 2018).

¹¹ *Id.*

¹² *Id.*

¹³ Memorandum from Neomi Rao, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget, Executive Office of the President, to Regulatory Reform Offices at Executive Departments and Agencies regarding "FY 2018 Regulatory Cost Allowances," (Sept. 7, 2017), *available* online at <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/FY%202018%20Regulatory%20Cost%20Allowances.pdf> (last visited March 1, 2018).

including the goal 'to lower regulatory burdens on the American People by implementing and enforcing regulatory reform."¹⁴ Administrator Rao, quoting Executive Order 13777, said "[i]t is the policy of the United States to alleviate unnecessary regulatory burdens placed on the American people."¹⁵

Meaningful, Lasting Regulatory Reform Must Come from Congress

Congress has also provided significant relief by rejecting fifteen burdensome regulations using its authority under the Congressional Review Act (CRA).¹⁶ With the CRA, Congress assures the regulated community that each of these problematic regulations will not be re-proposed by later administrations without significant substantive revision unless Congress passes a law that specifically allows the agency to do so.¹⁷

Moving forward, small business owners have been asking for decades for lasting and meaningful reforms to ensure smart, efficient, and transparent regulation. The House of Representatives has passed several regulatory reforms that would go a long way in delivering much-needed structural reforms to the regulatory process. These reforms would, among other things, improve cost-benefit analysis, transparency and stakeholder engagement. NFIB supports H.R. 5, the "Regulatory Accountability Act," (RAA) particularly Title III -- the "Small Business Regulatory Flexibility Improvements Act," (SBRFIA) which would provide important procedural regulatory reforms for small business.

During my nearly 16 years at NFIB, I have heard countless stories from small business owners struggling with new regulatory requirements. To them, newly effective federal mandates come out of nowhere. They are frustrated and believe that they have "no say" in the development of regulation. That is why early engagement in the regulatory process is key for the small business community.

But small business owners are not roaming the halls of administrative agencies, reading the *Federal Register* or even *Inside EPA*. Keeping up with the rulemaking process is not easy for the small restaurant owner in Brooklyn or small manufacturer in Ohio because they are busy running their business. As a result, small businesses depend on the notice-and-comment rulemaking process for the opportunity to voice their concerns (or for NFIB to raise those concerns on their behalf), and on the requirement that agencies must consider and minimize small business impacts under the Regulatory Flexibility Act (RFA). In addition, they rely heavily on internal government checks, including the Office of Advocacy at the Small Business Administration (SBA) and OIRA, to ensure that agencies are limiting the costs of new mandates on small business when there are viable and less expensive alternatives to achieve the same regulatory objectives.

It has been two decades since the Small Business Regulatory Enforcement Fairness Act (SBREFA) amendments were passed and signed into law. These amendments to the RFA may not be well-known to the average American, but they have positively

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ 5 U.S.C. 8.

¹⁷ *Id.*

impacted small business owners and their customers in every state across the country.

In its 20-year history, SBREFA has been instrumental in tamping down the “one-size-fits-all” mentality that can be found throughout the regulatory state. When followed correctly, SBREFA can be a valuable tool for agencies to identify flexible and less burdensome regulatory alternatives. However, the last 20 years have also exposed loopholes and weaknesses in the law that allow federal agencies to act outside of the spirit of SBREFA when imposing regulation on small business. As I will discuss in my testimony, regulatory reform legislation that Congress is considering, like the Small Business Regulatory Flexibility Improvements Act, would go a long way in addressing four issues that continue to plague small business 20 years after SBREFA’s enactment.

Regulatory reform is needed to ensure that SBREFA protections are expanded to other agencies, indirect costs of regulation on small business are considered, and judicial review is available early enough in the process to make a difference. Additionally, much work still needs to be done to ensure agencies comply with existing law and do not view SBREFA as just another box to be checked in the regulatory process.

NFIB Supports Expansion of SBREFA Protections to All Federal Agencies

NFIB supports reforms that would expand SBREFA to cover other agencies. SBREFA and its required procedures are vital because they force agencies to think seriously about small business concerns. For example, the requirement for a promulgating agency to solicit the views of the small business community through Small Business Advocacy Review (SBAR) panels is important in educating federal bureaucrats on how small businesses operate in the real world.¹⁸ SBAR panels are also helpful in explaining how regulatory burdens will disproportionately impact small business, offering alternative approaches, or aiding the agency in developing simple and concise guidance materials for the small business community.

Department of Labor “Overtime” Rule

The Department of Labor (DOL) “Overtime” Rule issued in 2016 demonstrates the need for expanded SBAR panels. On May 18, 2016, DOL issued its “Overtime” Rule, which would have increased the salary threshold from \$23,660 a year to \$47,476 for executive or “white collar” employees. The rule also would have increased automatically the salary threshold every three years.¹⁹

Currently, agencies are required to perform an Initial Regulatory Flexibility Analysis (IRFA) prior to proposing a rule that would have a significant economic impact on a substantial number of small entities. And DOL confirmed the overtime rule would have a significant impact on small firms. However, when analyzing the rule, DOL

¹⁸ Currently the Environmental Protection Agency, Occupational Safety and Health Administration, and Consumer Financial Protection Board are the only agencies required to conduct SBAR panels for rules that significantly impact a substantial number of small businesses.

¹⁹ DOL’s overtime rule was initially scheduled to take effect on December 1, 2016; however, a federal district court in Texas issued a preliminary injunction enjoining the rule from being enforced through pendency of litigation. *Nevada v. U.S. Department of Labor*, 218 F.Supp.3d 520 (E.D. Tex., 2016). On August 30, 2016 the Judge Mazzant found the rule invalid. DOL has appealed this ruling to the 5th Circuit Court of Appeals and the case is currently held in abeyance as DOL considers whether it will issue a revised rule. *Nevada v. U.S. Department of Labor*, 227 F.Supp.3d 696 (E.D. Tex., 2016).

simultaneously underestimated the compliance costs to small businesses and overestimated wage increases realized by employees.

First, DOL's IRFA underestimated compliance costs because it did not consider business size when it estimated 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 disregarded 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. Instead, 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.

Second, the IRFA overestimated the wage increases employees were likely to see under the rule. The story of NFIB member, Robert Mayfield, illustrates this point. Mr. Mayfield owns five Dairy Queens in and around Austin, Texas and was very concerned about the impact that the rule would have on his businesses and the individuals whom he employs. In his words, the rule would have been "bad news" for both employers and employees.

At the time the rule was promulgated, Mr. Mayfield employed exempt managers at all five locations. These individuals earned, on average, about \$30,000 per year and worked between 40-50 hours per week. The managers also received bonuses, more flexible work arrangements, including paid vacation and sick time, training opportunities, and promotions that Mayfield's hourly employees did not. Mayfield explained that, in his company, promotion to an exempt management position carries a great deal of status with employees who (upon promotion to a manager position) boast about no longer having to punch time clocks. In Mayfield's opinion, it would have been demeaning to force managers to punch a clock. He also noted that, as salaried employees, his managers have more flexibility for things like doctors' appointments and kids' activities.

Under DOL's rule, Mayfield predicted that he would have needed to move the managers back to hourly positions as there is simply no way he could have afforded to pay over ten managers \$47,000 each. As a result, he predicted the skill level of his managers would have decreased. Moreover, Mayfield noted that rather than giving managers overtime, he likely would have hired a few more part-time employees. In no scenario did he envision paying managers overtime; instead he would have enforced a strict, no-overtime policy. Overtime costs, he said, could not be passed on to customers nor could the business afford to absorb added labor costs.

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

The bottom line is that while IRFA analyses are helpful for agencies to realize the cost and impact a proposed rule would have on small business, they generally do not tell the full story. Agencies would benefit from convening an 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 the Environmental Protection Agency (EPA), the Occupational Safety and Health Administration (OSHA), and the Consumer Financial Protection Bureau. NFIB believes that DOL would have benefited from soliciting feedback through SBAR panels, and that all agencies would achieve better regulatory outcomes if required to go through such a procedure.

Expansion of 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. Unfortunately, there are instances where EPA and OSHA have declined to conduct an SBAR panel for a significant rule and/or a rule that would greatly benefit from small business input.

NFIB Supports Legislation That Would Account for the Indirect Cost of Regulation on Small Business

Regulatory agencies often proclaim indirect benefits for regulatory proposals but decline to analyze and make publicly available the indirect costs to consumers, such as higher energy costs, jobs lost, and higher prices. The indirect cost of environmental regulations is particularly problematic. It is hard to imagine a new environmental regulation that does not indirectly impact small business. Whether a regulation mandates a new manufacturing process, sets lower emission limits, or requires implementation of new technology, the rule will increase the cost of producing goods and services. Those costs will be passed onto the small business consumers that purchase them. Does that mean that all environmental regulation is bad? No. But it does mean that indirect costs must be included in the calculation when analyzing the costs and benefits of new regulatory proposals.

Environmental Protection Agency Clean Power Plan

The "Clean Power Plan" rule EPA issued on October 23, 2015 provides an excellent example of the indirect cost of regulation on small business.²⁰ The rule, which is

²⁰ The day the rule was issued NFIB joined the U.S. Chamber of Commerce, the National Association of Manufacturers, and other industry groups in suing EPA. We argue that the rule is an unconstitutional infringement of state rights and outside of EPA's statutory authority under the Clean Air Act. See *U.S. Chamber of Commerce, et al. v. EPA* (ESPS Rule), U.S. Chamber of Commerce Litigation Center, available online at <http://www.chamberlitigation.com/cases/chamber-commerce-et-al-v-epa-esps-rule> (last visited March 1, 2018) (providing summary of legal developments and copies of the pleadings). On February 9, 2016, the Supreme Court stopped EPA and the states from implementing the rule until the courts can determine whether it is legal. *Chamber of Commerce v. Environmental Protection Agency*, 136 S.Ct. 999 (2016). On September 27, 2016 the D.C. Circuit Court of Appeals met *en banc* to hear oral argument in our case and we are awaiting a final decision from that court. See Doc. No. 1594951, Case No. 15-1363, (D.C. Cir. 2015) (ordering expedited briefing). The case is currently held in abeyance as EPA considers whether to

currently subject to a national stay issued by the U.S. Supreme Court, would require states to reduce carbon emissions by shutting down many coal-fired power plants. President Obama's Administration stated that EPA's rule would "aggressively transform ... the domestic energy industry" and would sweep virtually all aspects of electricity production in America under the agency's control.

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

Even the Obama Administration predicted its Clean Power Plan would drive up the cost of electricity, the impact of which would fall hard on small businesses that depend heavily on affordable energy. NFIB research shows that the cost of electricity is already a top concern among small business owners across the country.²¹ Small businesses would be squeezed between higher direct expenses and lower consumer demand resulting from higher home electric bills.

NFIB supports legislation that would require federal agencies to make public a reasonable estimate of a rule's indirect impact on small business, in addition to acknowledging the rule's direct costs.

NFIB Supports Legislation that Would Allow for Judicial Review of RFA Compliance During the Proposed Rule Stage

Under SBREFA, agency decisions are reviewable once a rule is finalized and published in the *Federal Register*. However, waiting until the end of the regulatory process to challenge a rule creates uncertainty for the regulated community – which directly stifles economic growth. Under current law, an agency determination that a rule does not significantly impact a substantial number of small entities may occur years before the rule is finalized. Small businesses must then wait until the rule is promulgated before legally challenging the agency's determination that it will not significantly impact a substantial number of small entities. Unless a court stays enforcement of the rule (after it is finalized), small businesses must comply while the battle over the agency's RFA certification is fought in court. This system imposes unnecessary costs and regulatory burdens on small business. It is also extremely inefficient for all parties involved.

NFIB has experienced the inefficiency and needless costs of the current law first-hand. Over a decade ago, the U.S. Army Corps of Engineers (Army Corps) issued a rule defining what it considered a wetland under its Nationwide Permits (NWP) program. The Army Corps failed to perform a regulatory flexibility analysis as required by SBREFA and instead promulgated the rule using a "streamlined process." NFIB sued the agency for noncompliance. After four years of legal battles, we emerged victoriously – a federal

rescind and revise the rule. Order, Doc. No. 1687838, Case No. 15-1363 (D.C. Cir., 2017).

²¹ Wade, *Supra* n. 2 at 12. available online at <https://www.nfib.com/assets/NFIB-Problems-and-Priorities-2016.pdf> (last visited March 1, 2018).

court ruled that the agency had violated the RFA. Yet, instead of sending the rule back to the agency to be fixed, the court only admonished the Army Corps not to use its “streamlined process” in the future.²² Small business owners affected by the NWP rule realized no relief.

NFIB supports legislation that would afford small business advocates judicial review during the proposed rule stage of rulemaking—once an agency has improperly certified that there will be no significant small business impact in a proposed rule.

NFIB Supports Other Regulatory Reforms that Would Benefit Small Business

NFIB also would support the following regulatory reforms:

Waiver for First-Time Paperwork Violations

Congress should pass legislation that would waive fines and penalties for small businesses the first time they commit a non-harmful error on regulatory paperwork. Because small businesses lack specialized staff, mistakes in paperwork will happen. If no harm occurs because of the error, the agencies should waive penalties for first-time offenses and instead help owners to understand the mistake they made.

More Vigorous Cost-Benefit Analysis

Congress should require every agency to determine, compare, and publish the costs and benefits of a proposed regulation—including economic impacts for consumers and the regulated community. Congress should make clear that this requirement overrides any prior legislation or court decision that does not require such a cost/benefit analysis. Congress should not allow agencies to adopt regulations when costs exceed benefits or when costs are unreasonable. And Congress should make that prohibition enforceable in court.

End Chevron Deference

Congress should end the so-called *Chevron Doctrine*, which was made up in 1984 by the Supreme Court in *Chevron U.S.A. v. National Resource Defense Council, Inc.*²³ In *Chevron*, the Supreme Court decided that courts should defer to “reasonable” interpretations by agencies of statutes the agencies administer when the statutory text is “ambiguous.” Unfortunately, many statutes are ambiguous. Courts now routinely let agencies decide what the law means. As such, the *Chevron Doctrine* allows bureaucrats to do the job of judges. As Chief Justice John Marshall said in 1803: “It is emphatically the province and duty of the judicial department to say what the law is.”²⁴ In short, we pay judges, not bureaucrats, to determine what the law means.

Under the Administrative Procedure Act (APA), Congress has assigned to regulation-

²² *NAHB v. U.S. Army Corps of Engineers*, 417 F.3d 1272 (D.C. Cir. 2005).

²³ 467 U.S. 837.

²⁴ 1 Cranch 137, 177.

reviewing courts the duty to “interpret . . . statutory provisions.” Congress should amend the APA provision to make clear that, in statutory interpretation, the court should give no deference to the agency’s view beyond the power of the agency’s arguments to persuade. That would end the *Chevron* Doctrine—and restore a proper constitutional balance between the executive, legislative and judicial branches of government.

All Americans, including small business owners, would benefit. Under the principle of separated powers that guards our liberties, no single part of the government should have power to both make and enforce the law. With *Chevron* overturned, federal agencies would no longer be able to make up the law under the guise of interpreting ‘ambiguous’ statutes and could enforce the law only consistent with judicial interpretations. With *Chevron* gone, the courts once again would serve as a check on the power of federal agencies, helping to preserve our freedom.

Third-Party Review of RFA Analyses

Congress should demand that agencies perform regulatory flexibility analyses and require agencies to list all 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, NFIB would support third-party review when the agency and the SBA Office of Advocacy disagree on small business impact. If a disagreement occurs, then the analysis would be turned over to OIRA for review and a determination as to whether the agency must perform a better RFA analysis.

Codification of Executive Order 13563

NFIB supports legislation that would codify Executive Order 13563 and strengthen the cost/benefit review of regulation. Among other things, this legislation would statutorily ensure that agencies are examining the true cost of regulations, tailoring regulatory solutions so that they are least burdensome and most beneficial to society, encourage public participation in the regulatory process, promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and periodically review significant regulatory actions.

Agency Focus on Compliance

NFIB is concerned that over the last several years many agencies shifted from an emphasis on small business compliance assistance to an emphasis on enforcement. Small businesses lack the resources needed to employ specialized regulatory compliance staff. Congress can assist by stressing to the agencies that they need to devote adequate resources to help small businesses comply with the complicated and vast regulatory burdens they face.

Twenty-Two Years Later, Agency Compliance with SBREFA Is Not Assured

Finally, work still needs to be done to ensure agencies comply with the letter and spirit of existing law. NFIB remains deeply troubled by the lack of attention the Army Corps and EPA paid to following SBREFA when the agencies promulgated the Waters of the U.S. rule.²⁵

The rule, issued on June 29, 2015, would change 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 could 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.

It was clear to the regulated community, from the moment the rule was proposed, that EPA and the Army Corps had little interest in conducting a meaningful assessment of the proposed rule's impact on small business. Indeed, 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 waters of the U.S. 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.²⁶

Twenty-two years after it was signed into law, it is inexcusable that federal agencies view SBREFA as a law to work-around or ignore rather than embrace. NFIB hopes that the new administration will understand the important role SBREFA plays in reducing the regulatory burden on America's job creators and that Congress will hold federal agencies to account when they fail to follow the letter and spirit of SBREFA.

Conclusion

Small businesses are the engine of our economy. Yet over the last several years, the crushing weight of regulation has used up valuable human and financial capital, which is in short supply for America's small business owners. NFIB looks forward to working with the 115th Congress to pass regulatory reforms that would improve current law and level the regulatory "playing field" for small business.

Thank you for inviting me to testify today. I look forward to answering any questions you may have.

²⁵ NFIB, joined by the U.S. Chamber of Commerce, challenged the rule in a federal court in Oklahoma arguing, that EPA and Army Corps lacked authority under the Clean Water Act, that the rule violated the Commerce Clause, and that the agencies had violated the RFA and SBREFA. See *Chamber of Commerce et al. v. U.S. Environmental Protection Agency*, 2018 WL 577011 (10th Cir. 2018). In the meantime, EPA promulgated a rule delaying the effective date of the rule until 2020, to allow the Administration time to consider whether to rescind and/or replace the rule. See 83 Fed. Reg. 5,200 ("Applicability Rule"); see also Proposed Rule, Definition of "Waters of the United States" - Recodification of Pre-Existing Rules, 82 Fed. Reg. 34,899 (July 27, 2017).

²⁶ Letter of Winslow Sargeant, Chief Counsel for Advocacy, Small Business Administration, available online at <https://www.sba.gov/advocacy/1012014-definition-waters-united-states-under-clean-water-act> (last visited March 1, 2018).



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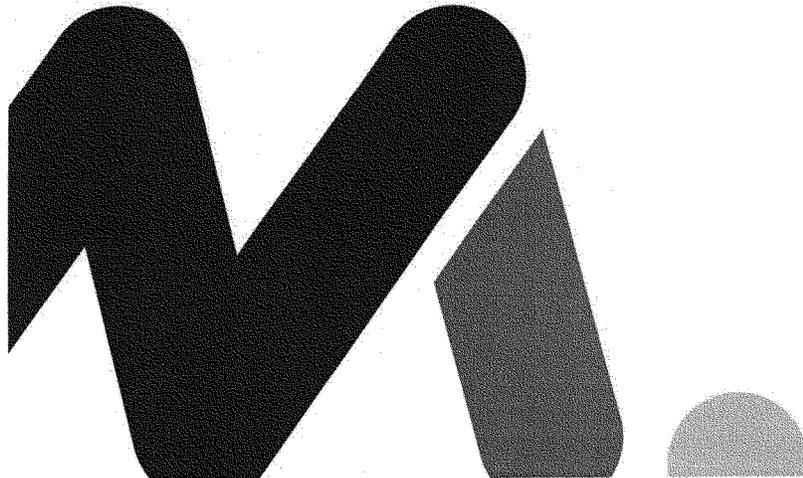
Testimony

of Patrick Hedren
Vice President, Labor, Legal and Regulatory Policy
National Association of Manufacturers

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

on Regulatory Reform and Rollback: The Effects on Small Businesses

March 7, 2018



**COMMENTS OF THE NATIONAL ASSOCIATION OF
MANUFACTURERS****BEFORE THE****COMMITTEE ON SMALL BUSINESS****U.S. HOUSE OF REPRESENTATIVES****MARCH 7, 2018**

Chairman Chabot, Ranking Member Velázquez, and members of the Committee on Small Business, thank you for the opportunity to testify about the impact of regulatory reform on small manufacturers in the United States.

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

State of Manufacturing

The NAM's most recent quarterly outlook survey from the end of 2017 showed the manufacturing sector on the upswing, with business leaders more upbeat about demand and production and more confident in their overall outlook. Indeed, 94.6 percent of NAM's members said that they were positive about their own company's outlook—an all-time high in the survey's 20-year history.

It is important to note that the vast majority of manufacturers, 98.6 percent, have 500 or fewer employees. Three quarters of manufacturing firms have fewer than twenty employees.

In the most recent data, manufacturers in the United States contributed \$2.25 trillion to the economy in 2016, (or 11.7 percent of GDP). For every \$1.00 spent in manufacturing, another \$1.89 is added to the economy, the highest multiplier effect of any economic sector. In 2016, the average manufacturing worker in the United States earned \$82,023 annually, including pay and benefits.

Beyond providing economic signals in the manufacturing center, the quarterly NAM survey also highlights other points of interest among our 14,000 members. Last year's fourth quarter survey results were illuminating.

- Over 37 percent of respondents indicated they spent at least seven hours per week on paperwork to comply with regulations, and almost a quarter spend over ten hours.
- Under 41 percent felt they had enough guidance on how to comply with the regulations that their company must follow.
- About the same percentage indicated they felt that regulatory agencies are primarily concerned with issuing fines, and
- Over half of respondents need to retain a law firm to help them keep up and comply with paperwork requirements.

At the same time, manufacturers are not anti-regulation. Over three quarters of respondents told us that smart regulations are necessary to ensure a level playing field. Almost 45 percent felt that regulatory agencies were primarily concerned with ensuring compliance or with working alongside companies to reduce risk.

Regulatory Environment

Democrats and Republicans often agree on the need for simpler, less burdensome, and more effective regulation, even when the rhetoric often fails to match that consensus. Similarly, the business community is often misunderstood about its views on regulation. Manufacturers believe regulation is critical to protect worker safety, public health, and our environment. Regulation is also a critical tool to promote more efficient markets by addressing externalities and correcting market failures. Indeed, some critical government objectives can only be achieved through regulation, and that is a powerful argument for improving the process by which regulations are developed.

The core challenge of regulatory policy is this: the benefits of regulation are often diffuse to society while the burdens of regulation are concentrated. Certain sectors, such as manufacturing, bear a sizeable portion of overall regulatory costs in the economy and therefore are able to provide good estimates of those costs during the course of a typical rulemaking. The benefit side of the ledger is much tougher to estimate, however, because individual parties may receive a de minimis share of the overall benefit, or because regulation may be intended to prevent so-called “black swan” events. As a result, it is no surprise that our public discourse on regulation tends to involve each side talking past the other.

Rulemaking by its nature contemplates a balance between the goals to be achieved and the price to be paid. Reforming the regulatory system in many ways is about putting in place basic procedures to ensure that agencies do their best to achieve that balance. We believe they create better rules when they understand the parties they are regulation (who oftentimes may even share the agencies’ goals), when they evaluate meaningful alternatives that could achieve the same or better regulatory outcome, and when they seek to maximize the net benefits to society of their actions.

Small and Medium-Sized Manufacturers

Small and medium-sized manufacturers experience the burdens of regulation in a different way than larger businesses, primarily

because they lack the economies of scale that larger businesses rely on to spread the costs of compliance. Those costs include the burden of monitoring new or changing requirements, implementing new or different processes, completing paperwork, and working directly with regulatory agencies to resolve disputes. Each dollar that a small or medium-sized manufacturer spends on regulatory compliance is a dollar that it cannot spend to grow its business or expand its workforce.

Executive Order 13771

Executive Order 13771, often referred to as President Trump’s “one-in, two-out” or “net-zero regulatory budget” order, has now been in effect for a little over a year. This Executive Order marks a significant change in regulatory philosophy compared to that of past Presidents from both parties. In President Trump’s first year, according to the federal register, federal agencies issued roughly half as many rule documents deemed significant under Executive Order 12866 than Presidents Bush and Obama issued in their respective first years.

In President Trump’s first year in office, the administration published 23 deregulatory actions with estimated annualized cost savings, excluding those nullified under Congressional Review Act resolutions. Through the end of fiscal year 2017, the administration completed 67 actions classified as deregulatory, including rules without estimated annualized cost savings. While these numbers are dramatic, they do not indicate a slash-and-burn approach to deregulation. Instead, they indicate a more methodical approach taking place through the rulemaking process. Perhaps the most noteworthy number through the end of fiscal year 2017 is *three*; the number of new final rules with over \$100 million in burdens on industry—a historic low.

This methodical approach, and dramatic slowdown in new rule-making, has likely been an important component in record-high manufacturing optimism. Manufacturers do best when regulatory conditions are certain and stable, because fast-paced and dramatic regulatory or deregulatory actions may introduce new variables and risks into their operations. Simply slowing down discretionary agency actions appears to have had a greater impact than the projected net-decrease in per capita regulatory burdens.

Opportunities for Executive Branch Reform

Presidents of both political parties have engaged in efforts over the years to retrospectively review regulations and amend or rescind them as appropriate. The NAM has supported these efforts, and we remain impressed that each subsequent round of retrospective review identifies even more regulations in need of a fresh look. Executive Order 13771 structurally incentivizes an ongoing process of retrospective review, as agencies attempt to meet their burden reduction targets each fiscal year.

Beyond retrospective review, we believe there are several important opportunities to improve the rulemaking process overall and

across each agency. For example, through an Executive Order or further guidance to agencies, the administration could:

- *Ensure stronger cost-benefit analysis.* Unless prohibited by law, agencies should seek to maximize net benefits by requiring full cost-benefit balancing when implementing regulatory statutes. This may take the form of a rebuttable presumption that a regulation should not proceed if the benefits do not justify the costs. Agencies could further encourage the public to submit their own cost-benefit analyses into the rulemaking record for the agency to review.

- *Require robust analysis of small business effects.* The administration may require each agency to analyze the effects of high-impact rules on small businesses, and when appropriate should invite greater engagement with the Small Business Administration's Office of Advocacy. Under the Regulatory Flexibility Act, agencies are required to prepare a regulatory flexibility analysis to determine the impact of proposed or final rules on small entities and to consider regulatory alternatives that would accomplish the rule's objective with minimal burden on those entities. Agencies frequently avoid this analysis by simply asserting that the rule at-issue will not significantly impact small entities.

- *Promote better information quality.* Agencies should use the best available science for agency risk assessments, and should provide more significant transparency to the public on any data upon which the agency relied when deciding among regulatory alternatives.

- *Conduct oversight or peer-reviewed of independent agency rulemaking.* Prior Presidents have stopped short of requiring independent agencies to submit their rules to the White House Office of Information and Regulatory Affairs for review, a step traditionally expected of executive agencies. As a result, independent agencies have issued rules that were later struck down in court because of deficient analysis and a failure to fully consider the consequences of agency action, an outcome that creates risk and implementation burden without a countervailing public benefit.

- *Require advanced notices for economically significant proposed rules.* Major rulemakings should give the public ample opportunity to provide early input to agencies as they evaluate the most cost-effective approaches to meet their statutory goals.

- *Allow response comments for significant rules.* Perhaps the single best way to improve the quality comments submitted to agencies would be to allow commenters to reply to arguments made by other commenters. A 30-day response period may ultimately save agencies time. This step would be especially impactful for significant rulemakings, and could be waived if exigent circumstances do not allow for it.

- *Build in smart, prospective lookback criteria.* No new major rule should be issued without a plan for future review. Rather than rely on ex post judgments on how a rule is per-

forming once finalized, agencies could set forth a set of bellwether measurements by which each major rule will be measured to determine if it is working as intended, or should be amended or rescinded in the future.

- *Provide fresh guidance on guidance.* Non-binding guidance documents can help regulated parties better understand federal requirements, but they can also impose burdens when the public views them as mandatory. Compounding this issue, agencies typically do not issue draft guidance documents for public comment. Providing more access to, and transparency around, these documents will improve the ability of small businesses to comply while simultaneously lowering the risk of improper or unpredictable enforcement actions.

Each of these reforms would benefit small and medium-sized manufacturers by promoting smarter rules that are fit for purpose.

Priorities for Congress

Last year was noteworthy in terms of the role of Congress in the regulatory process. Before 2017, Congress had only used the Congressional Review Act (CRA) to overturn one rule (the so-called “ergonomics” rule in 2001). In 2017, by comparison, Congress overturned fifteen rules across a range of industries and subjects. Each of these rules was by definition a “midnight regulation” completed late in the prior administration, and some of them would have had outsized impacts on small businesses. The CRA is only useable in limited and specific circumstances, however, so the NAM continues to advocate for substantive regulatory reform that will lead to smarter rules going forward.

This committee has done admirable work this year, and in prior years, to propose needed reforms that would close loopholes in the Regulatory Flexibility Act. This work is critical for small and medium-sized manufacturers, because too many regulations that have significant effects on small businesses escape the process that Congress intended agencies to follow to ensure their rules make sense as-applied to those businesses.

Beyond legislation such as the *Small Business Regulatory Flexibility Improvements Act of 2017*,¹ Congress should also focus on meaningful and bipartisan reforms that may not be explicitly focused on small businesses, but would nevertheless have an important impact on those businesses by driving better regulatory outcomes overall. These efforts certainly include bills that would:

- *Require standards of rigor that match the impact of rules.* The NAM supports legislation such as the *Regulatory Accountability Act of 2017*² that would require agencies to conduct a

¹ S. 584, originally sponsored by Senators Lankford (R-OK), Risch (R-ID), and Grassley (R-IA); see also H.R. 33, originally sponsored by Representatives Chabot (R-OH-1), Goodlatte (R-VA-6), Marino (R-PA-10), Radewagen (R-AS-At Large), Knight (R-CA-25), Cuellar (D-TX-28), Graves (R-MO-6), Sessions (R-TX-32), King (R-IA-4), Kelly (R-MS-1), Tipton (R-CO-3), Curbelo (R-FL-26), Hultgren (R-IL-14), and Luetkemeyer (R-MO-3).

² S. 951, originally sponsored by Senators Portman (R-OH), Heitkamp (D-ND), Hatch (R-UT), and Manchin (D-WV); see also H.R. 45, originally sponsored by Representatives Goodlatte (R-

robust analysis and then truly evaluate alternative ways to address each regulatory problem, but commensurate with the level of impact anticipated from each rule. Greater analytical requirements need not slow down agency rulemaking efforts, and the NAM opposes restrictions on rulemaking that serve no other purpose than to delay necessary protections. Rules with billions of dollars in economic impacts deserve careful consideration and analysis, and the NAM commends the House of Representatives for passing its version of this bill last year as part of the broader H.R. 5 package.

- *Promote earlier participation in major rulemakings.* Public engagement is an important driver of good regulatory outcomes, and is a critical component of both transparency and predictability. The NAM supports legislation such as the *Early Participation in Regulations Act of 2017*³ that would require agencies to solicit earlier public participation in major rulemaking. That engagement will result in more effective rules that provide the regulated public with better predictability.

- *Require agencies to lay out the standards by which their rules will be measured in the future.* Often called “prospective retrospective review,” legislation such as the *Smarter Regs Act of 2015*⁴ would ask agencies to set out up-front performance metrics for their intended regulatory goals. If a rule proves to be ineffective in achieving its stated goal, agencies should look to update, restructure, or rescind it.

- *Agencies should provide their guidance documents in one easy-to-access place online.* As above, guidance documents are an important tool that agencies use to provide information to the regulated public but can become regulatory in their own right because they may lay out expectations that appear mandatory. Legislation such as the *GOOD Act*⁵ would require agencies to put guidance documents online on one location, enabling both oversight and easier compliance for the public.

- *Independent agencies should be held to the same standards as executive agencies.* Independent agencies are responsible for a significant portion of high-impact rules, but they often fail to conduct robust analyses of their regulatory proposals and they seldom conduct an inter-agency review process to identify areas in which their rules may overlap or conflict with other agencies’ requirements. Bills like the *Independent Agency Regulatory Analysis Act of 2017*⁶ would establish a basic, flexible, and non-binding OIRA review process that would provide valuable insight among agencies, and uncover opportunities for more effective and efficient rules.

The NAM urges the committee to continue developing and promoting sensible, bipartisan legislation that will give small business

VA-6), Peterson (D-MN-7), Smith (R-TX-21), Marino (R-PA-10), Sessions (R-TX-32), and Franks (R-AZ-8).

³S. 579, sponsored by Senators Heitkamp (D-ND), Hatch (R-UT), and Roberts (R-KS).

⁴S. 1817 (2015), originally sponsored by Senators Heitkamp (D-ND), and Lankford (R-OK).

⁵S. 2296, sponsored by Senator Johnson (R-WI); see also H.R. 4809, sponsored by Representative Walker (R-NC-6).

⁶S. 1448, sponsored by Senators Portman (R-OH), Collins (R-ME), Lankford (R-OK), Ernst (R-IA) and Johnson (R-WI).

a true voice and seat at the table. Thank you for your invitation to speak to you today, and for your attention on small and medium-sized manufacturers across the country.



Testimony of

Randy Noel

**On Behalf Of the
National Association of Home Builders**

**Before the
United States House of Representatives
Small Business Committee**

**Hearing on
Regulatory Reform and Rollback: The Effects on Small Businesses**

March 7, 2018

Introduction

Chairman Chabot, Ranking Member Velázquez and Members of the Committee, thank you for the opportunity to testify today. My name is Randy Noel. I am a home builder and small business owner from LaPlace, Louisiana, and the Chairman of the Board of Directors of the National Association of Home Builders (NAHB).

NAHB is a federation of more than 700 state and local associations representing more than 140,000 members nationwide. NAHB's members are involved in home building, remodeling, multifamily construction, land development, property management, and light commercial construction. Taken together, NAHB's members employ more than 1.26 million people and construct about 80 percent of all new American housing each year.

The majority of NAHB's builder members are truly small businesses constructing 10 or fewer homes each year with fewer than 12 direct employees. These builders, in addition to building homes, must navigate a dense thicket of regulations. There is no question that we need to protect public health, welfare, safety and the environment. But federal agencies need to fully and consistently consider the unique burdens small businesses face in complying with regulations.

As a second-generation home builder with more than 30 years of experience, I understand all too well how difficult (and often costly) it can be to comply with the many and varied government regulations that apply to my day-to-day work. NAHB estimates, on average, regulations imposed by government at all levels account for nearly 25 percent of the final price of a new single-family home built for sale.¹

The significant cost of regulations reflected in the final price of a new home is not just a problem for the small businesses that build them; it has a negative effect on main street U.S.A. by making affording a home that much more difficult. Based on findings from a 2016 study, NAHB estimated that approximately 14 million American households were priced out of the market for a new home by government regulations in that year.²

But I am happy to report today that things are getting better. The first year of Donald Trump's presidency has seen major progress on efforts to reduce the relentless and costly over-regulation of American industry. The home building industry and the small businesses that predominate it have been significant beneficiaries of these efforts. Builders have taken note and entered 2018 with a great deal of optimism.

Over the last three months, NAHB's Housing Market Index (HMI), a measure of builder sentiment, has recorded its highest readings in nearly two decades. Much of that optimism is due to tight existing home inventory, a solid economy with low unemploy-

¹ <http://www.nahbclassic.org/generic.aspx?sectionID=734&genericContentID=250611&channelID=311&—ga=1.255452874.358516237.1489032231>

² <http://eyeonhousing.org/2016/05/14-million-households-priced-out-by-government-regulation/>

ment, and an improving policy environment that offers hope for reduced regulatory burdens.

Good Progress but the Job is Not Done

Today I wish to focus on the significant progress that has already been made in reducing regulatory burdens for small businesses in our industry, how the changes have helped builders, and what regulatory headwinds still linger. While much has been accomplished, the hefty price home buyers are paying for government regulations represents just one more obstacle that home builders need to overcome in restoring the marketplace to normal conditions. Later in my testimony, I outline a number of areas that Congress and the administration should address that would further reduce regulatory burdens on small businesses and spur job and economic growth.

On the positive side, the successful efforts of this administration and Congress to reduce the regulatory burdens on small businesses in the home building industry are remarkable both in their number and scope. To date, we have seen more than 20 significant regulatory changes that will benefit home owners, home buyers, and home builders. Allow me to quickly summarize some of the more significant changes.

HUD Federal Flood Risk Management Standard (FFRMS)

The Obama administration executive order that created the FFRMS would have expanded the federally regulated floodplain and required increased structural elevation and flood-proofing for all federally funded projects, including single-family homes and multifamily projects using FHA mortgage insurance.

In response to the FFRMS, HUD proposed a problematic rule in 2016 to expand its floodplain management oversight. HUD's proposal threatened access to FHA mortgage insurance for single-family home buyers and multifamily builders and would have jeopardized affordable housing opportunities for countless low- to moderate-income working-class families.

The additional elevation and flood-proofing requirements proposed for multifamily properties using FHA mortgage insurance programs would have made many projects infeasible, thereby preventing the delivery of much-needed rental housing during the current affordable housing crisis. Additionally, multifamily builders would have had no way of knowing if they had to comply with the new floodplain rules because maps of the expanded floodplain did not (and still do not) exist. President Trump rescinded the executive order and soon after HUD followed suit by withdrawing its FFRMS proposal.

EPA/Corps Waters of the U.S. (WOTUS) Rule

The 2015 WOTUS rule expanded federal jurisdiction of the Clean Water Act to isolated wetlands, channels that only flow when it rains, and most man-made ditches. The result would have greatly increased federal regulatory power over private property and led to increased permit requirements, project delays, and significant

avoidance and mitigation costs. Equally important, the changes would not have significantly improved water quality because much of the rule improperly encompassed water features under state regulatory authority. As a result, 31 states sued the federal government over the deeply flawed rule. The agencies are in the process of withdrawing the 2015 rule and developing a new rule.

Expanded Health Care Options

Small businesses continue to struggle to provide health benefits to their employees. On October 12, 2017, President Trump signed an executive order that will ease restrictions on association health plans and health reimbursement accounts to create more options for small businesses to provide health benefits to their employees. Easing restrictions on association health plans will grant small businesses access to better and more affordable health care plans, allow them to negotiate lower costs for coverage, and level the playing field for smaller firms that want to help their workers and their families with their health care needs. Additionally, expanding the use of health reimbursement arrangements will allow small businesses to offer pre-tax dollars to insured employees to help pay premium and/or other out-of-pocket costs associated with medical care and services.

OSHA Volks Recordkeeping Rule

Finalized on December 19, 2016, this rule extended the explicit six-month statute of limitations on recordkeeping paperwork violations in the Occupational Safety and Health (OSH) Act of 1970 to five years. Earlier court rulings had affirmed applicability of the six-month statute of limitations; nonetheless, the agency proceeded with its rulemaking.

The Volks Rule represented a particularly egregious end run around Congress's power to write the laws and a clear challenge to the judicial branch's authority to prevent an agency from exceeding its authority to interpret the law. Had it been allowed to stand, the rule would have subjected millions of small businesses to potential citations for paperwork violations, but do nothing to improve worker health or safety. Congress voted to overturn the rule by a joint resolution of Congress under the Congressional Review Act. President Trump signed the resolution into law on April 3, 2017.

More to Be Done

The Code of Federal Regulations didn't grow to over 180,000 pages oversight. Even with the significant progress of the past year, there still remains significant work to be done in peeling back and revisiting the accumulated layers of regulations heaped upon small businesses. In particular, NAHB urges Congress and the administration to focus on the following:

OSHA Multiemployer Policy

Existing policy outlines agency procedures for allowing compliance officers to issue citations on work sites where there is more than one employer. On construction sites, this policy allows OSHA to issue citations to a general contractor (i.e., a home builder) for safety violations created by subcontractors, even if none of the general contractor's employees are exposed to the hazardous condition. This interpretation impermissibly nullifies the employer/employee relationship and must be changed.

EPA Lead Renovation, Repair and Painting (RRP) Program

This rule addresses lead-based paint hazards created by renovation, repair, and painting activities that disturb lead-based paint in target housing and child-occupied facilities built before 1978.

The RRP program, as it is currently being implemented, is an inefficient tool for achieving the environmental and health goals of the underlying statute and rule. The regulation is needlessly burdensome, costly, and fails to provide the tools needed for efficient implementation, which discourages homeowners from using the services of certified renovators. Most importantly, the lack of a reliable, commercially available lead paint test kit (more than five years after EPA believed a test kit would be ready) means renovators are left in the dark when it comes to compliance. Other aspects of the program, including the new renovator recertification requirements, add needless complexity to the rule's implementation and create an unnecessary bias against online training. EPA expects to complete a comprehensive review in spring 2018; NAHB is hopeful this review will lead to change.

DOL Apprenticeship Programs

With labor shortages in the residential construction industry reaching levels not seen in two decades, it is critically important that the administration and Congress take immediate steps to encourage the development of a skilled workforce now and for the future.

Consistent with the President's Executive Order on Expanding Apprenticeships in America, the Employment and Training Administration (ETA) will be proposing regulations to establish the framework for industry-recognized apprenticeship programs, a new industry-led initiative to promote innovation and opportunity in apprenticeship, and integrate this initiative with the existing Registered Apprenticeship system. NAHB applauds this effort and looks forward to working with the administration to further this important program.

FWS/NMFS Endangered Species (ESA) Regulations

Implementation of the ESA increasingly impacts land use activities. The current regulations enable the services to assert authority over large swathes of land and a broad array of activities that are rarely associated with species conservation. The consultation requirements also remain expensive, burdensome and unwieldy. As land is impacted by the ESA, it becomes too expensive or otherwise

extremely difficult to use for home building. The higher costs invariably translate into higher home prices, and higher prices, in turn, disqualify more individuals from being able to afford a home.

Fixing the Underlying Problem

The administration and this Congress is to be commended for its successful efforts thus far to reduce regulatory burdens on small businesses. Additionally, I urge the administration and Congress to continue its work and move swiftly to address outstanding regulatory hurdles. However, all of these actions will amount to little more than a Band-Aid on the problem until such time as Congress and the administration can successfully address our broken regulatory rulemaking system.

NAHB has consistently said the only sure way to safeguard against future bad regulation is to fix the broken regulatory rulemaking process itself, ensure all regulations are designed with small businesses in mind, and, perhaps most importantly, restore meaningful congressional oversight to the rulemaking process. Fortunately, the solution already exists. Legislation has already passed the U.S. House that would go a long way toward accomplishing these goals: the Regulatory Accountability Act (RAA); the Regulatory Flexibility Improvements Act (RFIA); and the Regulations from the Executive in Need of Scrutiny (REINS) Act. NAHB will continue to urge the Senate to take up these important bills.

The REINS Act restores much-needed congressional oversight to the rulemaking process, a desperately needed improvement given the growth of the regulatory state over the past few decades. Without meaningful congressional oversight, poorly-crafted rules often to into place and businesses are forced to divert precious resources to lengthy and uncertain legal challenges.

While the REINS Act returns control of the regulatory process to the people, the RAA repairs the decades-old, badly-broken system and the RFIA makes common sense improvements to existing law to ensure all agencies are considering the true impact or proposed regulations on small businesses. Taken together, these reforms will ensure we protect the environment and our workers, while also adding fuel to the engine of economic growth that America's small businesses represent.

Thank you again for the opportunity to testify today.

Testimony of Lisa Heinzerling

Justice William J. Brennan, Jr., Professor of Law
Georgetown University Law Center

Before the House Committee on Small Business

March 7, 2018

Hearing on “The Effects of the President’s Regulatory Reform and Rollback Efforts on Small Businesses”

Mr. Chairman and Members of the Committee, thank you for giving me the opportunity to testify before you today.

President Trump has made deregulation a central goal of his domestic policy. Through executive orders aimed at particular regulatory programs, President Trump has directed agencies to take an axe to existing regulations. Through the so-called “2-for-1” order on regulatory costs, President Trump has also placed strict limits on the development of new regulations.

Agencies have responded by delaying, suspending, and revoking existing regulations.¹ All across the government, rules and policies that took years to develop have been put off or wiped out. These rules and policies address issues as important and diverse as climate change, consumer deception, airline safety, chemical accidents, food safety, sexual assault, and more. In a great many cases, the rules and policies have been put off or rejected with little of the legally required attention to statutory constraints, factual records, or procedural frameworks. As a consequence, federal courts have rejected the administration’s attempts to delay or suspend existing rules on such matters as lead paint, energy efficiency, and methane emissions from oil and gas facilities. Two weeks ago, for example, a federal district court in California granted a preliminary injunction against the Department of the Interior’s suspension of a rule intended to reduce waste of natural gas from oil and gas facilities on public lands. Particularly pertinent to today’s hearing, the court found that the Department’s attempt to justify the suspension based on the rule’s purported effects on small businesses was not supported by the factual evidence. Other, similar challenges to the administration’s deregulatory activities remain pending and may suffer similar fates due to the administration’s apparently indifferent attitude toward law, facts, and process.

Agencies have also responded to the President’s deregulatory agenda by putting off or canceling new regulatory initiatives.

¹Attached as an appendix to this testimony is my forthcoming article analyzing the first phase of the Trump administration’s deregulatory surge: Lisa Heinzerling, *Unreasonable Delays: The Legal Problems (So Far) of Trump’s Deregulatory Binge*, Harvard Law & Policy Review (forthcoming March 2018).

Under the 2-for-1 executive order, the Office of Management and Budget (OMB) is empowered to set regulatory budgets for the executive agencies. These are not ordinary budgets, in which agencies have a limit on the amounts they can spend to do their work. With regulatory budgets, agencies have a limit on what they can require private parties to spend to alleviate the problems the agencies are charged with addressing. For fiscal year 2018, OMB has given the agencies regulatory budgets that are in every case zero or negative. Agencies may not, in other words, issue any new regulations without offsetting the new rules' costs by at least, and in most cases by more than, a 1:1 ratio. As the federal district court hearing a legal challenge to the 2-for-1 executive order found last week, at the current rate of annual cost savings from *all* deregulatory efforts across *all* agencies, "it would take the Executive Branch as a whole *two or three years* to accumulate cost savings sufficient to offset even the most conservative estimated cost" of just one rule from just one agency (a Department of Transportation rule related to motor vehicle safety). The court observed: "the Executive Order curtails the ability of agencies to adopt significant new rules, even when the benefits of the new rules would vastly outweigh the costs."

Indeed, it appears to be the official policy of this administration that regulatory benefits do not count when one is evaluating the wisdom of regulatory policy. Under the 2-for-1 executive order, a reduction in regulatory costs is considered a success no matter how dearly we all pay for it in benefits forgone. Consider again the regulatory budgets OMB has set for this fiscal year. The Department of Energy takes one of the biggest hits in OMB's regulatory budget; it must find \$80 million in savings from discarded rules before it may spend a single dollar on new regulation, at which point it must still offset each dollar spent with reductions elsewhere. However, according to OMB's own draft report on the costs and benefits of federal regulation, the Department of Energy is one of the star performers in the government when one compares the regulatory costs it imposes to the benefits it reaps for the public. OMB reports that the Department's regulations on energy efficiency from 2006 to 2016 produced net benefits ranging from \$12 billion to \$31 billion. And yet these are the programs OMB has slated for especially deep cuts. It makes no sense, if one cares about the public benefits of regulation.

In this regard, consider, too, the example of the Environmental Protection Agency. No agency in this administration has taken a bigger axe to existing regulatory programs than the EPA. Yet OMB has also reported that EPA rules outperform the rules of all other agencies combined in terms of producing net monetized benefits. OMB estimates that from 2006 to 2016, EPA regulations provided as much as \$706 billion in benefits—measured in such terms as lives saved, illnesses averted, and environmental degradation reduced—while imposing no more than \$65 billion in costs. However, the gargantuan benefits of EPA rules, particularly rules related to air pollution, disappear in the administration's regulatory budget for EPA.

A question for today's hearing is whether the costs of this deregulatory surge to the public at large are at least mitigated by substantial benefits to small businesses. The answer is that this war on regulation is not designed to deliver benefits to small businesses. Recent cases rejecting the Trump administration's deregulatory moves are relevant here as well. The court hearing the case on Interior's rule on waste of natural gas on public lands found that the blanket suspension of the rule was not tailored to address the concerns of small entities. Similarly revealing is EPA's most recent regulatory plan. This plan is full of deregulatory initiatives the agency intends to undertake, but EPA highlights only two of the rules slated for revocation or relaxation as affecting small entities.

Make no mistake: the war on regulation is being conducted at the behest of some of the largest corporations in this country, and its benefits are being delivered primarily to them. In fact, many of the administration's deregulatory actions not only fail to target their savings to small businesses, but they affirmatively harm small entities by withdrawing regulatory protections that would have benefited them. Consider, for example, the Department of Agriculture's withdrawal of a rule intended to address anti-competitive behavior in the meat industry. In this matter pitting small farmers against big agribusiness, the administration planted its flag on the side of big business. In evaluating the deregulatory initiatives of this administration, one cannot simply assume that small entities are benefited when regulations are withdrawn.

Unreasonable Delays: The Legal Problems (So Far) of Trump's Deregulatory Binge

*Lisa Heinzerling**

President Trump has promised a historic rollback of regulation. In his early days in office, he produced a flurry of executive orders directing executive agencies to begin to undo a wide variety of regulatory measures put in place in the Obama administration.¹ The broadest of these orders instructed agencies to pull back two regulations for every one issued and to abide by regulatory budgets limiting the regulatory costs agencies could impose on private entities.² Agencies led by Trump's appointees have already announced their intention to reconsider, and dismantle, a broad array of existing rules.³ In this endeavor, many agencies are being guided by political personnel who have come straight from jobs as lobbyists for the industries they will be deregulating.⁴ It seems fair to say that a central goal of the Trump administration is indeed the one dramatically described by a prominent former White House aide: "the deconstruction of the administrative state."⁵

In service of this deregulatory agenda, the Trump administration has delayed or suspended dozens of final rules issued in the Obama administration. On President Trump's first day in office, his Chief of Staff at the time, Reince Priebus, sent a memorandum to the heads of all executive agencies,

* Justice William J. Brennan, Jr. Professor of Law, Georgetown University. I am grateful to Leah Wisser for outstanding research assistance and to Susannah Weaver for exceptionally helpful comments.

¹ See, e.g., Exec. Order No. 13,766, 82 Fed. Reg. 8657 (Jan. 24, 2017); Exec. Order No. 13,772, 82 Fed. Reg. 9965 (Feb. 3, 2017); Exec. Order No. 13,777, 82 Fed. Reg. 12,285 (Feb. 24, 2017); Exec. Order No. 13,778, 82 Fed. Reg. 12,497 (Feb. 28, 2017); Exec. Order No. 13,783, 82 Fed. Reg. 16,093 (Mar. 28, 2017).

² See Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Jan. 30, 2017) (instructing agencies to identify two existing regulations to eliminate for every new regulation proposed).

³ See, e.g., Improve Tracking of Workplace Injuries and Illnesses: Proposed Delay of Compliance Date, 82 Fed. Reg. 29,261 (June 28, 2017) (to be codified at 29 C.F.R. pt. 1904); Public Statement, Acting Chairman Michael S. Piwowar, SEC, Reconsideration of Pay Ratio Rule Implementation (Feb. 6, 2017), <https://www.sec.gov/news/statement/reconsideration-of-pay-ratio-rule-implementation.html> [<https://perma.cc/7WP8-34QS>]; NHTSA Civil Penalties, Reconsideration of final rule and request for comments, 82 Fed. Reg. 32,140 (July 12, 2017) (to be codified at 49 C.F.R. pt. 578).

⁴ See Danielle Ivory & Robert Faturechi, *Secrecy and Suspicion Surround Trump's Deregulation Teams*, N.Y. TIMES (Aug. 7, 2017); Danielle Ivory et al., *The Business Links of Those Leading Trump's Rollbacks*, N.Y. TIMES (updated Aug. 7, 2017); Danielle Ivory & Robert Faturechi, *The Deep Industry Ties of Trump's Deregulation Teams*, N.Y. TIMES (July 11, 2017).

⁵ See Phillip Rucker & Robert Costa, *Bannon vows a daily fight for 'deconstruction of the administrative state'*, WASH. POST: POL. (Feb. 23, 2017), https://www.washingtonpost.com/politics/top-wh-strategist-vows-a-daily-fight-for-deconstruction-of-the-administrative-state/2017/02/23/03f6b8da-f9ea-11e6-bf01-d47f8cf9b643_story.html?utm_term=.7eb6a5033de1 [<https://perma.cc/4SFY-RBQ8>].

instructing them to “temporarily postpone” by sixty days the effective dates of published rules that had not yet taken effect.⁶ The memorandum directed the agencies to take this step “immediately,” but encouraged the agencies to consider taking notice and comment on delays beyond the initial sixty-day period.⁷ The memorandum specified that the agencies should postpone effective dates only “as permitted by applicable law” and should notify the Director of the Office of Management and Budget (OMB) if any of the relevant regulations should not be delayed because they affected “critical health, safety, financial, or national security matters.”⁸

Pursuant to this memorandum, agencies across the federal government have delayed the effective dates, and in some cases the compliance dates,⁹ of dozens of final rules. These rules span a wide array of regulatory fields, including environmental protection, consumer financial protection, education, energy efficiency, nutrition disclosures, workplace health and safety, and more.¹⁰ Agencies have also, in many cases, stretched the delays well beyond the initial sixty-day period, sometimes suspending the rules indefinitely.¹¹ Agencies have opened, or announced an intention to open, numerous notice and comment proceedings to support further delay.¹²

Memoranda and orders from President Trump have taken aim not only at rules that have not yet taken legal effect but also at final rules that have been in place for some time. President Trump has ordered a broad rethinking of rules relating to infrastructure, energy, financial regulation, and water pollution.¹³ Here, too, agencies have responded by delaying the targeted rules, in some cases putting off indefinitely the dates by which regulated entities

⁶ Memorandum for the Heads of Executive Departments and Agencies; Regulatory Freeze Pending Review, 82 Fed. Reg. 8346, 8346 (Jan. 20, 2017).

⁷ *Id.*

⁸ *Id.*

⁹ *See, e.g.*, Compliance Date Extension; Formaldehyde Emission Standards for Composite Wood Products, 40 C.F.R. § 770.2 (2017).

¹⁰ For a chart cataloging the rules delayed as of mid-July, 2017, see RENA STEINZOR & ELISE DESIDERIO, CENTER FOR PROGRESSIVE REFORM, THE TRUMP ADMINISTRATION’S RULE-MAKING DELAYS (2017), http://www.progressivereform.org/articles/Trump_Rule_Delays_Charts_071917.pdf [<https://perma.cc/JXR4-5K8R>].

¹¹ *See, e.g.*, Civil Penalties; delay of effective date, 82 Fed. Reg. 32,140, 32,143 (July 12, 2017) (to be codified at 49 C.F.R. pt. 578); National Performance Management Measures, Final regulation; 23 C.F.R. § 490 (2017) (“indefinite delay”).

¹² *See, e.g.*, Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources: Stay of Certain Requirements, Proposed rule, 82 Fed. Reg. 27,645, 27,645 (June 16, 2017) (to be codified at 40 C.F.R. pt. 60); Public Statement, Acting Chairman Michael S. Piwowar, SEC, Reconsideration of Pay Ratio Rule Implementation (Feb. 6, 2017), <https://www.sec.gov/news/statement/reconsideration-of-pay-ratio-rule-implementation.html> [<https://perma.cc/KZ6E-BVYU>]; Postponement of Certain Compliance Dates for Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 82 Fed. Reg. 19,005, 19,006 (Apr. 25, 2017) (to be codified at 40 C.F.R. pt. 423).

¹³ *See, e.g.*, Exec. Order No. 13,766, 82 Fed. Reg. 8657 (Jan. 24, 2017); Exec. Order No. 13,772, 82 Fed. Reg. 9965 (Feb. 3, 2017); Exec. Order No. 13,777, 82 Fed. Reg. 12,285 (Feb. 24, 2017); Exec. Order No. 13,778, 82 Fed. Reg. 12,497 (Feb. 28, 2017); Exec. Order No. 13,783, 82 Fed. Reg. 16,093 (Mar. 28, 2017).

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must comply.¹⁴ Judicial challenges to these delays and suspensions have been filed around the country.¹⁵

Administrative agencies get a good deal of deference from the courts when they make choices about law, facts, and policy. Whether they are regulating or deregulating, however, they must follow a few simple rules. Agencies are creatures of statutes, and they must find in statutes authority for the actions they take.¹⁶ They must follow the processes Congress has prescribed for their decisions.¹⁷ They must explain their choices in reasonable and understandable terms.¹⁸ Agencies that recognize their legal limits, follow careful processes, and give sound reasons for what they do are unlikely to get into legal trouble for their choices.

In racing to upend a wide variety of regulatory initiatives, the Trump administration has not obeyed these basic rules. Instead, the administration has put on a display of autocracy, impulsivity, and jerry-rigged reasoning. Within the constraints of administrative law that apply to such regulatory decisions, however, autocracy, impulsivity, and jerry-rigging are the very kinds of urges that get agencies into legal trouble. Indeed, one of Mr. Trump's appointees—Secretary of Labor Alexander Acosta—recognized as much in conceding that he had no legal authority to delay the rule on the fiduciary responsibilities of retirement investment advisors and would instead begin the orderly process of revisiting the substance of the rule.¹⁹

This article examines the legal risks posed by the decision-making style exhibited by the Trump administration so far, with a focus on the administration's decisions delaying or suspending rules issued by the Obama administration.²⁰ These early decisions are worth studying for their own sake, as they put the brakes on rules aimed at addressing a broad array of social problems.²¹ The decisions are also important for the signals they send about how administrative agencies in the Trump era will go about their business. These early actions portend legal trouble for the administration's deregu-

¹⁴ See, e.g., Waste Prevention, Production Subject to Royalties, and Resource Conservation; Postponement of Certain Compliance Dates, Notification, 43 C.F.R. § 3170 (2017).

¹⁵ See, e.g., *Air All. Hous. v. EPA*, No. 17-1155 (D.C. Cir. filed June 22, 2017) (concerning EPA rule on chemical risk management plans); *New York v. Perry*, No. 17-918 (2d Cir. filed Mar. 31, 2017) (DOE efficiency standards); *Clean Air Council v. Pruitt*, No. 17-1145, 2017 WL 2838112 (D.C. Cir. July 3, 2017) (concerning EPA rule on methane emissions from oil and gas facilities); *Thrivent Fin. for Lutherans v. Acosta*, Civil Action No. 16-cv-03289-SRN-DTS (D. Minn. filed Aug. 9, 2017) (concerning DOL's financial advisor rule);

¹⁶ See, e.g., *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002).

¹⁷ See, e.g., *Perez v. Mortg. Bankers Ass'n.*, 135 S. Ct. 1199, 1203 (2015).

¹⁸ See, e.g., *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983); *Encino Motorcars v. Navarro*, 136 S. Ct. 2117 (2016).

¹⁹ Alexander Acosta, *Deregulators Must Follow the Law, So Regulators Will Too*, WALL STREET J. (May 22, 2017), <https://www.wsj.com/articles/deregulators-must-follow-the-law-so-regulators-will-too-1495494029> [<https://perma.cc/F6SL-KCY9>].

²⁰ For excellent treatments of the prevalence and legal consequences of agencies' delays or suspensions of final rules in prior administrations, see Anne Joseph O'Connell, *Agency Rulemaking and Political Transitions*, 105 NW. U. L. REV. 471 (2011), and Jack M. Beermann, *Midnight Rules: A Reform Agenda*, MICH. J. ENVTL. & ADMIN. L. 286 (2013).

²¹ See STEINZOR & DESIDERIO, *supra* note 10.

latory push. Agencies in this administration have delayed or suspended existing rules with little attention to legal authority, process, or reason giving, and in doing so have violated basic principles of administrative law.

I begin with a discussion of the law on effective dates—their legal nature and the reviewability of agency decisions changing them. I then turn to an examination of the legal errors the Trump administration has made in delaying or suspending existing rules. These errors include acting without legal authority, failing to use processes prescribed by law, and giving legally unacceptable reasons for the decisions being made. Two central questions going forward are whether the Trump administration will be able to—or even want to—stop itself from continuing to make legally problematic decisions, and whether the courts will brush the administration back when it makes such decisions.

I. EFFECTIVE DATES AND THE LAW

Most of the Trump administration’s early decisions in moving toward deregulation have involved delaying or suspending the effective dates of final rules issued during the Obama administration. In this part, I examine the legal significance of effective dates. Understanding this legal significance is important to grasping the legal implications of the Trump administration’s delays. I also examine the reviewability of agencies’ decisions to delay or suspend effective dates.

A. *The Legal Nature of Effective Dates*

It was not always common practice for an incoming administration to delay or suspend a large swath of the outgoing administration’s rules. The practice began in the Reagan administration, and has been embraced to some extent by every administration since that time.²² Within days of entering office, President Reagan issued a presidential memorandum instructing agencies to delay for sixty days rules that had not yet become effective, to give the new administration time to review the rules in light of its own priorities and policies.²³

In an opinion examining the legality of this presidential directive, the Office of Legal Counsel (OLC) concluded that such delays were not “rulemaking” subject to the notice and comment requirements of the Administrative Procedure Act (APA).²⁴ OLC thought that deeming extensions of effective dates not to be rulemaking was bolstered by the APA’s provision

²² Presidents George H.W. Bush, Bill Clinton, George W. Bush, and Barack Obama all issued—or had their White House Chiefs of Staff issue—memoranda directing agencies, in the immediate wake of the change in presidential administrations, to delay regulations that were not yet effective.

²³ See, e.g., Exec. Order No. 12,291, 82 Fed. Reg. 8657 (Jan. 29, 1981).

²⁴ Presidential Memorandum Delaying Proposed & Pending Regulations, 5 Op. O.L.C. 55, 57 (1981).

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requiring a thirty-day period between the publication of a rule and its effective date: “The purposes of the minimum thirty-day requirement would plainly be furthered if an extension of the effective date were not considered ‘rule making,’ for such an extension would permit the new Administration to review the pertinent regulations and would free private parties from having to adjust their conduct to regulations that are simultaneously under review.”²⁵ In OLC’s view, the same purposes that animated the thirty-day waiting period between publication and effectiveness supported a conclusion that extending an effective date is not rulemaking.

The courts have consistently rejected this view. In an important early case, the Third Circuit held that the Environmental Protection Agency (EPA)’s indefinite postponement of the effective date of the amendments to a regulation governing the discharge of toxic water pollutants into publicly owned treatment works was a “rule” within the meaning of the APA.²⁶ Quoting the APA’s definitions of a “rule” and “rulemaking,” the court said:

In general, an effective date is “part of an agency statement of general or particular applicability and of future effect.” It is an essential part of any rule: without an effective date, the “agency statement” could have no “future effect,” and could not serve to “implement, interpret, or prescribe law or policy.” In short, without an effective date a rule would be a nullity because it would never require adherence.²⁷

The Third Circuit described the bad incentives that would be created for agencies by a different ruling:

If the effective date were not “part of an agency statement” such that material alterations in that date would be subject to the rulemaking provisions of the APA, it would mean that an agency could guide a future rule through the rulemaking process, promulgate a final rule, and then effectively repeal it, simply by indefinitely postponing its operative date. The APA specifically provides that the repeal of a rule is rulemaking subject to rulemaking procedures. Thus, a holding that EPA’s action here was not a rule subject to the rulemaking procedure of the APA would create a contradiction in the statute where there need be no contradiction: the statute would provide that the repeal of a rule requires a rulemaking proceeding, but the agency could (albeit indirectly) repeal a rule simply by eliminating (or indefinitely postponing) its effective date, thereby accomplishing without rulemaking something for which the statute requires a rulemaking proceeding. By treating the indef-

²⁵ *Id.* OLC was not even sure that agencies needed to provide an opportunity for comment “on the intended effective date of a rule in the first instance.” *See id.* at 59 n.2.

²⁶ *See Nat. Res. Def. Council, Inc. v. EPA*, 683 F.2d 752, 761 (3d Cir. 1982).

²⁷ *Id.* at 761–62.

inite postponement of the effective date as a rule for APA purposes, it is possible to avoid such an anomalous result.²⁸

Other courts have consistently embraced the Third Circuit's perspective, holding that adjustments to the effective dates of final rules are themselves rules, or amendments to rules, subject (unless an exception applies) to notice and comment requirements.²⁹

The idea that an effective date is an "essential part" of a rule, alterations of which require notice and comment, is also supported by federal requirements on the mechanics of federal rulemaking. According to the Office of the Federal Register, the "effective date" of a rule is the date on which the Code of Federal Regulations (CFR) is amended by the underlying agency action.³⁰ It is, simply put, the date on which the law changes to reflect the agency's new rule. Only rule documents that amend the CFR are given effective dates.³¹ Before a final rule may take effect, the rule must be published in the Federal Register. And before a rule may be published in the Federal Register, it must have an effective date.³² These requirements reflect the core importance of the effective date of a rule: without an effective date, the rule cannot become law.

Judicial decisions on the legal status of rules without effective dates support this conclusion. When the Clinton administration came to power, it withdrew rules that had been sent by the previous administration to the Office of the Federal Register for publication. One rule that ended up in litigation had gone to the Federal Register with no specified effective date. As often happens, in place of a specified date, the rule had gone to the Federal Register with the following notation: "EFFECTIVE DATE: [Insert date of publication in the FEDERAL REGISTER.]" Since the rule was withdrawn before publication, it never received an effective date. In *Zhang v. Slattery*,³³ the Second Circuit held that the rule was not "binding on anyone" without becoming effective, and that, "[b]y its own terms, the Rule never became effective."³⁴ Distinguishing a case holding that the postponement of a rule's effective date required notice and comment, the Second Circuit stated that,

²⁸ *Id.* at 762.

²⁹ *See, e.g.,* *Envtl. Def. Fund v. Gorsuch*, 713 F.2d 802, 815–17 (D.C. Cir. 1983) (stating general rule that changes to effective dates constitute rulemaking and rejecting agency's argument that its decision not to call for hazardous waste permits from a whole class of facilities was a policy statement); *Council of S. Mountains, Inc. v. Donovan*, 653 F.2d 573, 580 n.28 (D.C. Cir. 1981); *Ranchers Cattlemen Action Legal Fund v. USDA*, 566 F. Supp. 2d 995, 1004 (D.S.D. 2008) ("The effective date of a rule generally is more than procedural and its suspension or delay usually is subject to rulemaking."); *see also* *New York v. Abraham*, 199 F. Supp. 2d 145, 150–51 (S.D.N.Y. 2002) (holding that Department of Energy's suspensions of effective date of energy efficiency rule were "elements of a rule" under Energy Policy and Conservation Act).

³⁰ OFF. FED. REG., NAT'L ARCHIVES & REC. ADMIN., DOCUMENT DRAFTING HANDBOOK 3–8 (2017).

³¹ *See id.*

³² *See id.*

³³ 55 F.3d 732 (2d Cir. 1995).

³⁴ *Id.* at 749.

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“[u]ntil the ‘EFFECTIVE DATE’ was reached—by publication—there was no rule to repeal.”³⁵ The failure to specify an effective date, in other words, prevents a final agency decision from having any legal effect.³⁶

All of these legal sources reflect the legal power of the effective date. On the effective date of a rule, the rule has a formal legal effect. Without an effective date, the rule has no formal legal effect. By definition, then, the effective date of a rule has a “legal effect” under a settled test for identifying substantive rules subject to notice and comment rulemaking: it activates a binding legal norm.³⁷

B. Judicial Review of Rule Delays and Suspensions

To be judicially reviewable under the APA or other similar statutes, an agency decision must reflect “final agency action.”³⁸ The courts have consistently held that agencies’ delays or suspensions of the effective dates of final rules are judicially reviewable final agency actions. An important case early in the Trump administration has beaten back an agency’s attempt to avoid this legal trend.

In its opinion examining the legality of President Reagan’s directive to delay agency rules that had not yet become effective, the OLC only acknowledged that an action to delay or suspend the effective date of a final rule “may be subject to judicial review” in the courts.³⁹ In litigation over agencies’ delays of final rules, however, the Reagan administration conceded that such decisions were *indeed* judicially reviewable,⁴⁰ and courts handling such cases have had little trouble finding that agency decisions delaying final rules are reviewable.⁴¹

The Trump administration is chafing at this settled doctrine. In one of the first judicial challenges to its delay of an agency rule, the Trump administration argued that the delay was not judicially reviewable because the delay was not a “final” agency action. In *Clean Air Council v. Pruitt*,⁴² the D.C. Circuit considered the grant by EPA of a ninety-day stay of the compliance date for a final rule setting Clean Air Act standards for emissions of methane and other air pollutants from oil and gas facilities. EPA argued that its stay was unreviewable because it was not final.⁴³ The dissenting judge distinguished deregulatory from regulatory actions in this regard, arguing

³⁵ *Id.*

³⁶ *See id.*; *see also* *Kennecott Utah Copper Corp. v. Dep’t of Interior*, 88 F.3d 1191, 1208–09 (D.C. Cir. 1996).

³⁷ *See, e.g.*, *Pac. Gas & Elec. Co. v. Fed. Power Comm’n*, 506 F.2d 33 (D.C. Cir. 1974).

³⁸ 5 U.S.C. § 704 (2012).

³⁹ Presidential Memorandum Delaying Proposed & Pending Regulations, 5 Op. O.L.C. 55, 56 (1981) (emphasis added).

⁴⁰ *See Council of S. Mountains, Inc. v. Donovan*, 653 F.2d 573, 579 n.26 (D.C. Cir. 1981) (upholding Reagan administration’s delay by six months of the effective date of a mine safety rule).

⁴¹ *See, e.g., id.*

⁴² 862 F.3d 1 (D.C. Cir. 2017).

⁴³ *Id.* at 6.

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vacate an agency decision taken without complying with the requirements of administrative law.⁵² It may also decline to vacate such a decision on the basis of its judgment that vacatur is inappropriate in the circumstances presented. Indeed, in reviewing two different agency decisions to delay rules in the Trump administration, a single district court in California has chosen one of each of these remedies.⁵³ A significant question going forward will be not only whether an agency has violated administrative requirements in delaying or suspending a rule, but what the appropriate remedy is for such a violation.

II. LACK OF LEGAL AUTHORITY

An administrative agency can only take actions that Congress has allowed it to take. The courts have drawn this principle from the separation of powers, going all the way back to *Marbury v. Madison*: just as “the powers of the legislature are defined and limited,” so, too, are the powers of the “modern administrative state.”⁵⁴ An agency is, as the courts have reminded us, a “creature of statute,”⁵⁵ with “literally . . . no power to act, unless and until Congress confers power upon it.”⁵⁶ An agency’s action “cannot stand” if there is no statutory authorization for it.⁵⁷ Most important for present purposes, an agency has no “inherent” (non-statutory) authority to delay or suspend rules while it reconsiders them.⁵⁸

It is deeply ironic that, in trying to check the power of what it regards as the all-too-powerful administrative state, the Trump administration has ignored the legal limits on agencies’ authority. As noted, settled legal doctrine requires agencies to find and identify statutory authority for the actions they take. In postponing or proposing to postpone final rules, however, agencies in the Trump administration have disregarded this requirement, either failing altogether to state the statutory basis for their actions or offering merely a conclusory statement that their actions fall within a particular statute’s domain. These terse assertions betray an array of legal and logical errors.

I discuss each of these legal problems below.

⁵² See, e.g., *California v. Bureau of Land Mgmt.*, No. 17-CV-03804-E-DL, 2017 WL 4416409, at *7–9 (N.D. Cal. Oct. 4, 2017).

⁵³ See *id.* (vacating unlawful rule delay); *Becerra v. Dep’t of the Interior*, Docket No. 13, Case No. 17-cv-02376-EDL, slip op. at 13–16 (N.D. Cal. Aug. 30, 2017) (declining to vacate unlawful rule delay).

⁵⁴ *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 1995).

⁵⁵ *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002); see generally *Soriano v. United States*, 494 F.2d 681, 683 (9th Cir. 1974); *Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 915 n.3 (3d Cir. 1981).

⁵⁶ See *La. Pub. Serv. Comm. v. FCC*, 476 U.S. 355, 374 (1986).

⁵⁷ *Michigan v. EPA*, 268 F.3d at 1081.

⁵⁸ See *Nat. Res. Def. Council v. Abraham*, 355 F.3d 179, 202 (D.C. Cir. 2004).

A. *No Legal Authority Identified*

Some agencies have dispensed altogether with identifying the source of legal authority for their decisions to delay or suspend rules. Before EPA was chastised by the D.C. Circuit for attempting to stay its rule on methane emissions from oil and gas facilities under section 307(d)(7)(B) of the Clean Air Act, the Agency had proposed a rule to further stay the final rule. In proposing this further delay, EPA avoided the topic of statutory authority altogether; its proposal is silent on the statutory basis for its proposed delay.⁵⁹ EPA also stayed the effective date of its “Risk Management Program” rule on chemical safety, while acknowledging that it was staying the rule *before* meeting the requirements specified in the statutory provision it thought authorized the stay.⁶⁰ EPA extended the effective date of a rule on reporting and recordkeeping for nanoscale chemical substances without citing any statutory authority for the delay—although it did detail the Agency’s compliance with various presidential executive orders.⁶¹ In delaying a rule that increased civil penalties for violations of fuel efficiency standards, the National Highway Traffic Safety Administration (NHTSA) sufficed with a non sequitur: “Because NHTSA is reconsidering the final rule, NHTSA is delaying the effective date pending reconsideration.”⁶²

I could multiply examples. The point is that many of the rule delays that have taken place in the Trump administration have failed to identify the legal authority under which the delays took place. A court reviewing such delays may not supply, or allow an agency on judicial review to supply, a basis for the agency’s action that the agency itself did not identify at the time it took the action.⁶³ In *Clean Air Council*, the D.C. Circuit took this principle seriously in the context of reviewing and vacating EPA’s delay of the methane rule for oil and gas facilities.⁶⁴ At the very least, the agencies that have not identified the source of their authority to delay rules are vulnerable to a remand for further explanation. If there is no such authority, their actions are unlawful, and the courts can strike them down.

⁵⁹ Oil and Natural Gas Sector; Emission Standards for New, Reconstructed, and Modified Sources: Stay of Certain Requirements, 82 Fed. Reg. 27,645 (June 16, 2017) (to be codified at 40 C.F.R. pt. 60). For a devastating catalog of the legal inadequacies of EPA’s proposal to delay the methane rule, see Earthworks et al., Comment on the EPA’s Proposed Rules Regarding Stay of Certain Requirements (EPA-HQ-OAR-2010-0505) and Three Month Stay of Certain Requirements (EPA-HQ-OAR-2017-0346) of the Emission Standards for New and Modified Sources in the Oil and Natural Gas Sector (Aug. 9, 2017), https://www.edf.org/sites/default/files/content/joint_env_comments_on_proposed_extended_stays.pdf [<https://perma.cc/F8MR-63AV>].

⁶⁰ Accidental Release Prevention Requirements, Final rule, 82 Fed. Reg. 13,968, 13,969 (Mar. 16, 2017) (to be codified at 40 C.F.R. pt. 68).

⁶¹ Chemical Substances When Manufactured or Processed as Nanoscale Materials; TSCA Reporting and Recordkeeping Requirements 82 Fed. Reg. 22,088 (May 16, 2017) (to be codified at 40 C.F.R. pt. 704).

⁶² See Civil Penalties 82 Fed. Reg. 32,140 (July 12, 2017) (to be codified at 49 C.F.R. pt. 578).

⁶³ See *SEC v. Chenery Corp.*, 318 U.S. 80 (1943).

⁶⁴ See *Clean Air Council v. Pruitt*, 862 F.3d 1, 5–6 (D.C. Cir. 2017).

lodge it, that view is foreclosed by the settled principle that agencies do not have authority that Congress has not given them.

C. *Priebus Memorandum*

Many of the decisions to delay or suspend the effective date of final rules cite, as legal authority, the Priebus memorandum instructing them to freeze rules that had not yet taken effect as of January 19, 2017.⁶⁷ A memorandum from the White House Chief of Staff, however, does not enlarge the authority of an administrative agency. Indeed, the memorandum itself acknowledges as much, providing that the agencies should postpone effective dates “only as permitted by applicable law.”⁶⁸ The Trump administration’s many decisions delaying or suspending rules only on the say-so of the former White House Chief of Staff may be legally vulnerable under the principle that agencies must find statutory authority for the actions they take. It often happens, of course, that a brief delay predicated on a “freeze” memorandum from the White House terminates before any judicial action can be filed. That does not mean that the delay was legally valid, but it does limit the concrete consequences of any illegality; parties who would have challenged the delay if it remained in effect might forgo a challenge—and the judicial remedies of remand and vacatur—if the delay lasts only a brief time.

D. *Statutory Provisions Unrelated to Stays Pending Reconsideration*

Still other decisions on delay have cited, as “authority,” the statutory provisions under which the final rules being delayed were promulgated. Often, however, these statutory provisions do not say anything about the agency’s authority to reconsider final rules or delay them during reconsideration. Here, too, examples abound, but I will rest with just two. The Department of Agriculture stayed a rule on agricultural bioterrorism, citing as “Authority” the statutory provision authorizing regulation of certain biological agents and toxins.⁶⁹ That provision does not authorize a regulatory stay

⁶⁷ See, e.g., Onshore Oil and Gas Operations, 82 Fed. Reg. 9974, 9975 (Feb. 9, 2017) (to be codified at 43 C.F.R. pt. 3160); Delay of Effective Date for 30 Final Regulations, 82 Fed. Reg. 8499, 8500 (Jan. 26, 2017) (to be codified at 40 C.F.R. pts. 22, 51, 52, 61, 68, 80, 81, 124, 147, 171, 239, 259, 300, 770); Affirmative Action for Individuals With Disabilities in Federal Employment, 82 Fed. Reg. 10,863 (Feb. 16, 2017) (to be codified at 29 C.F.R. pt. 1614); Confidentiality of Substance Use Disorder Patient Records; Delay of Effective Date, 82 Fed. Reg. 10,863, 10,863 (Feb. 16, 2017) (to be codified at 42 C.F.R. pt. 2); Clarification of When Products Made or Derived From Tobacco Are Regulated as Drugs, Devices, or Combination Products; Amendments to Regulations Regarding “Intended Uses”; Delayed Effective Date, Final rule; delay of effective date, 82 Fed. Reg. 9501, 9502 (Feb. 7, 2017) (to be codified at 21 C.F.R. pts. 201, 801, 1100); National Organic Program (NOP); Organic Livestock and Poultry Practices, 82 Fed. Reg. 21,677 (May 10, 2017) (to be codified at 7 C.F.R. pt. 205).

⁶⁸ Memorandum for the Heads of Executive Departments and Agencies; Regulatory Freeze Pending Review, 82 Fed. Reg. 8346 (Jan. 20, 2017).

⁶⁹ Agricultural Bioterrorism Protection Act of 2002, 82 Fed. Reg. 10,855 (Feb. 16, 2017) (to be codified at 7 C.F.R. pt. 3319).

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pending reconsideration. Likewise, in putting off compliance dates for a rule on formaldehyde in wood products, EPA cited the provision of the Toxic Substances Control Act directing EPA to regulate formaldehyde in wood products.⁷⁰ That provision contains no reference to regulatory stays pending reconsideration.⁷¹ An action delaying the effective date of a rule for purposes of reconsideration must be justified not by the statutory provision authorizing the *rule being reconsidered and delayed*, but by a statutory provision authorizing the *delay pending reconsideration*.

E. Contingent Statutory Authority

Another legal mistake agencies in the Trump administration have made is to cite, as authority for rule delays, statutory provisions authorizing changes to effective dates contingent upon the agency making certain findings—without making the required findings. For example, in delaying the effective date of a final rule setting minimum sound requirements for hybrid and electric vehicles, the NHTSA cited several statutory provisions establishing NHTSA’s rule-making responsibilities.⁷² One of these provisions is about effective dates, and states that NHTSA may, for “good cause” and if it is in the “public interest,” set an effective date outside the temporal range specified in that provision.⁷³ Without making these predicate findings, NHTSA has not established the legal basis for its delay.

Similarly, EPA has cited statutory provisions authorizing stays pending reconsideration without adhering to the limits imposed by those provisions. In staying its rule on methane emissions from oil and gas facilities, the Agency invoked section 307(d)(7)(B) of the Clean Air Act but did not meet the statutory requirements for issuing a stay under that provision.⁷⁴ In delaying the designation of areas under its revised ozone air quality standard, EPA invoked section 107(d)(1)(B)(i) of the Clean Air Act,⁷⁵ which permits extensions of designations “in the event the Administrator has insufficient information to promulgate the designations.”⁷⁶ The Agency explained that the Administrator “cannot assess whether he has the necessary information to finalize designations until additional analyses from [the Agency’s reevaluation of the ozone standards, occasioned by the change in administrations]

⁷⁰ Compliance Date Extension; Formaldehyde Emission Standards for Composite Wood Products, Direct final rule, 82 Fed. Reg. 23735, 23,736 (May 24, 2017) (to be codified at 40 C.F.R. pt. 770) (referring for agency’s authority to 15 U.S.C. § 2697 (2012)).

⁷¹ No part of 15 U.S.C. § 2697 deals with delaying rules while reconsidering them. *See* 15 U.S.C.A. § 2697 (West 2017).

⁷² Federal Motor Safety Standards; Minimum Sound Requirements for Hybrid and Electric Vehicles, 82 Fed. Reg. 14,477 (Mar. 21, 2017) (to be codified at 49 C.F.R. pts. 571, 585).

⁷³ 49 U.S.C. § 30111(d) (2012 & Supp. I 2013).

⁷⁴ *See* Clean Air Council v. Pruitt, 862 F.3d 1 (D.C. Cir. 2017).

⁷⁵ Extension of Deadline for Promulgating Designations for the 2015 Ozone National Air Quality Standards, 82 Fed. Reg. 29,246, 29,247 (June 28, 2017).

⁷⁶ 42 U.S.C. § 7407(d)(1)(B)(i) (2012).

are available.”⁷⁷ EPA dropped its proposal to delay the ozone designations the day after state attorneys general sued the Agency, asserting that its delay was unlawful.⁷⁸ Environmentalists had also earlier sued the Agency over the delay, arguing in part that the “information” EPA sought to obtain during reconsideration of the ozone standard was not the kind of information the Clean Air Act made relevant in the decision to extend deadlines for designations.⁷⁹

F. APA Section 705

A final potential source of legal authority to postpone rules is section 705 of the APA. Section 705 provides that an agency may, when it “finds that justice so requires, . . . postpone the effective date of action taken by it, pending judicial review.”⁸⁰ EPA, the Department of the Interior (DOI), and the Department of Education have cited section 705 as the basis of their authority to delay several final rules. EPA, DOI, and the Department of Education have tried to stretch this authority in several implausible directions. Their reasoning cannot stand under the existing jurisprudence of section 705.

For starters, EPA and DOI have tried to justify a delay of a *compliance date* under section 705. They have asserted, without citation or elaboration, that a compliance date *is* an “effective date” within the meaning of section 705 of the APA.⁸¹ The agencies may be attempting to convert compliance dates into effective dates because courts have held that an agency may not “postpone” an effective date under section 705 of the APA once the effective date has passed.⁸² EPA and DOI are trying to stretch the period of section 705’s relevance to include the period after effectiveness and before compliance.⁸³

But compliance dates are not the same as effective dates.⁸⁴ Compliance dates are the dates on which parties subject to the underlying rule are ex-

⁷⁷ Extension of Deadline for Promulgating Designations for the 2015 Ozone National Air Quality Standards, 82 Fed. Reg. at 29,247.

⁷⁸ See Lisa Friedman, *E.P.A. Reverses Course on Ozone Rule*, N.Y. TIMES (Aug. 3, 2017), https://www.nytimes.com/2017/08/03/climate/epa-reverses-course-on-ozone-rule.html?_r=0 [<http://perma.cc/L2QD-AXNZ>].

⁷⁹ See Motion for Summary Vacatur or, in the Alt., for Stay Pending Judicial Review, Am. Lung Ass’n v. EPA, No. 17-1172 (D.C. Cir. July 12, 2017).

⁸⁰ 5 U.S.C.A. § 705 (West 2017).

⁸¹ See Postponement of Certain Compliance Dates for Effluent Limitations Guidelines and Standards for the Seam Electric Power Generating Point Source Category, 82 Fed. Reg. 19,005 (Apr. 25, 2017) (to be codified at 40 C.F.R. pt. 423); Waste Prevention, Production Subject to Royalties, and Resource Conservation; Postponement of Certain Compliance Dates, 82 Fed. Reg. 27,430, 27,431 (June 15, 2017) (to be codified at 43 C.F.R. pt. 3170).

⁸² See *Safety-Kleen Corp. v. EPA*, No. 92-1629, and consolidated case No. 92-1639, 1996 LEXIS 2324, at *2–3 (D.C. Cir. Jan. 19, 1996).

⁸³ See Postponement of Compliance Dates for Effluent Limitations Guidelines, 82 Fed. Reg. at 19,005 (emphasizing that rule’s compliance dates “have not yet passed”).

⁸⁴ Some statutes explicitly contemplate that rules will have both an “effective date” and a “compliance date.” See *Nat. Res. Def. Council v. EPA*, 749 F.3d 1055, 1057–58 (D.C. Cir. 2014) (citing 42 U.S.C. § 7412); see also *Cal. Energy Comm’n v. Dep’t of Energy*, 585 F.3d 1143 (9th Cir. 2009) (citing Energy Policy and Conservation Act).

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pected, on pain of penalty, to conform their conduct to the rule. Effective dates are the dates on which rules take legal effect. Compliance dates set by agencies are often later than effective dates, in order to give affected parties time to bring their activities into conformity with the rule. Under EPA and DOI's assertions about the equivalency of effective dates and compliance dates, rules having both an effective date and a compliance date would have more than one effective date. The point of an effective date, however, is to give clarity about when a rule becomes law. Perhaps for this reason, section 705 of the APA refers to "*the* effective date," in the singular, indicating that an action has just one effective date. EPA and DOI's positions would undo that clarity and singularity, and make a muddle of rules and statutes that carefully distinguish between these two kinds of regulatory milestones.

A district court in California has twice rejected DOI's invocation of section 705 in delaying rules issued in the Obama administration—a rule on royalty valuation and a rule on methane emissions from oil and gas facilities—with reasoning just like that offered above. The court held that compliance dates were not "effective dates" within the meaning of section 705 and that compliance dates and effective dates have different meanings.⁸⁵ Because the agencies that have, in the Trump administration, tried to delay compliance dates under section 705 have all called upon this problematic equation of compliance dates and effective dates, these judicial decisions throw all of these delays into legal doubt.

Beyond improperly conflating effective dates and compliance dates, agencies in the Trump administration have also distorted the meaning of "justice" in invoking section 705 to justify rule delays. The term "justice" itself invites consideration of the competing interests at stake in a matter, as a district court has observed in rejecting one of the administration's rule delays.⁸⁶ It does not generally countenance a fixation on one set of interests without reference to others. In fact, settled case law on judicial review of agencies' delays of rules under section 705 considers whether agencies have shown that there will be irreparable harm without the delay and whether they have also shown that the harm that will occur without the delay balances out the harm that will come to the beneficiaries of regulation due to the rule delay.⁸⁷

In delaying rules under section 705, however, EPA, DOI, and the Department of Education have paid loving attention to the interests of regulated industry while brushing aside the interests of regulatory beneficiaries. In postponing its rule on toxic water pollution from power plants, EPA mentioned only the costs that regulated industry would avoid during the delay,

⁸⁵ See *California v. Bureau of Land Mgmt.*, No. 17-CV-03804-E-DL, 2017 WL 4416409, at *11 (N.D. Cal. Oct. 4, 2017); *Becerra v. Dep't of the Interior*, Docket No. 13, Case No. 17-cv-02376-EDL, slip op. at 13–16 (N.D. Cal. Aug. 30, 2017).

⁸⁶ See *California* at *11.

⁸⁷ See *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 34 (D.D.C. 2012).

not the benefits that the general public would forgo.⁸⁸ In postponing its rule on venting, flaring, and leaks in the oil and gas industry's operations on federal and Indian lands, DOI referred only to the regulated industry's interests in avoiding the cost of complying with the rule, not to the public's interest in receiving the benefits of the rule.⁸⁹ In postponing the effectiveness of its final rule establishing a new standard and process for deciding whether a student borrower has a defense to repayment on a loan based on the behavior of the school she borrowed money to attend, the Department of Education trained its gaze almost exclusively on the costs saved by educational institutions. Student borrowers came into the picture only insofar as the Department indicated they would be taken care of under existing regulations—the very regulations the Department had decided to revise in the borrower defense regulation.⁹⁰ Such one-sided analysis does not meet the settled requirements for postponing a rule under section 705 of the APA.

EPA, DOI, and the Department of Education have also tried to smuggle pending processes for internal reconsideration of rules into section 705's authorization of rule postponement. Section 705 authorizes postponement of an agency rule only when the rule is the subject of "pending judicial review." Courts have concluded, reasonably, that an agency seeking to postpone a rule under section 705 must connect its rationale for postponement to the litigation that is invoked as the trigger for the postponement.⁹¹ Agencies in the Trump administration have not drawn this connection.

In putting off the compliance dates for its final rule on preventing wasteful losses of natural gas from facilities on federal and Indian lands, DOI conceded that it "believes the Waste Prevention Rule was properly promulgated," yet it asserted, without elaboration, that the rule faced an "uncertain future" in light of both the pending litigation and the pending administrative consideration of the rule.⁹² A district court in California has rejected this reasoning as a basis for postponing the rule under section 705,

⁸⁸ See Postponement of Compliance Dates for Effluent Limitations Guidelines, 82 Fed. Reg. at 19,005 (discussing "capital expenditure" of regulated industry). EPA followed the same playbook—mentioning only costs saved by regulated entities through delay, not costs incurred by the public—in justifying, as a matter of "justice," its stay of a general permit for municipal stormwater discharges. See Notice of EPA's Action To Postpone the Effective Date of the EPA Region 1 Clean Water Act National Pollutant Discharge Elimination System General Permits for Stormwater Discharges From Small Municipal Separate Storm Sewer Systems in Massachusetts, 82 Fed. Reg. 32,357, 32,358 (July 13, 2017).

⁸⁹ Waste Prevention, Production Subject to Royalties, and Resource Conservation; Postponement of Certain Compliance Dates, 82 Fed. Reg. 27,430, 27,431 (June 15, 2017) (to be codified at 43 C.F.R. pt. 3170).

⁹⁰ Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Education Assistance for College and Higher Education Grant Program, 82 Fed. Reg. 27,621 (June 16, 2017) (to be codified at 34 C.F.R. pts. 668, 674, 682, 685).

⁹¹ See *Sierra Club*, 883 F. Supp. 2d at 34.

⁹² Waste Prevention, Production Subject to Royalties, and Resource Conservation, 82 Fed. Reg. at 27,431.

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finding that the federal defendants had paid mere “lip service” to the requirement that the postponement be tied to the underlying litigation.⁹³

This decision threatens other rule delays that have relied on the same legal reasoning. In postponing its borrower defense rule, the Department of Education, without elaboration, asserted that “serious questions” were raised and “legal uncertainty” was created by the pending judicial challenge to the rule. If an agency may simply wave its hand at pending litigation, pronounce its outcome “uncertain,” and stay a rule while the litigation unfolds, the link section 705 requires between stays and litigation will disappear, and agencies will be able to use the almost-inevitable litigation that attends any notable rulemaking as an excuse for staying rules indefinitely.

Similarly, in postponing the compliance dates for its final rule on toxic water pollution, EPA referred repeatedly to objections made in petitions for reconsideration of the rule and only glancingly to the pending judicial challenges.⁹⁴ EPA even cited data obtained after the final rule was issued—data that will not be admissible in the judicial challenge to the rule.⁹⁵ EPA has been schooled before in the requirements for section 705 postponements; yet in the announcement of the postponement of the rule on toxic water pollution, it made virtually the same mistakes all over again—right down to its explicit declination to identify any possible legal error in the underlying rule-making proceeding.⁹⁶ So divorced is EPA’s postponement of the rule from the attendant judicial challenge that EPA successfully petitioned the court hearing the challenge to hold it in abeyance while EPA reconsidered the rule.⁹⁷ Thus has EPA created a kind of Alphonse and Gaston routine for

⁹³ See *California v. Bureau of Land Mgmt.*, No. 17-CV-03804-E-DL, 2017 WL 4416409, at *10 (N.D. Cal. Oct. 4, 2017).

⁹⁴ In a separate matter, EPA postponed the effective date of a rule promulgating a federal implementation plan for Arkansas, citing section 705, with no reference whatsoever to any pending litigation. See *Promulgation of Air Quality Implementation Plans; State of Arkansas; Regional Haze and Interstate Visibility Transport Federal Implementation Plan; Partial Stay*, 82 Fed. Reg. 18,994 (Apr. 25, 2017) (to be codified at C.F.R. pt. 52).

⁹⁵ *Postponement of Certain Compliance Dates for Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category*, 82 Fed. Reg. 19,005, 19,005 (Apr. 25, 2017).

Similarly, in staying Region 1’s general permit for municipal stormwater discharges, EPA did not discuss the merits of the litigation that it invoked, under section 705 of the APA, in staying the permit; it discussed only its desire to conduct Alternative Dispute Resolution regarding the permit itself and to figure out what “changes are appropriate in the permit and to determine next steps.” See *Action To Postpone the Effective Date of the EPA Region 1 Clean Water Act*, 82 Fed. Reg. 32,357, 32,358 (July 13, 2017).

⁹⁶ *Dates for Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category*, 82 Fed. Reg. 19,005, 19,005 (Apr. 25, 2017) (“While EPA is not making any concession of error with respect to the rulemaking, the far-ranging issues contained in the reconsideration petitions warrant careful and considerate review of the Rule.”). Cf. *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 34 (D.C. Cir. 2012) (finding that postponement of two rules had “no rational connection to the underlying litigation” where EPA’s notice of postponement stated that the Agency “believe[s] that the final rules reflect reasonable approaches consistent with the requirements of the Clean Air Act,” even if some issues related to the rules could “benefit from additional public involvement”).

⁹⁷ *Sw. Elec. Power Co. v. EPA*, No. 15-60821 (stayed Apr. 24, 2017 until Aug. 12, 2017). The judicial challenge to EPA Region 1’s general permit for municipal stormwater discharges

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the regulatory state: the courts give way so that the agency can do its work, and the agency stops the rule so that the courts can do their work.⁹⁸

III. UNLAWFULLY TRUNCATED PROCESS

In making decisions, agencies must use the decision-making process Congress has prescribed for those decisions. For agency rules, this process is usually the familiar notice and comment process of the APA, or a close variant of it specified in other statutes.⁹⁹ As I explained in Part I, courts have long held that agency decisions to delay or suspend rules are themselves “rules” subject to notice and comment requirements.

The question then is whether any exception to the procedural requirements for rules applies. As discussed below, the Trump administration has invoked two exceptions to the APA’s notice and comment requirement for rulemaking. It has suggested, without elaboration, that some of its decisions delaying or suspending rules are exempt from notice and comment requirements insofar as they are “procedural rules.” More often, the administration has argued that its delays need not be preceded by notice and comment because it has “good cause” to forgo this process. I argue below that the Trump administration has misused both of these statutory exceptions.

A. Procedural Rules

The APA exempts from notice and comment requirements “rules of agency organization, procedure, or practice.”¹⁰⁰ The Trump administration has justified some of its delays of agency rules on the ground that these decisions are “rules of procedure” and as such do not need to be preceded by notice and comment. The administration has supplied no reasoning for this conclusion in any of the instances in which it has offered it, sufficing with a terse declaration that, “to the extent that 5 U.S.C. 553 APA applies”

was likewise stayed, without objection from EPA, pending agency reconsideration. *See Action To Postpone the Effective Date of the EPA Region I Clean Water Act*, 82 Fed. Reg. at 32,358.

⁹⁸ In *Becerra*, the district court in California rejected DOI’s attempt to justify a delay under section 705 where the Agency had convinced the court reviewing the judicial challenge to the underlying rule to stay the litigation. *See Becerra v. Dep’t of the Interior*, Docket No. 13, Case No. 17-cv-02376-EDL, slip op. at 14 (N.D. Cal. Aug. 30, 2017).

⁹⁹ The Clean Air Act, for example, requires that many rules promulgated under the Act follow a process much like, though not identical to, the notice and comment process of the APA. *See* 42 U.S.C. § 7607(d) (2012).

¹⁰⁰ 5 U.S.C. § 553(b)(3)(A) (2012).

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to the agency decision to delay an effective date,¹⁰¹ the decision “constitutes a rule of procedure” under the APA.¹⁰²

These attempts to circumvent notice and comment rulemaking are not legally sound. They appear to take the position that delays of effective dates are, as a class, procedural rules. As I just discussed, however, courts have held that such delays are substantive rules, presumptively requiring notice and comment. Moreover, as I explain below, agencies’ delays of the effective dates of final rules are not plausibly conceived of as procedural rules.

In thinking through whether delays of rules are procedural rules under the APA, it is helpful to remember the language of the APA itself. The APA’s bundling-together of “rules of agency organization, procedure, or practice”¹⁰³ implies a concern with rules that govern an agency’s internal operations. Agency “organization” and “practice” call to mind an agency’s choices about how to structure and govern itself, not choices about how to govern parties outside the agency. Given the adjacent placement of rules of “procedure” in the same statutory provision, it is reasonable to conclude that “procedure” should be read to refer to an agency’s processes for organizing or structuring its own operations.

Beyond the text of the APA, courts have cited the legislative history in making the same point: that the exception from notice and comment for rules of “agency organization, procedure, or practice” was “provided to ensure that agencies retain latitude in organizing their internal operations.”¹⁰⁴

A long line of cases accept the basic idea that procedural rules are ones involving agencies’ internal operations. Such rules may nevertheless affect outside parties; in an influential early case, the D.C. Circuit quoted Professor

¹⁰¹ It is unclear whether the qualifier “to the extent that” is a subtle suggestion that the agency, if legally challenged, will argue that section 553’s notice and comment provisions do not apply at all to an agency’s delay of an effective date. Such an argument should fail on the basis of the legal analysis described above. *See supra* Section II.A. It may also fail based on the *Chenery* principle, that an agency’s decision must stand or fall based on the reasoning given at the time of the decision. By hedging (“to the extent”) rather than declaring, the agencies may not have met *Chenery*’s requirement of contemporaneous explanation. *See generally* SEC v. *Chenery Corp.*, 318 U.S. 80 (1943).

¹⁰² *See, e.g.*, Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments, 82 Fed. Reg. 20,825, 20,827 (May 4, 2017); Energy Conservation Program: Test Procedures for Walk-in Coolers and Walk-in Freezers, 82 Fed. Reg. 14,426 (Mar. 21, 2017); Energy Conservation Program: Test Procedures for Ceiling Fans, Final rule; further delay of effective date, 82 Fed. Reg. 14,427 (Mar. 21, 2017); Energy Efficiency Standards for the Design and Construction of New Federal Low-Rise Residential Buildings’ Baseline Standards Update, 82 Fed. Reg. 10,287, 10,288 (Mar. 21, 2017); Confidentiality of Substance Use Disorder Patient Records, 82 Fed. Reg. 10,863 (Feb. 16, 2017); Endangered and Threatened Wildlife and Plants; Endangered Species Status for Rusty Patched Bumble Bee, 82 Fed. Reg. 10,285, 10,286 (Feb. 10, 2017); Onshore Oil and Gas Operations, 82 Fed. Reg. 9974, 9975 (Feb. 9, 2017); Clarification of When Products Made or Derived From Tobacco Are Regulated as Drugs, Devices, or Combination Products, 82 Fed. Reg. 9501, 9502 (Feb. 7, 2017); Refuse to Accept Procedures for Premarket Tobacco Product Submissions, 82 Fed. Reg. 8894 (Feb. 1, 2017); Procedural Rules for DOE Nuclear Activities, 82 Fed. Reg. 8807 (Jan. 31, 2017).

¹⁰³ 5 U.S.C. § 553(b)(3)(A) (2012).

¹⁰⁴ *Batterton v. Marshall*, 648 F.2d 694, 707 (D.C. Cir. 1980).

Freund in observing that “even office hours . . . necessarily require conformity on the part of the public.”¹⁰⁵ The courts have held that when the “substantive effect” of a seemingly procedural rule on “the rights or interests of parties” becomes “sufficiently grave so that notice and comment are needed to safeguard the policies underlying the APA,” notice and comment are required for that rule.¹⁰⁶ This principle has persuaded courts to deem some rules seemingly directed at an agency’s internal operations to be substantive rules that require notice and comment.¹⁰⁷

These precedents are not helpful to the Trump agencies that have opined that their delays of effective dates are rules of procedure. The effective date of a rule is clearly not a rule addressed at an agency’s internal operations. It is not a deadline for internal agency filings, or a principle of agency organization, or anything of the sort. It is, rather, the date on which the underlying rule becomes law.

The Trump administration has effectively, even if unintentionally, conceded as much. In delaying the effective dates of Obama-era rules, the administration has consistently pointed to the effects on the public—in particular the regulated industry—of allowing the effective dates to pass without delay.¹⁰⁸ The entire reason for delaying these rules without notice and comment is to shelter regulated industry from having these rules take on the force of law.¹⁰⁹ As in one of the D.C. Circuit cases denying “procedural” status to an agency rule, no agency that has claimed that its delays constitute procedural rules has argued that its “need for ‘latitude in organizing [its] internal operations’ is implicated at all.”¹¹⁰

This situation differs fundamentally from ones in the cases that courts have found hard. The hard cases are those in which a superficially “procedural” rule, aimed at internal agency operations, has a substantial substantive effect on external parties. In those cases, the rules’ effect is sometimes grave enough for the courts to deem them substantive.¹¹¹

¹⁰⁵ *Id.* at 707 (quoting E. FREUND, ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY 213 (1928)).

¹⁰⁶ *Elec. Privacy Info. Ctr. v. Dep’t of Homeland Sec.*, 653 F.3d 1, 5–7 (D.C. Cir. 2011).

¹⁰⁷ *Mendoza v. Perez*, 754 F.3d 1002, 1024 (D.C. Cir. 2014).

¹⁰⁸ *See, e.g.*, Changes to the Nutrition Facts Label, FOOD & DRUG ADMIN. (Oct. 2, 2017), <https://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/LabelingNutrition/ucm385663.htm#dates> [<https://perma.cc/R9SL-KQ9Z>]; Commission Guidance on Pay Ratio Disclosure, 82 Fed. Reg. 44,917 (Sept. 27, 2017); Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments, 82 Fed. Reg. 20,825, 20,827–28 (May 4, 2017); Dates for Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 82 Fed. Reg. 19,005, 19,005 (Apr. 25, 2017).

¹⁰⁹ *See, e.g.*, Pesticides: Certification of Pesticide Applicators; Delay of Effective Date, 82 Fed. Reg. 25,529, 25,530 (June 2, 2017) (to be codified at 40 C.F.R. pt. 171); Reporting of Data for Mishandled Baggage and Wheelchairs and Scooters Transported in Aircraft Cargo Compartments; Extension of Compliance Date, 82 Fed. Reg. 14,437, 14,437 (Mar. 21, 2017) (to be codified at 14 C.F.R. pt. 234); Poultry Grower Ranking Systems, 82 Fed. Reg. 9533, 9533 (Feb. 7, 2017) (to be codified at 9 C.F.R. pt. 201).

¹¹⁰ *Chamber of Commerce v. Dep’t of Labor*, 174 F.3d 206, 212 (D.C. Cir. 1999).

¹¹¹ *Id.*

In the Trump delay cases, however, the agencies are trying the opposite move. They are trying to convert a rule that is explicitly and fundamentally aimed at outside parties—the alteration of the effective date of a final rule—into a procedural rule, aimed at internal agency operations. But that is not what the delays are about. Moreover, even assuming for the sake of argument that some of the rule delays do not have “grave” effects on the rights and interests of the public, that fact does not make them “procedural.” The conversion between procedural and substantive, based on the gravity of effects, runs only in one direction; grave effects may turn an apparently procedural rule into a substantive one, but the absence of such effects does not turn a substantive rule into a procedural one. To say otherwise is to make the following logical mistake:

1. A rule that has grave effects on the interests of parties is substantive.
2. Therefore, a rule that does not have grave effects on the interests of parties is procedural.

The D.C. Circuit has previously criticized this kind of flawed reasoning in the context of determining whether a rule was substantive or procedural, noting that “the agency argues that because a rule backed by the force of law is substantive, a rule that has no binding legal authority must therefore be procedural. By the same reasoning, one would conclude that because all men are mortal, women must be immortal.”¹¹² There is no plausible argument that a delay of an effective date is a way of managing an agency’s internal operations. The effects of that delay on external parties, however great or small, cannot convert the decision about delay into a procedural rule.

The D.C. Circuit has occasionally supplemented its focus on substantial impacts on parties with an inquiry into “whether the agency action also encodes a substantive value judgment or puts a stamp of approval or disapproval on a given type of behavior.”¹¹³ Under this approach, the Trump administration’s rule delays are not procedural as well. These delays both “encode a substantive value judgment” and “put a stamp of approval or disapproval on a given type of behavior.”¹¹⁴

A broad imposition of rule delays at the beginning of a new presidential administration reflects a substantive value judgment that the rules of the previous administration are not to be trusted. Indeed, the wholesale imposition of delays, predicated on a generic instruction from the White House to freeze rules, could reflect nothing but such a judgment, since agencies responding in bulk to such an instruction are doing so solely on the basis of the change

¹¹² *Id.*

¹¹³ *Am. Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1047 (D.C. Cir. 1987).

¹¹⁴ *But see* Jack M. Beermann, *Midnight Rules: A Reform Agenda*, 2 MICH. J. ENVTL. & ADMIN. L. 286, 367 (2013) (“A brief delay of a rule’s effective date appears procedural under this standard—the freeze does not necessarily reflect approval or disapproval of the substance of the rule, it merely provides time for the agency to review the rule and perhaps take further substantive action.”).

in administrations. Mick Mulvaney, the current Director of OMB, captured this kind of value judgment when, in touting the Trump administration's deregulatory efforts and without citing any specific evidence, he said: "Our philosophy has been that the previous administration fudged the numbers, that they either overstated the benefits to people or understated the costs."¹¹⁵

Where agencies in the Trump administration have not relied solely on White House instructions in imposing rule delays, they have most often supported the delays by invoking some form of the argument that imposing costs on regulated industry before they have reconsidered the rules in question is inappropriate. This judgment implicitly assumes that regulatory beneficiaries are the ones who should bear the burden of delay. This preference for regulated parties over regulatory beneficiaries "puts a stamp of approval . . . on a given type of behavior" by allowing activity that the agency previously judged harmful to continue unchanged.

Courts have long emphasized that exceptions to the APA's notice and comment requirements are to be recognized sparingly, to avoid creating " 'escape clauses' that may be arbitrarily utilized at the agency's whim."¹¹⁶ Conceiving of adjustments to the effective dates of substantive rules as procedural rules would give agencies an easy way out. Agencies could delay rules, either for consecutive brief intervals or for longer periods, without having to justify their antipathy to or suspicion of the final rules they are delaying. This is exactly the kind of end run around the notice and comment process that courts have been anxious to prevent.¹¹⁷

B. Good Cause

The APA also provides that an agency may forgo notice and comment rulemaking if it "for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."¹¹⁸

Here, too, the courts have cautioned that exceptions to notice and comment "will be narrowly construed and only reluctantly countenanced."¹¹⁹ They have specified that use of the good cause exception "should be limited to emergency situations, so that the section does not become an all-purpose

¹¹⁵ Donna Borak, *Trump's war on regulation comes with tradeoffs*, CNN: MONEY (Aug. 17, 2017, 6:44 AM), <http://money.cnn.com/2017/08/17/news/economy/trump-deregulatory-war-agenda/index.html> [<https://perma.cc/UJG4-QADC>].

¹¹⁶ *See, e.g.*, *Am. Fed'n of Gov't Emps., AFL-CIO v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981).

¹¹⁷ *See, e.g.*, *Nat. Res. Def. Council v. EPA*, 683 F.2d 752, 762 (3d Cir. 1982).

¹¹⁸ 5 U.S.C. § 553(b)(3)(B) (2012).

¹¹⁹ *Block*, 655 F.2d at 1156 (citing *State of N.J., Dep't of Env'tl. Prot. v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980)).

This explanation runs up against the settled principle that the “mere existence” of a deadline usually does not constitute good cause to forgo notice and comment.¹²³ In assessing whether an impending deadline satisfies the good cause standard, courts have considered whether an “emergency” exists. The exemplar for an “emergency” justifying a failure to conduct notice and comment is a situation that threatens public health or safety.¹²⁴

None of the agencies citing the imminence of effective dates in explaining their failure to conduct notice and comment have claimed any threat to public health or safety from keeping effective dates as is. Indeed, the rules subject to delays under the “imminent” effective date rationale are all, directly or indirectly, aimed at improving public health or safety.¹²⁵ Even though the Chief of Staff may have been alluding to this line of cases when he allowed agencies to decline to delay rules if delay would threaten public health or safety,¹²⁶ no agency, to my knowledge, took him up on this offer of flexibility. To the extent that public health or safety has figured into agencies’ decisions about delay, it has been in the wrong direction: agencies have simply ignored or dismissed the potential threats to public health or safety that may arise from delaying rules aimed at protecting public health and safety.

An imminent effective date, without more, is not an “emergency.” The arrival of an effective date means that a final rule, issued after notice and comment rulemaking, will become law on the date the agency previously announced in the rule. It is kind of the opposite of an emergency. Allowing the effective date to remain in place allows events to unfold in precisely the way the agency had said they would.¹²⁷

2. *Interests of regulated industry*

Agencies have also cited the interests of regulated industry in justifying their failure to conduct notice and comment before delaying the effective dates of final rules. They have asserted that the delays will “ease the burdens on all stakeholders,”¹²⁸ including regulated entities, and that soliciting comment would be contrary to the public interest because regulated entities need

¹²³ U.S. Steel v. EPA, 595 F.2d 207, 213 (5th Cir. 1979); Am. Fed’n of Gov’t Emps., AFL-CIO v. Block, 655 F.2d 1153, 1158 (D.C. Cir. 1981); Council of S. Mountains, Inc. v. Donovan, 653 F.2d 573, 581 (D.C. Cir. 1981); Nat. Res. Def. Council, Inc. v. Evans, 316 F.3d 904, 912 (9th Cir. 2003); Chamber of Commerce v. SEC, 443 F.3d 890, 908 (D.C. Cir. 2006).

¹²⁴ See, e.g., United States v. Dean, 604 F.3d 1275, 1281 (11th Cir. 2010).

¹²⁵ See *supra* note 122.

¹²⁶ See Memorandum for the Heads of Executive Departments and Agencies; Regulatory Freeze Pending Review, 82 Fed. Reg. 8346 (Jan. 20, 2017).

¹²⁷ Cf. *Becerra v. Dep’t of the Interior*, Docket No. 13, Case No. 17-cv-02376-EDL, slip op. at 14–15 (N.D. Cal. Aug. 30, 2017) (rejecting federal defendants’ policy argument for broadening section 705 to include compliance dates, based on idea of maintaining the status quo: “Defendants’ position undercuts regulatory predictability and consistency . . . [The] suspension of the Rule did not merely ‘maintain the status quo,’ but instead prematurely restored a prior regulatory regime.”).

¹²⁸ 340B Drug Pricing Program Ceiling Price and Manufacturer Civil Monetary Penalties Regulation, 82 Fed. Reg. 22,893, 22,893 (May 19, 2017) (to be codified at 42 C.F.R. pt. 10).

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to know as soon as possible whether the effective dates will be delayed so that they can plan and adjust their behavior accordingly.¹²⁹ Regulated entities, as EPA has put it, need “immediate notice” of whether an effective date will be put off, and thus soliciting comment before serving this notice would be against the public interest.¹³⁰

These are the kinds of justifications that could make the good cause exception swallow the rule of notice and comment. Delaying a regulatory requirement will always ease burdens on the entities regulated, at least temporarily. If easing these burdens constitutes good cause for delaying a rule, it is hard to imagine an agency being unable to delay a rule whenever it would like to give industry a break. Nothing in the agencies’ explanations for delays in the Trump administration suggests a particularly onerous or exceptional regulatory burden; no agency has asserted that a failure to delay a rule will affect the national economy or undermine an entire industry. Instead, the agencies’ references to alleviating costs for industry are generic and unelaborated. If these references suffice for good cause, the good cause constraint is quite meaningless.

There is also a nonsensical idea at the heart of these explanations. The idea, according to the agencies, is that delaying effective dates helps regulated entities plan. It lets them know what lies ahead and gives them time to adjust their conduct. But until the agency announced a delay in the effective date, regulated entities knew exactly what they had to do: they had to conform their conduct to the requirements of the final rule. Delaying the rule disrupts that certainty. Not only is the effective date put off, perhaps temporarily, or perhaps once in a continuing sequence of delays, or perhaps indefinitely, but the announcement of the delay is, in the Trump administration, typically accompanied by a reference to the agency’s current doubts about the durability of the underlying final rule.

Delaying effective dates, while simultaneously expressing discomfort with the underlying rule, is not a way to help affected parties plan or adjust their behavior. At its least harmful, it is a way to induce anxiety about the plans and adjustments affected parties are already in the midst of undertaking. At its worst, it ratifies the choices of those who delayed planning and adjustment in the hope the agency would rescue them from their own choices.¹³¹ Indeed, agencies in the Trump administration have exacerbated these dynamics, pitting compliance leaders against compliance laggards, by

¹²⁹ Refuse To Accept Procedures for Premarket Tobacco Product Submissions, 82 Fed. Reg. 8894–01 (Feb. 1, 2017) (to be codified at 21 C.F.R. pt. 1105); Agricultural Bioterrorism Protection Act of 2002, 82 Fed. Reg. 10,855, 10,855 (Feb. 16, 2017) (to be codified at 7 C.F.R. pt. 331, 9 C.F.R. pt. 121); National Organic Program, 82 Fed. Reg. 21,677, 21,677 (May 10, 2017) (to be codified at 7 C.F.R. pt. 205).

¹³⁰ Delay of Effective Date for 30 Final Regulations, 82 Fed. Reg. 8499, 8500 (Jan. 26, 2017) (to be codified at 40 C.F.R. pts. 22, 51, 52, 61, 68, 80, 81, 124, 147, 171, 239, 259, 300, 770).

¹³¹ *Cf.* Mack Trucks, Inc. v. EPA, 682 F.3d 87, 93 (D.C. Cir. 2012) (declining to support EPA regulatory exception for “lone manufacturer,” to help it escape the “folly of its own choices”).

casually dismissing the concerns of those in industry that have already sunk costs into complying with a rule the administration has now delayed.¹³²

3. *Interest in an orderly administrative process*

Agencies in the Trump administration have asserted that they have good cause to forgo notice and comment in announcing rule delays because this choice alleviates uncertainty¹³³ and promotes an “orderly” process for promulgating rules.¹³⁴

As just discussed, however, last-minute changes to effective dates disrupt the very certainty that identified effective dates are designed to achieve. The situation goes from predictable to unpredictable, from settled to unsettled.

The idea, moreover, that the deregulatory free-for-all we are now witnessing is an “orderly” process for promulgating and implementing rules is almost comical. Agencies in the Trump administration have announced their intentions to delay rules via letters to regulated industry,¹³⁵ vague notices posted on their websites,¹³⁶ Federal Register notices published after the fact,¹³⁷ “interim final” rules,¹³⁸ and more. They have finalized delays in effective dates after those dates have passed, backdating their announcements

¹³² Onshore Oil and Gas Operations, 82 Fed. Reg. 9974 (Feb. 9, 2017) (to be codified at 43 C.F.R. pt. 3160); Oil and Natural Gas Sectors, 82 Fed. Reg. 27,645 (June 16, 2017) (to be codified at 40 C.F.R. pt. 60); Medicare Program; Advancing Care Coordination Through Episode Payment Models (EPMs) 82 Fed. Reg. 22,895-01 (May 19, 2017) (to be codified at 42 C.F.R. pts. 510, 512).

¹³³ Waste Prevention, Production Subject to Royalties, and Resource Conservation; Postponement of Certain Compliance Dates, 82 Fed. Reg. 27,430, 27,431 (June 9, 2017) (to be codified at 43 C.F.R. pt. 3170); 340B Drug Pricing Program Ceiling Price and Manufacturer Civil Monetary Penalties Regulation, 82 Fed. Reg. 22,893, 22,894 (May 19, 2017) (to be codified at 42 C.F.R. pt. 10) (referring to “uncertainty” in the marketplace); Scope of Sections 202(a) and (b) of the Packers and Stockyards Act, 82 Fed. Reg. 17,531, 17,531 (Apr. 12, 2017) (delaying interim final rule would “reduce confusion of uncertainty for the industry” while agency decides “final disposition” of interim final rule).

¹³⁴ National Performance Management Measures, Assessing Performance in National Highway System, 82 Fed. Reg. 22,879 (May 19, 2017) (to be codified at 23 C.F.R. pt. 490); Clarification of When Products Made or Derived From Tobacco Are Regulated as Drugs, Devices, or Combination Products, 82 Fed. Reg. 9501 (Feb. 7, 2017) (to be codified at 21 C.F.R. pts. 201, 801, 1100); Delay of Effective Date for 30 Final Regulations, 82 Fed. Reg. 8499, 8500 (Jan. 26, 2017) (to be codified at 40 C.F.R. pts. 22, 51, 52, 61, 68, 80, 81, 124, 147, 171, 239, 259, 300, 770).

¹³⁵ Press Release, U.S. EPA Office of Media Relations, EPA to Extend Deadline for 2015 Ozone NAAQS Designations (June 6, 2017), <https://www.epa.gov/newsreleases/epa-extend-deadline-2015-ozone-naaqs-area-designations> [<https://perma.cc/7VRL-S2BB>].

¹³⁶ Changes to the Nutrition Facts Label, (June 19, 2017), <https://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/LabelingNutrition/ucm385663.htm> [<https://perma.cc/8EKN-PEK3>] (On June 13, 2017, the FDA announced its intention to extend the compliance date for the Nutrition Facts Label final rules. The FDA will provide details of the extension through a Federal Register Notice at a later time).

¹³⁷ Notice of EPA’s Action To Postpone the Effective Date of the EPA Region 1 Clean Water Act National Pollutant Discharge Elimination System General Permits for Stormwater Discharges From Small Municipal Separate Storm Sewer Systems in Massachusetts, 82 Fed. Reg. 32,357, 32,357–59 (July 13, 2017).

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to the day before the effective dates they are delaying.¹³⁹ They have delayed, sometimes indefinitely, the effective dates of rules that were years in the making and of rules that were the subjects of thousands of public comments.¹⁴⁰

If this is an “orderly” process for promulgating rules, one shudders to imagine what the Trump administration thinks of as a disorderly process.

4. *Limited resources and personnel*

Some agencies have offered what I believe is a brand new justification for forgoing notice and comment: their resources and personnel are limited. Since agency resources and personnel are always limited, this new justification, if accepted, would devour the rule that agencies must conduct notice and comment before issuing substantive rules.

In citing resource constraints, the Department of Homeland Security simply explained that it would prefer not to spend limited government resources enforcing a rule that it is “highly likely” to rescind, and that this reluctance provides good cause for failing to undertake notice and comment.¹⁴¹ This reasoning is a non sequitur; an agency’s enforcement priorities do not govern whether it must use notice and comment for rulemaking. The Agency’s explanation, moreover, betrays a mind already made up on the wisdom of keeping the rule in place, which itself is a betrayal of the open-mindedness ideally associated with the notice and comment process. And to justify a failure to undertake notice and comment on the ground that, someday in the future, a notice and comment rulemaking will ratify the Agency’s instincts that the underlying rule is bad and needs to be undone would effectively allow rule rescission in the absence of the usual process for such a decision.

EPA has taken a slightly different approach to making the limited resources argument. It has stated that it would prefer to spend agency resources on the “substance” of regulations rather than on justifying rule delays.¹⁴² This desire, the Agency has asserted, gives it good cause to avoid notice and comment in delaying rules.

¹³⁸ Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments, 82 Fed. Reg. 20,825 (May 4, 2017) (to be codified at 21 C.F.R. pts. 11, 101).

¹³⁹ Emission Standards for New, Reconstructed, and Modified Sources; Grant of Reconsideration and Partial Stay, 82 Fed. Reg. 25,730 (June 5, 2017) (to be codified at 40 C.F.R. pt. 60) (stating the delay of underlying rule is effective on June 2, 2017, three days before delay was published in the Federal Register).

¹⁴⁰ Postponement of Effectiveness of the Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform 2017 Valuation Rule, 82 Fed. Reg. 11,823, 11823–24 (Feb. 27, 2017) (to be codified at 30 C.F.R. pts. 1202, 1206).

¹⁴¹ International Entrepreneur Rule: Delay of Effective Date, 82 Fed. Reg. 31,888 (July 11, 2017) (to be codified at 8 C.F.R. pts. 103, 212, 274a).

¹⁴² Uniform National Discharge Standards for Vessels of the Armed Forces-Phase II Batch One: Delay of Effective Date, 82 Fed. Reg. 9682 (Feb. 8, 2017) (to be codified at 40 C.F.R. pt. 1700); Delay of Effective Date for 30 Final Regulations, 82 Fed. Reg. 8499, 8499 (Jan. 26,

But all agencies have limited resources, and all agencies have preferences about which kinds of activities to spend those resources on. If an agency can cite limited resources and the desire to spend those resources on something other than the notice and comment process, good cause will become a meaningless constraint on agency process. For this reason, perhaps, courts have held that constraints on resources are not “exigencies” justifying forgoing notice and comment.¹⁴³

EPA’s justification goes beyond even the context of rule delays. Many agencies would probably rather focus on one substantive aspect of rulemaking over another; they might rather, for example, spend resources studying the health risks of particular activities than spend them studying the costs to industry of reducing those risks. This preference does not justify forgoing notice and comment on matters the agency is less interested in.

EPA and the Department of Energy (DOE) have also cited the lack of political personnel in asserting that they have good cause to delay rules without notice and comment. EPA noted the “length[y]” nomination process of its administrator, and the lack of other Senate-confirmed appointees in the Agency, in forgoing notice and comment for a group of rules.¹⁴⁴ DOE also cited the lack of Senate-confirmed political personnel in declining to conduct notice and comment before delaying rules on energy efficiency.¹⁴⁵

The lack of Senate-confirmed officials in these agencies is in part the administration’s own fault. President Trump has not even nominated, or has greatly delayed in nominating, people for the Senate-confirmed positions in these agencies.¹⁴⁶ The lack of Senate-confirmed officials, moreover, does not signify a lack of political personnel. EPA and DOE are thick with political personnel who can do the work of the new administration—many of them, as I said at the outset, fresh off from working for the industries they are now trying to deregulate.¹⁴⁷ Furthermore, even if these agencies have chosen to run their deregulatory actions through a select group of political officials rather than through career channels,¹⁴⁸ this self-imposed choice does not justify forgoing notice and comment.¹⁴⁹

2017) (to be codified at 40 C.F.R. pts. 22, 51, 52, 61, 68, 80, 81, 124, 147, 171, 239, 259, 300, 770).

¹⁴³ Chamber of Commerce v. SEC, 443 F.3d 890, 908 (D.C. Cir. 2006).

¹⁴⁴ Further Delay of Effective Dates for Five Final Regulations, 82 Fed. Reg. 14,324, 14,325 (March 20, 2017) (to be codified at 40 C.F.R. pts. 22, 51, 124, 171, 300, 770).

¹⁴⁵ See Energy Efficiency Standards for the Design and Construction of New Federal Low-Rise Residential Buildings’ Baseline Standards Update, 82 Fed. Reg. 14,427, 14,428 (March 21, 2017) (to be codified at 10 C.F.R. pt. 435).

¹⁴⁶ See Karen Yourish & Gregor Aisch, *The Top Jobs in Trump’s Administration Are Mostly Vacant: Who’s to Blame?* N.Y. TIMES (July 20, 2017), https://www.nytimes.com/interactive/2017/07/17/us/politics/trump-appointments.html?_r=0 [https://perma.cc/FSR7-DU4W].

¹⁴⁷ See *supra* note 4.

¹⁴⁸ See Coral Davenport & Eric Lipton, *Scott Pruitt Is Carrying Out His E.P.A. Agenda in Secret, Critics Say*, N.Y. TIMES (Aug. 11, 2017), <https://www.nytimes.com/2017/08/11/us/politics/scott-pruitt-epa.html> [https://perma.cc/9Z9A-T92Z].

¹⁴⁹ Nat. Res. Def. Council v. Abraham, 355 F.3d 179, 205 (D.C. Cir. 2004).

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5. *Change in presidential administrations*

Numerous agencies have justified forgoing notice and comment for rule delays on the ground that a new administration has been installed.

Some agencies have claimed that they simply have “no discretion” to fail to comply with the Chief of Staff’s memorandum instructing them to delay the effective dates of rules not yet effective in January.¹⁵⁰ Their hands are tied, in other words; they cannot do otherwise.

That memorandum itself, however, leaves agencies with discretion to decline to delay rules, and specifically provides that agencies are to delay rules only if consistent with law.¹⁵¹ Law must, in this instance, include the APA’s requirement of notice and comment rulemaking in the absence of good cause. To cite a memorandum recognizing legal constraints (among which is the requirement of good cause) as good cause for disobeying legal constraints is not just unpersuasive; it is baffling.

Even if the Pricbus memorandum did not acknowledge legal constraints on agencies, this would not give the agencies authority to ignore them. Again, the incentives created by a different result would be unfortunate. A Chief of Staff could undo the notice and comment requirements of the APA simply by telling agencies to ignore them, thereby giving the agencies “no discretion” to decide otherwise and conduct notice and comment rulemaking. This would create a large “escape clause” indeed.

Some agencies have cited the change in presidential administrations as a reason to forgo notice and comment because, they say, the change in administrations means they need to review and perhaps reconsider the rules that have not yet become effective. In order to do this, they need to be able to delay the effective dates of these rules, and they cannot do this if they are required to conduct notice and comment first. Quite apart from the question of whether the statements of inability to fit notice and comment into the agencies’ schedules are factually accurate,¹⁵² this explanation is also unsatisfactory for other reasons. It is utterly generic, giving no hint of whether a particular rule is indeed susceptible to the kind of reconsideration the agency has in mind. It is also the kind of explanation that could be deployed against any rule, thus ushering in widespread exceptions to the requirement of notice and comment.

¹⁵⁰ See also *Endangered and Threatened Wildlife and Plants; Endangered Species Status for Rusty Patched Bumble Bee*, 82 Fed. Reg. 10,285, 10,286 (Feb. 10, 2017) (to be codified at 50 C.F.R. pt. 10285) (postponing the effective date and citing the Chief of Staff’s memorandum); *Onshore Oil and Gas Operations*, 82 Fed. Reg. 9974, 9974 (Feb. 9, 2017) (to be codified at 43 C.F.R. pt. 3160) (same); *Energy Efficiency Standards for the Design and Construction of New Federal Low-Rise Residential Buildings’ Baseline Standards Updates*, 82 Fed. Reg. 9343, 9343 (Feb. 6, 2017) (to be codified at 10 C.F.R. pt. 435); *Procedural Rules for DOE Nuclear Activities*, 82 Fed. Reg. 8807, 8807 (Jan. 31, 2017) (to be codified at 10 C.F.R. pt. 820).

¹⁵¹ See *Memorandum for the Heads of Executive Departments and Agencies; Regulatory Freeze Pending Review*, 82 Fed. Reg. 8346, 8346 (Jan. 20, 2017).

¹⁵² Courts have held that an agency must have a well-grounded factual basis for its assertions about “good cause.” *Tenn. Gas Pipeline v. FERC*, 969 F.2d 1141, 1146 (D.C. Cir. 1992).

Bear in mind that full reconsideration, revision, and even rescission of rules are always available as agency choices. To implement revisions and rescissions of rules, agencies must follow the same process they used in issuing the rules in the first place. Whether an effective date has passed or not, this route is almost always available to the agency. Exceptions exist, as when Congress has disempowered the agency to weaken prior rules, but for the most part agencies remain free to revise or undo rules they have promulgated. Courts have recognized, however, that an agency that effectively undoes a rule, without going through the required process, shifts the dynamic of formally undoing the rule. It shifts the agency's mindset from having to justify the change to having to justify returning the rule to its prior status. Courts have warned against shifting the agency mindset in this way without going through the appropriate process.¹⁵³

To sum up: the agencies' explanations for their conclusions that they have "good cause" to forgo notice and comment in delaying the effective dates of rules are flawed. They would greatly expand the category of decisions not subject to notice and comment. They are inconsistent with legal precedent on the nature of "good cause." They are nonsensical. Even if these explanations are subject only to a constraint of non-arbitrariness, they should fail.

IV. REASON GIVING

A basic requirement of modern administrative law is that agencies must give reasons for the choices they make. An agency required to give reasons for what it does may well find that some policy choices it may be considering simply cannot be defended; perhaps the choices do not jibe with the evidence before the agency,¹⁵⁴ or perhaps they are defensible only if the agency considers factors that it is not entitled by law to consider.¹⁵⁵ The requirement of reason giving helps agencies to avoid decisions that do not make sense, and it helps courts to review agency decisions for arbitrariness.

Agencies must give reasons—reasons that make sense—when they decide to delay or suspend final rules. In this part, I consider the most common explanations agencies in the Trump administration have given for choosing to delay or suspend final rules. These explanations overlap considerably with the explanations agencies have given for finding "good cause" to forgo notice and comment in delaying rules—in itself a strange phenomenon, given that in one case, the agencies are trying to justify forgoing notice and comment, and in the other, they are trying to justify putting off the effectiveness of final rules. One might expect, in the latter case, the agencies would show some reason to believe—beyond generic and conclusory assertions—that

¹⁵³ See *Nat. Res. Def. Council, Inc. v. EPA*, 683 F.2d 752, 768 (3d Cir. 1982).

¹⁵⁴ See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 51–52 (1983).

¹⁵⁵ *Massachusetts v. EPA*, 549 U.S. 497, 533–34 (2007).

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there is actually a substantive problem with the underlying final rules. In any event, as I explain below, the agencies' rationales are no more persuasive as reasons for delay on the merits than they are as reasons to do without notice and comment.

A. *Imminent Deadline-Like Moment*

Agencies in the Trump administration have argued that they need to delay final rules that are not yet effective because, without such a delay, the rules will become effective.¹⁵⁶ As EPA put it in delaying its final rule on chemical facility safety, "A delay of effectiveness can only be put in place prior to a rule becoming effective."¹⁵⁷

This reasoning is highly unsatisfactory. It is entirely circular: the agency needs to delay the effective date because the agency needs to delay the effective date. Stating a conclusion is not the same as explaining it.

B. *Interests of Regulated Industry*

As in their decisions forgoing notice and comment, agencies in the Trump administration have been highly solicitous of regulated industry in explaining their need to delay final rules. Sometimes, they simply report that some segment of the regulated industry asked them to revisit a rule,¹⁵⁸ or complained about some aspect of the rule.¹⁵⁹ Sometimes, agencies cite the decrease in compliance costs that will accompany either a revision to the underlying rule¹⁶⁰ or a delay of the rule during reconsideration.¹⁶¹ In a num-

¹⁵⁶ See Pesticides; Certification of Pesticide Applicators; Delay of Effective Date, 82 Fed. Reg. 25,529, 25,530 (June 2, 2017) (to be codified at 40 C.F.R. pt. 171); Reporting of Data for Mishandled Baggage and Wheelchairs and Scooters Transported in Aircraft Cargo Compartments; Extension of Compliance Date, 82 Fed. Reg. 14,437, 14,437 (Mar. 21, 2017) (to be codified at 14 C.F.R. 234); Poultry Grower Ranking Systems, 82 Fed. Reg. 9533, 9533 (Feb. 7, 2017) (to be codified at 9 C.F.R. pt. 201).

¹⁵⁷ See Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, Further Delay of Effective Date, 82 Fed. Reg. 27,133, 27,142 (June 14, 2017) (to be codified at 40 C.F.R. pt. 68).

¹⁵⁸ See Reporting of Data for Mishandled Baggage and Wheelchairs and Scooters Transported in Aircraft Cargo Compartments, 82 Fed. Reg. at 14,437.

¹⁵⁹ Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments, 82 Fed. Reg. 20,825, 20,827 (May 4, 2017) (to be codified at 8 C.F.R. pts. 103, 212, 274) ("[S]ome entities with certain business models have stated that they continue to have questions about what provisions of the final rule are applicable to them."); Public Statement, Acting Chairman Michael S. Piwowar, SEC, Reconsideration of Pay Ratio Rule Implementation (Feb. 6, 2017), <https://www.sec.gov/news/statement/reconsideration-of-pay-ratio-rule-implementation.html> [<https://perma.cc/KZ6E-BVYU>] ("[S]ome issuers have begun to encounter unanticipated compliance difficulties that may hinder them in meeting the reporting deadline.")

¹⁶⁰ See Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments, 82 Fed. Reg. at 20,827.

¹⁶¹ See Postponement of Certain Compliance Dates for Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 82 Fed. Reg. 19,005 (Apr. 25, 2017) (to be codified at 40 C.F.R. pt. 423).

ber of instances, agencies have cited, in supporting delay, the same consideration agencies have cited in finding “good cause”: the need to inform regulated industry as soon as possible so they can plan and adjust their behavior accordingly.¹⁶²

However phrased, the concern for industry has a common characteristic: it is not matched by any concern for regulatory beneficiaries. To the extent agencies in the Trump administration have mentioned forgone regulatory benefits at all, it has been only to dismiss them, as when EPA waved away any possible missed benefits of its rule on chemical facility safety by saying they were “speculative but likely minimal.”¹⁶³ Agencies have also reasoned that a brief stay, coupled with no substantive changes to the rule, will have no effect on regulatory benefits because, presumably, the regulatory process will unfold just as it would have without the delay.¹⁶⁴ This reasoning is not very convincing when the agency is, elsewhere and at the same time, indicating that it may amend the rule’s compliance dates.¹⁶⁵

In dismissing or slighting the consequences of regulatory delay, agencies in the Trump administration have made an elementary administrative law mistake: they have entirely ignored an important aspect of the problem.¹⁶⁶

C. Interest in an Orderly Administrative Process

In justifying delay, agencies in the Trump administration have offered some of the same explanations based on process values that they have offered in justifying their failure to conduct notice and comment rulemaking. They have cited a desire to alleviate “regulatory uncertainty”¹⁶⁷ and “public

¹⁶² See *supra* note 143; Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments, 82 Fed. Reg. at 20828; National Organic Program (NOP); Organic Livestock and Poultry Practices, 82 Fed. Reg. 21,677 (May 10, 2017) (to be codified at 7 C.F.R. pt. 205); Agricultural Bioterrorism Protection Act of 2002, 82 Fed. Reg. 10,855, 10,855 (Feb. 16, 2017) (to be codified at 7 C.F.R. pt. 331, 9 C.F.R. pt. 121); Refuse to Accept Procedures for Premarket Tobacco Product Submissions, 82 Fed. Reg. 8894 (Feb. 1, 2017).

¹⁶³ Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Further Delay of Effective Date, 82 Fed. Reg. 13,968 (Mar. 16, 2017) (to be codified at 40 C.F.R. pt. 68).

¹⁶⁴ Occupational Exposure to Beryllium and Beryllium Compounds in Construction and Shipyard Sectors; Proposed rule, 82 Fed. Reg. 29182, 29183 (June 27, 2017) (to be codified at 29 C.F.R. 1915, 1926); Accidental Release Prevention Requirements, 82 Fed. Reg. at 27136; Pesticides; Certification of Pesticide Applicators; Delay of Effective Date, 82 Fed. Reg. 25,529, 25,531 (June 2, 2017) (to be codified at 40 C.F.R. pt. 171).

¹⁶⁵ Accidental Release Prevention Requirements, 82 Fed. Reg. at 27137; Exposure to Beryllium and Beryllium Compounds in Construction and Shipyard Sectors, 82 Fed. Reg. at 14439.

¹⁶⁶ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

¹⁶⁷ Waste Prevention, Production Subject to Royalties, and Resource Conservation; Postponement of Certain Compliance Dates, 82 Fed. Reg. 27,430, 27,431 (June 9, 2017) (to be codified at 43 C.F.R. pt. 3170).

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confusion,”¹⁶⁸ and to “preserve the regulatory status quo.”¹⁶⁹ They have also explained delays based on their judgment that additional public input on a rule would be helpful.¹⁷⁰

The justifications involving regulatory uncertainty, public confusion, and preserving the status quo are no more persuasive in explaining delays than they are in explaining a failure to undertake notice and comment. Delaying the effective date of a final rule disrupts the status quo; it does not preserve it. In this way, it injects uncertainty into a previously settled situation.

In fact, some agencies have admitted as much. In extending the compliance date for its rule requiring disclosure of pay ratios of chief executive officers to the median compensation of its employees, the head of the Securities and Exchange Commission ordered expedited review of the substance of the rule in order to allow regulated entities to plan.¹⁷¹ In extending the compliance date for its rule regulating formaldehyde emissions from composite wood products, EPA reasoned that its previous delays of the rule’s effective date had shortened the period between the effective date and compliance date and that, to give industry the same amount of time to comply as they had had in the final rule, it needed to extend the compliance date of the rule.¹⁷² This is a circuitous way of acknowledging the disruption caused by the Agency’s extension of the rule’s effective date.

Agencies’ attempts to justify delays on the ground that additional public input would be helpful are similarly unpersuasive. These agencies do not grapple with the fact that the rules in question were the product of an intensive process, years in the making, in which the public was given ample opportunity to raise concerns and objections. The agencies’ insistence on more process in a proceeding already full of process is, as the D.C. Circuit put it in a similar context, “like a ‘how to’ manual for the compulsive perfectionist,” one that “withhold[s] any regulation until every i is dotted and t is crossed.”¹⁷³

¹⁶⁸ Further Delay of Effective Dates for Five Final Regulations Published by the EPA Between December 12, 2016 and January 17, 2017, 82 Fed. Reg. 14,324, 14,325 (Mar. 14, 2017) (to be codified at C.F.R. pt. 504).

¹⁶⁹ Postponement of Certain Compliance Dates for the Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 82 Fed. Reg. 26,017, 26,018 (May 25, 2017) (to be codified at 40 C.F.R. pt. 423).

¹⁷⁰ Postponement of Certain Compliance Dates for Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 82 Fed. Reg. at 19,005–06; Occupational Exposure to Beryllium: Further Delay of Effective Date, 82 Fed. Reg. 14,439, 14,439 (Mar. 16, 2017) (to be codified at 29 C.F.R. pts. 1910, 1915, 1926); Civil Penalties, 82 Fed. Reg. 8694, 8694 (Jan. 25, 2017) (to be codified at 49 C.F.R. pt. 578).

¹⁷¹ *Chamber of Commerce v. SEC*, 443 F.3d 890, 893 (D.C. Cir. 2006).

¹⁷² Compliance Date Extension; Formaldehyde Emission Standards for Composite Wood Products, 82 Fed. Reg. 23,735 (May 24, 2017) (to be codified at 40 C.F.R. pt. 770).

¹⁷³ *Pub. Citizen v. Steed*, 733 F.2d 93, 105 (D.C. Cir. 1984).

D. Change in Presidential Administrations

Here, too, agencies have cited the change in administrations as justification for their decisions. They have asserted that they have exercised “no discretion” in delaying rules in response to the Chief of Staff’s memorandum imposing a regulatory freeze,¹⁷⁴ have cited only this memorandum in justifying some delays,¹⁷⁵ and have explained that they must delay rules in order to give themselves time to reconsider and revise them.¹⁷⁶

The argument from lack of discretion fails for the same reason given above with respect to agencies’ explanations of failure to conduct notice and comment rulemaking: the Chief of Staff’s memorandum, by its own terms, leaves the agencies with some discretion in deciding whether to delay rules.¹⁷⁷

Moreover, the explanation that agencies must delay rules in order to reconsider them actually undercuts the agencies’ legal authority to delay the rules. As discussed, courts have found that agencies must have statutory authority for the actions they take and that they have no inherent authority to stay rules pending reconsideration. By justifying delay based on pending reconsideration, agencies concede that they are attempting to do what settled law forbids them to do: stay a rule pending reconsideration without statutory authority to do so.

E. Miscellaneous Bad Reasons

One agency explained that it needed to extend the effective date of a rule because if it did not, it would have no statutory leeway to change the rule once it had taken effect.¹⁷⁸ A desire to avoid a statutory restriction, how-

¹⁷⁴ Procedural Rules for DOE Nuclear Activities, 82 Fed. Reg. 8807, 8807 (Jan. 24, 2017) (to be codified at 10 C.F.R. pt. 82).

¹⁷⁵ Affirmative Action for Individuals With Disabilities in Federal Employment, 82 Fed. Reg. 10,863, 10,863 (Feb. 10, 2017) (to be codified at 29 C.F.R. pt. 1614); Endangered and Threatened Wildlife and Plants; Final Rule To List Two Guitarfishes as Threatened Under the Endangered Species Act, 82 Fed. Reg. 9975, 9975 (Feb. 3, 2017) (to be codified at 50 C.F.R. pt. 223); Endangered and Threatened Wildlife and Plants; Revisions to the Regulations for Candidate Conservation Agreements With Assurances, 82 Fed. Reg. 8501, 8501 (Jan. 23, 2017) (to be codified at 50 C.F.R. pt. 17).

¹⁷⁶ Waste Prevention, Production Subject to Royalties, and Resource Conservation; Postponement of Certain Compliance Dates, 82 Fed. Reg. 27,430, 27,431 (June 9, 2017) (to be codified at 43 C.F.R. pt. 3170); Pesticides; Certification of Pesticide Applicators; Delay of Effective Date, 82 FR 25529, 25530 (May 26, 2017) (to be codified at 40 C.F.R. pt. 171); Lease and Interchange of Vehicles; Motor Carriers of Passengers, 82 Fed. Reg. 27,766, 27,766 (May 17, 2017) (to be codified at C.F.R. pt. 390); Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments; Extension of Compliance Date; Request for Comments, 82 Fed. Reg. 20825, 20825–26 (May 1, 2017) (to be codified at 21 C.F.R. pts. 11, 101).

¹⁷⁷ See Memorandum for the Heads of Executive Departments and Agencies; Regulatory Freeze Pending Review, 82 Fed. Reg. 8346 (Jan. 20, 2017).

¹⁷⁸ Civil Penalties, 82 Fed. Reg. 32140, 32142 (July 12, 2017) (to be codified at 49 C.F.R. pt. 578).

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ever, is a problematic explanation for agency action.¹⁷⁹ Another agency explained, with respect to one rule, that it needed to extend the effective date for that rule because it was extending the effective date for a separate rule—and then, in extending the effective date for the separate rule, it explained that it had extended the effective date for the other rule—a perfect circle of non-explanation.¹⁸⁰

Summing up: in attempting to justify their delays of final rules, agencies in the Trump administration have offered up a mix of circular reasoning, industry favoritism, internal contradictions, and other exemplars of arbitrary decision making.

CONCLUSION

The Trump administration has displayed unfortunate tendencies in delaying final rules issued by the Obama administration. It has autocratically put these delays in place without respect for the legal limits on its authority to do so. It has impulsively raced to delay whole blocs of rules on the presumption that rules put in place in the Obama administration are suspect. It has cobbled together reasons for these delays that do not bear scrutiny. If the administration continues these habits in revising or rescinding the rules it has delayed, it will likely face legal trouble.

The delays may survive in some cases despite their legal problems. A district court roundly rejected the DOI's reasons for delaying a final rule on royalty valuation, yet in the end declined to vacate the delay.¹⁸¹ While the litigation over the delay was pending, DOI had hurried up and repealed the underlying rule.¹⁸² The district court found that although the repeal itself had not yet become effective, it would become effective so imminently that vacating the delay of the repealed rule—and thus temporarily reinstating the repealed rule—would entail “disruptive consequences” insofar as it would require compliance for only “a few days” before the repeal rule became effective.¹⁸³ The parties challenging the rule delay won big on the substance but lost on the remedy. Insofar as other agency rule delays have been paired

¹⁷⁹ *Cf.* *Nat. Res. Def. Council v. Abraham*, 355 F.3d 179, 205 (2d Cir. 2004) (“The only thing that was imminent was the impending operation of a statute intended to limit the agency’s discretion (under DOE’s interpretation), which cannot constitute a threat to the public interest.”).

¹⁸⁰ *Enhancing Airline Passenger Protections III: Extension of Compliance Date for Provision Concerning Baggage Handling Statistics Report*, 82 Fed. Reg. 14604, 14604 (Mar. 22, 2017) (to be codified at 14 C.F.R. pt. 234).

¹⁸¹ *Becerra v. Dep’t of the Interior*, Docket No. 13, Case No. 17-cv-02376-EDL, slip op. at 17–18 (N.D. Cal. Aug. 30, 2017).

¹⁸² Press Release, Dep’t of the Interior, Interior Repeals Defective Federal Mineral Valuation Rule: Clears the way for developing clearer, more workable regulations for accurate accounting and valuation of oil, gas and coal from Federal and Indian leases (Aug. 7, 2017) (edited Sept. 7, 2017), <https://www.doi.gov/pressreleases/interior-repeals-defective-federal-mineral-valuation-rule> [https://perma.cc/WG3H-8N4L].

¹⁸³ *Becerra*, slip op. at 18.

with speedy reconsiderations and repeals of the underlying rules, they may meet a similar legal fate: judged unlawful but kept in place.

Unfortunately, such a result would only encourage further bad behavior on the part of the agencies. The district court reviewing the delay of the DOI royalty valuation rule had, in finding the case not to be moot, concluded that the federal defendants were likely to repeat their unlawful conduct in delaying rules.¹⁸⁴ The district court's decision to leave the delay rule in place could only embolden agencies in the Trump administration to continue to flout administrative law principles in their zeal to deregulate.

It is of some moment, then, that the very same district court has now vacated a different rule delay. After holding unlawful the DOI's postponement of the compliance date for a final and effective Obama-era rule regulating the waste of natural gas from oil and gas facilities on federal land, the court held that vacatur of the postponement was the appropriate remedy. Not only, the court found, were the Agency's legal errors serious, but allowing the postponement to stand despite its legal flaws "could be viewed as a free pass for agencies to exceed their statutory authority and ignore their legal obligations under the APA, making a mockery of the statute."¹⁸⁵ The court was unimpressed with the argument that "some of the regulated entities of the oil and gas industry" would not, *because they relied on the Agency's postponement of the compliance date*, be able to meet the original compliance deadline. This was a problem, the court said, "to some extent of their own making."¹⁸⁶

The Trump administration has already lost three cases challenging its rule delays. Given the many delays the administration has put in place without following basic principles of administrative law, there are likely more losses to come.

¹⁸⁴ *Id.* at 9.

¹⁸⁵ *California v. Bureau of Land Mgmt.*, No. 17-CV-03804-EDL, 2017 WL 4416409, at *14 (N.D. Cal. Oct. 4, 2017).

¹⁸⁶ *Id.*



March 7, 2018

The Honorable Steve Chabot
Chairman
House Small Business Committee
Washington, DC 20515

The Honorable Nydia Velázquez
Ranking Member
House Small Business Committee
Washington, DC 20515

Dear Chairman Chabot and Ranking Member Velázquez:

On behalf of Associated Builders and Contractors (ABC), a national construction industry trade association with more than 21,000 members, I commend the Small Business Committee for holding the hearing, "Regulatory Reform & Rollback: The Effects on Small Businesses."

ABC and its 70 chapters help members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which they work. ABC members build our communities—from schools and hospitals to highways, military installations, industrial facilities, skyscrapers, professional sports venues and the playground down the street.

ABC's membership represents all specialties within the U.S. construction industry and is comprised primarily of firms that perform work in the industrial and commercial sectors. Moreover, the vast majority of our contractor members are classified as small businesses. Our diverse membership is bound by a shared commitment to the merit shop philosophy, which is based on the principles of nondiscrimination due to labor affiliation and the awarding of construction contracts through open, competitive bidding based on safety, quality and value.

ABC member contractors are encouraged by the efforts of the Trump administration and Congress to roll back as well as bring to light costly and burdensome regulations. During the Obama administration, ABC members suffered from an aggressive and burdensome rulemaking agenda, where regulations were promulgated hastily with limited stakeholder input and questionable legal authority.

As builders of our nation's communities and infrastructure, ABC members understand the value of standards and regulations when they are based on solid evidence, with appropriate consideration paid to implementation costs and input from the business community. In some cases, regulations are based on conjecture and speculation, lacking foundation in sound scientific analysis. For the construction industry, unjustified and unnecessary regulations translate to higher costs, which are then passed along to the consumer or lead to construction projects being unaffordable. This chain reaction ultimately results in fewer projects and hinders businesses' ability to hire and expand.

Small businesses are the backbone of our economy and give Americans a sense of pride and accomplishment. ABC remains committed to working with Congress and the Trump administration to reform costly and burdensome regulations imposed on small businesses. Again, we appreciate your attention to this important matter.

Sincerely,

Kristen Swearingen
Vice President, Legislative & Political Affairs



Jim Nussle
President & CEO

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March 7, 2018

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

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

Dear Chairman Chabot and Ranking Member Velazquez:

On behalf of America's credit unions, I am writing to express support for your hearing entitled "Regulatory Reform and Rollback: The Effects on Small Businesses." The Credit Union National Association (CUNA) represents America's credit unions and their 110 million members.

The current regulatory environment, created under Dodd-Frank, favors the largest banks and non-bank financial services providers. These large entities can afford to absorb the significant regulatory and compliance costs from the thousands of pages of new rules and regulations. It has made it significantly more difficult for credit unions to provide the affordable financial services that our members depend on and deserve.

A recent study entitled, "2017 Regulatory Burden Financial Impact Study: An Elevated New Normal," shows that credit union regulatory costs have increased significantly. The regulatory burden for credit unions has increased to an "elevated new normal," totaling an estimated \$6.1 billion in 2016. Costs are up more than \$800 million compared with 2014. That is a 15.1 percent increase, which far exceeds the 2.8 percent inflation rate over the two-year period. In total, the credit union regulatory burden costs for 2016 translate to \$115 per credit union household.

Congress is currently considering S. 2155, the Economic Growth, Regulatory Relief, and Consumer Protection Act. This bipartisan legislation includes a number of provisions which would provide much needed regulatory relief and give credit union members more access to credit. The bill would allow loans held in portfolio by credit unions and other small financial institutions with less than \$10 billion in assets to be considered qualified mortgages for the purposes of the CFPB's Ability to Repay rule. It would also change the credit unions' residential mortgage lending practices. This provision is based on parity with other financial services providers and would significantly reduce constraints and free up billions in capital for economic development. The legislation includes important provisions to address burdens imposed on small credit unions as a result of the Home Mortgage Disclosure Act. It also provides important new protections against elder financial abuse. If enacted, these commonsense proposals would help credit unions and other small financial institutions manage the regulatory burden.

Thank you for your leadership in highlighting the burdens of overregulation on credit unions and other small businesses. We look forward to working with you on these issues. On behalf of America's Credit Unions and their 110 million members, thank you for the opportunity to share our views.

Sincerely,

Jim Nussle
President & CEO