

**IMPROVING SMALL BUSINESS INPUT ON FEDERAL
REGULATIONS: IDEAS FOR CONGRESS AND A
NEW ADMINISTRATION**

HEARING

BEFORE THE

SUBCOMMITTEE ON
REGULATORY AFFAIRS AND FEDERAL
MANAGEMENT

OF THE

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HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
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IMPROVING SMALL BUSINESS INPUT ON FEDERAL REGULATIONS: IDEAS FOR CONGRESS AND A NEW ADMINISTRATION

THURSDAY, JANUARY 19, 2017

U.S. SENATE,
SUBCOMMITTEE ON REGULATORY,
AFFAIRS AND FEDERAL MANAGEMENT,
OF THE COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:06 a.m., in room SD-342, Dirksen Senate Office Building, Hon. James Lankford, Chairman of the Subcommittee, presiding.

Present: Senators Lankford, Heitkamp, Tester, and Peters.

Also present: Senator Risch.

OPENING STATEMENT OF SENATOR LANKFORD¹

Senator LANKFORD. Good morning, everyone. Welcome to today's Subcommittee hearing titled, "Improving Small Business Input on Federal Regulations: Ideas for Congress and a New Administration."

In the 115th Congress, the Subcommittee looks to continue our examination of the Federal regulatory process, as we look for solutions to increase transparency, accountability, and efficiency. Today we look at how Federal regulations impact small businesses and whether agencies should be required to take more seriously the impact on small businesses during the rulemaking process.

According to the Small Business Administration (SBA), there are 28 million small businesses in the United States which account for 55 percent of all jobs and 66 percent of all new jobs since the 1970s.

Despite the importance of this sector for our economy, small business owners continually tell me they do not feel that Washington hears their voice. The annual Federal regulatory burden is huge—nearly \$2 trillion—and the burden falls disproportionately on small businesses.

A recent study by the American Action Forum found that every 10 percent increase in cumulative regulatory costs results in a loss of more than 400 small businesses. As regulatory costs rise, small businesses disappear. Agencies do not draft rules with the intent to close small businesses, but, unfortunately, that often ends up being the result.

¹The prepared statement of Senator Lankford appears in the Appendix on page 33.

One way to avoid unnecessary burdens on small businesses is to have real, meaningful consultation with stakeholders. Currently, agencies are required to consider the regulatory impact on and consult with small business entities pursuant to the Regulatory Flexibility Act (RFA) and the Small Business Regulatory Enforcement Fairness Act (SBREFA). The only place you will ever hear that being referred to is probably this Committee.

However, in reality, agencies do not generally take into account the views of small businesses. During today's hearing, we will discuss ideas to address this problem to ensure that agencies truly consider the effects of rules on small business sectors of our economy. When entrepreneurs open their own businesses, their goal is to provide for their family and serve their community by offering a product or service. Each moment a small business spends trying to understand and comply with overly burdensome Federal regulation is time that is not spent growing their business.

This past December, the National Federation for Independent Businesses (NFIB) reported a 38 percent jump in small business owners' belief that the economy will improve. According to the NFIB's index, small business optimism increased by 7.4 points in December, up to 105.8, up from November's 98.4. It is the largest month-over-month index change since it began in 1986. In fact, members' perceptions that business conditions will improve, especially in the area of regulatory burden, accounted for 48 percent of the month's increase.

We have the opportunity to implement changes that would make it easier for small business owners to participate in rulemaking and truly have their concerns considered. We must turn their optimism into a reality. I look forward to discussing ways to deliver these results for small businesses today with our witnesses.

With that, I would like to recognize Ranking Member Heitkamp for her opening remarks.

OPENING STATEMENT OF SENATOR HEITKAMP¹

Senator HEITKAMP. Thank you, Mr. Chairman. I look forward to working with you on this Committee in another Congress. Our Subcommittee was busier last Congress than, quite honestly, many full committees, and I am sure we will have two more productive and bipartisan years ahead of us on this Committee.

Small business plays a crucial role in our Nation's economy and the overall prosperity of our country. The vast majority of businesses across our country are small businesses. Small businesses are especially critical in my State of North Dakota. Ninety-six percent of business in North Dakota is small. These small businesses are the backbone of our economy, and they are a primary source of job creation. I am proud to represent North Dakota small business in Congress on this Committee but also with Chairman Risch on the Small Business Committee.

There is a reason why I am on both of these committees: because along with agriculture and energy, small business is the economic engine that makes North Dakota work. So it has been my privilege to travel across my State and visit a wide variety of small busi-

¹ The prepared statement of Senator Heitkamp appears in the Appendix on page 35.

nesses that call North Dakota home and to visit and hear about their needs and their concerns.

From Main Street bricks-and-mortar retailers in Grand Forks and Grafton to cutting-edge innovators in the unmanned aircraft systems industry like Packet Digital in Fargo to oil field service businesses in Minot, North Dakota needs to listen and hear these concerns and react here in Washington to the problems that we hear.

So it is absolutely critical that Congress always be willing to work to ensure small business can prosper. Congress must seek out the policies that help small business innovate and thrive. I am proud that on the Small Business Committee I have been a strong advocate for small business and startups in our country in more rural States like North Dakota because we know that innovation does not just happen in our country's biggest cities or biggest States. That innovation must be fostered and promoted if we are going to be successful in rural America, and I think one thing we learned in this election is rural America feels left behind. There is a reason for that, and we are here to represent, along with my friend Senator Tester from that State to the west of me, Montana—it is a big place. It is between me and Senator Risch, that wide open space of greatness called “Big Sky Country.” Anyway, we digress. But I think it is fairly critical that Congress makes sure policies do not unfairly or certainly unintentionally hamper small business.

I want to just tell you that we had hoped that we would have a fantastic businesswoman from North Dakota who could appear in this Committee. Because of timing, she could not. I would like to ask the Chairman to allow me to submit her comments for the record.¹

Senator LANKFORD. Without objection.

Senator HEITKAMP. Thank you.

Kari Warberg Block owns EarthKind in Bismarck. They are a pest control developer and designer and a biomanufacturing pioneer. I had hoped to get her out here. She could not make it. But when I talk to her about the Federal regulatory process, you get a simple answer that is difficult to turn into action, but it must be turned into action. She talks about needing more common sense from agencies, more small business smart from agencies, more understanding, more outreach, and more feedback. I hear that from every small business person that I talk to, and it usually starts with, “They just do not get it. They just do not get what they are doing and the impact it is having on me.”

People want to innovate. They want to invest the profitability back into the business and not into another bean counter that is going to satisfy yet another bureaucrat. So to me, that is one of the key questions that we have to tackle in this space. How do we make sure that agencies engage in a way that small businesses need and that include protecting the ability of agencies to promulgate fair and well-analyzed rules in a timely fashion? So much of the discussion in this area has focused on the importance of considering the impact of regulations on small business.

¹The statement submitted by Ms. Block appears in the Appendix on page 78.

I am going to say something that I say often here: that until we actually in the Federal Government sit down and have a conversation with our counterparts in State and local government, we will not tackle the problem of overregulation.

We opened up a portal called “CutRedTape,” and frequently, the comments that we get do not necessarily apply to the Federal Government. They apply to a State or a local overreach or inconsistency between State and local regulations. I would say that I would put that on my top issue of concerns for small business today in America, is not only navigating the Federal Government and being worried about the “I gotcha” regulation that you did not know about, but having to harmonize and deal with various levels and wondering where is the productivity in that. You are expected to be as efficient and productive as you can be to survive. The government should be as efficient and productive as they can be.

And so I look forward to hearing from our witnesses on that topic. I would ask that you if you do have comments on how we can better coordinate, State and local regulation, I would appreciate hearing those as well.

And, finally, for the record, it is great to see the Chairman here, Chairman Risch, but I also have a statement from the Ranking Member of Small Business, Jeanne Shaheen, and would ask that that be submitted for the record.¹

Senator LANKFORD. Without objection. Before we proceed to our witnesses, I would like to ask unanimous consent for Senator Risch, the Chairman of the Senate Small Business and Entrepreneurship Committee, be allowed to join this hearing and give a brief opening statement. Without objection. And Senator Shaheen, a member of that Committee, submitting everything for the record. Glad to be able to have her submission and absolutely have unanimous consent to be able to do that as well.

You are recognized, Chairman Risch, and glad that you are here joining us.

OPENING STATEMENT OF SENATOR RISCH

Senator RISCH. Chairman Lankford, thank you so much for having me here today. Thank you so much for having this hearing. We are going to be pursuing our Committee’s goal, by working together as we pursue these really important matters.

As the Chairman of the Small Business and Entrepreneurship Committee, I appreciate the opportunity to work with you and with everyone on this Committee on what I think is the most important thing that we can do in Congress to help small businesses.

I also can put this in very succinct terms from what I hear from my small business owners in Idaho and, for that matter, around the country, and that is, they put it in these terms: “Government, get out of the way.” That is what they tell me. And, of course, they are talking about the regulatory structure in America today more than anything.

I have had opportunity to work with a very robust Committee, the Small Business Committee. Senator Shaheen and I have been very close on Foreign Relations and a lot of other committees, and

¹ The prepared statement of Senator Shaheen appears in the Appendix on page 37.

I have no doubt that we are going to work together very well and have worked together very well. Her predecessor, Chairman, I have worked with also; it was a very bipartisan effort.

We hear a lot in the news these days about how polarized things are here. This is one of those issues that never gets any attention that brings Republicans and Democrats together. This is not an “R” or “D” issue. This is an issue that is a bipartisan issue.

The excessive regulatory burdens our Nation’s entrepreneurs face are crippling their growth and operations. Every time they turn around, there is another rule of compliance mandate from the Federal Government, and what the bureaucrats do not understand or do not care about is the degree to which these regulations increase costs and uncertainty in the business world. This is the most profound thing I guess I am going to say. Washington, D.C., is not the real world.

As a former small business owner myself, I can tell you that many of the people writing these regulations are grossly insensitive in regards to how a real business is run and how to make a payroll and figure out how to grow the business.

What makes matters worse many times is these regulators seem more interested in collecting fines than actually resolving the underlying issues. This varies from agency to agency. Some are not bad at all at it, and they are actually trying to do what the agency is supposed to do.

And if I can digress for just a moment, the story I will tell is when I was in business, when I was practicing law, I would have clients come in and they would say, “Well, you know, the Environmental Protection Agency (EPA) wants to come around and look at our place.” And I would say, “If the EPA wants to come around, you tell them no. You tell them to go get a warrant before they set foot on your business. And if they do, I can tell you, it is going to cost you thousands of dollars for me when the fines are negotiated at the end of the day.”

In my own small business, the fire inspector from Boise, Idaho, would walk into my place—the fire chief with the fire inspector—and he would say, “Jim, how are you doing? We are here to look your place over and make sure that things are in good shape and if we get a fire started we can put it out.” You know what I told him? “Absolutely. Come on in.” And he would come through, and he would go through it, and then he got into the disaster area, which was in the basement. And he would come out, and he would say, “Well, I got a list here of things that need to be done.” And I would look at that, and I would say, “Yes, we can get that done. You say you want me to do this. How about if we do it like this?” “Yes, yes, no problem. Why don’t you work on this and we will be back in about a month.”

He would come back in a month, and again, we would be pretty close but not there. This guy, I was not worrying about him levying a fine. You know what I knew about that guy? I knew that his job was to see that if my place caught fire, that he was going to be able to put it out, and also it was his job to see fires did not start.

That is what we need out of the Federal Government. The EPA should walk onto the place and say, “Our job is to clean up the air and water. How can we work on doing this together?” They do not

get that. When this person walks in, they are the enemy. They are the enemy. What kind of world do we live in when people who are supposed to be doing a certain job become the enemy, when the government is the enemy of small business? It is wrong.

What frustrates me is that we all agree the importance of small business is to our economy. They make up 54 percent of the private sector economy and 99.7 percent of all employers and create about 70 percent of all new jobs. But when it comes to helping those small businesses survive, grow, and hire, Washington, D.C., has been tone deaf.

Federal regulatory agencies estimate the cost of complying with their own regulations to be \$108 billion annually. Small businesses bear a larger-than-average proportion of that cost as their cost to comply with those regulations is 36 percent higher than larger firms. Now, this just makes sense. If the Federal Government walks into General Electric corporate and they say, "Here is a new regulation," they say, "Go down there to the Department of Regulations," and they have an army of lawyers, they have an army of consultants, they have an army of compliance officers. When they walk into one of my constituents who fixes lawn mowers in his garage and says, "Here is a form. It is 36 pages long, and this has to be done by 5 o'clock tomorrow night," it sets this guy completely off.

And so it is just common sense that it is much more difficult for a small business person to comply than it is for big businesses.

The National Small Business Association (NSBA) released their 2017 regulation survey yesterday, which I asked to be included in the record,¹ Mr. Chairman, and we will submit that.

Senator LANKFORD. Without objection.

Senator RISCH. This staunchly bipartisan organization, which has been around for 80 years, reports the following, and this is just a summary: More than one-third of small business owners have held off on business investment due to the uncertainty on pending regulation. And if anybody does not believe this, find a small businessman and say, "Hey, how you guys doing with the Affordable Care Act (ACA)? Everything OK here?" And be prepared for about an hour lecture on them not understanding what it is all about.

More than half have held off on hiring a new employee due to regulatory burdens. The average small business owner is spending at least \$12,000 a year on regulations; 14 percent of small business owners report they spend more than 20 hours per month on Federal regulations. And when asked which areas of regulations are most burdensome, the Federal Tax Code and the Affordable Care Act were the top two. The Internal Revenue Service (IRS), the Department of Labor (DOL), and EPA are the most difficult agencies to work with when it comes to regulatory burdens and compliance, according to NSBA members.

We have to give our country's small businesses a break. They need relief. In my view, the only way to ensure that the Federal Government, under either Democrat or Republican leadership in the White House stops beating up on small businesses through new

¹The statement submitted by the National Small Business Association appears in the Appendix on page 92.

rules and mandates, is to enact meaningful regulatory reform. We have talked and talked and talked about it, and we really need to get at it.

The Committee that I now chair, the Small Business Committee, has jurisdiction over one entity in the Federal Government that I think is one of the most important, and that is the Office of Advocacy, which is an office within the SBA. It is an independent arm of the SBA charged with reducing the burdens that Federal regulations and other policies imposed on small entities, monitoring Federal agency compliance with the Regulatory Flexibility Act and assisting regulatory agencies during all stages of the rulemaking development process to mitigate the potential impact of rules on small businesses.

Unfortunately, the views of the Office of Advocacy have been ignored more often than not, and this is an agency that I have done my best to try to make much more robust than what it is. It is supposed to be independent. It is supposed to get the Federal bureaucrats by the throat when they are rulemaking and say, "Look, let me tell you what this is going to do to small business. Stop. Think about this."

Let me give you an example of that. The Small Business Office of Advocacy disputed the finding by the EPA and U.S Army Corps of Engineers (USACE) that the rule would not have a significant impact on a substantial number of small entities, and that is the rule dealing with the Waters of the United States. Those of you from ag States, can you imagine a Federal agency—the EPA and the Army Corps of Engineers—finding that this would not—that the Waters of the United States proposed rule would not have a significant economic impact on small businesses? I mean, to me that is a poster child for the nonsense that goes on.

Despite the Office of Advocacy's finding that the rule was improperly certified and recommending the agencies withdraw the rule and conduct a Small Business Advocacy Review Panel before proceeding any further with the rulemaking, obviously EPA brushed them aside and ignored that input.

Under the Regulatory Flexibility Act, when an agency finds a proposed rule will have a significant impact on a substantial number of small entities, it must evaluate the impact, consider the alternatives, and in the case of the EPA, convene a Small Business Advocacy Review Panel to consider the input of the Office of Advocacy in the small business community. By certifying that the rule would not have a significant economic impact, the EPA and the Corps effectively shut them out of the rulemaking process and turned their backs on small businesses. And that is why regulatory reform is so important. Just an example.

The Federal Government should not be allowed to ignore small businesses. We need strong controls to limit what Washington, D.C., bureaucrats of any Administration, Republican or Democrat, can do to stifle small businesses. I hope that we are able to come together this year and pass common-sense reforms that keep the Federal Government from playing fast and loose with our Federal regulatory system.

As part of our reform efforts here in Congress, we have to bolster the Office of Advocacy and give it more authority when regulatory

agencies ignore small business impacts. I applaud the U.S. House of Representatives for passage of the Regulatory Accountability Act and the Small Business Regulatory Flexibility Improvements Act last week. And I look forward to working with this Committee on similar reforms so that we can limit the ability of Federal agencies to impose new regulatory costs on small business.

I would like to submit for the record a letter from the U.S. Chamber of Commerce,¹ which I just got, which also congratulates the House on the passage of those bills and urges the Senate to expeditiously consider regulatory reform legislation. I would ask that be put in the record.

Senator LANKFORD. Without objection.

Senator RISCH. Despite my frustrations about the anti—business climate here in Washington, D.C., I am extremely confident in America's entrepreneurs who are innovative and tenacious. If they were not tenacious, they would not be around today. And they provide robust economic growth when we give them the chance to do so. After all, America's greatness comes from those millions of hardworking small business entrepreneurs, not from the government.

Thank you for the opportunity to join you here today. I look forward to working with you in the weeks and months ahead to pass these much needed reforms.

Senator LANKFORD. Thank you, Chairman Risch.

Senator HEITKAMP. Thank you.

Senator LANKFORD. At this time we will proceed with testimony from our witnesses. Let me do a brief introduction. Then we will have a swearing-in time period as well.

Rosario Palmieri is vice president for Labor, Legal, and Regulatory Policy at the National Association of Manufacturers (NAM). Prior to joining NAM, Mr. Palmieri worked for several years at the U.S. House of Representatives on the Committee of Oversight and Government Reform and the Committee on Small Business. He is a native of Pittsburgh, Pennsylvania, a graduate of American University, and American University's Washington College of Law.

Jerry Hietpas is president of Action Safety Supply Company, headquartered in Oklahoma City, Oklahoma—the center of the world. Action Safety Supply is a family owned and—operated business that has been a subcontractor and contractor working on roads, streets, bridges, airports, and highways in Oklahoma since 1975.

LaJuanna Russell is the founder and president of Business Management Associates (BMA), a business process and human capital management firm in Alexandria, Virginia. She is also a member of the Board of Directors of the Small Business Council for Small Business Majority, a national small business advocacy organization. Ms. Russell is a graduate of Virginia Tech and George Washington University.

Karen Harned is the executive director of the National Federation of Independent Business Small Business Legal Center. Prior to joining NFIB, she worked as an attorney here in Washington

¹The letter submitted from the U.S. Chamber of Commerce appears in the Appendix on page 81.

and for Senator Don Nickles of Oklahoma. She graduated from the University of Oklahoma and George Washington University National Law Center. She is from Tulsa, Oklahoma. So we are disproportionately represented by Central Time today. I just want everyone to know that, center of the universe. [Laughter.]

I do want to thank our witnesses today for your preparation. It is very difficult to get on to Capitol Hill right now with all the security perimeters, and so we appreciate not only your preparation but your tenacity to actually get here.

It is the custom of this Subcommittee that we swear in all witnesses that appear before us. If you do not mind, I would ask you all to stand and raise your right hand to be sworn in.

Do you swear the testimony you will give before this Subcommittee will be the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. PALMIERI. I do.

Mr. HIETPAS. I do.

Ms. RUSSELL. I do.

Ms. HARNED. I do.

Senator LANKFORD. Thank you. Let the record reflect the witnesses all answered in the affirmative. You may be seated.

We will be using a timing system and microphone system. I explained that before we began to everyone at the table. I appreciate everyone. There will be about a 5-minute time period allotted for your opening statement, and, obviously, what you have submitted already written will be entered into the permanent record as well. So I would ask you to go ahead and begin. Mr. Palmieri, you are up first.

TESTIMONY OF ROSARIO PALMIERI,¹ VICE PRESIDENT LABOR, LEGAL, AND REGULATORY POLICY, NATIONAL ASSOCIATION OF MANUFACTURERS

Mr. PALMIERI. Thank you, Chairman Lankford, Chairman Risch, Ranking Member Heitkamp, and Senators Tester and Peters. It is an honor to testify before you today about this important topic.

Manufacturers employ nearly 12 million Americans and support 18 million jobs in this economy. Manufacturing has the highest multiplier effect of any sector. And to retain manufacturing momentum and return to net manufacturing job gains in this country, we need both improved economic conditions but also improved Government policies.

Manufacturers believe regulation is critical to the protection of worker safety, public health, and our environment. We believe some critical objectives of government can only be achieved through regulation, but that does not mean our regulatory system is not in need of considerable improvement and reform.

Regulations are often unnecessarily complex, duplicative, and ineffectively achieve their benefits. Excessive regulatory changes and uncertainty impose high costs, especially on small businesses, and small businesses, as we have heard, bear a disproportionate burden of regulation because the often high fixed costs of compliance are not subject to economies of scale. That is why today's hearing and

¹ The prepared statement of Mr. Palmieri appears in the Appendix on page 39.

the implementation of the Regulatory Flexibility Act are so important.

Unfortunately, agencies are not anxious to analyze the impact of their regulations on small business. A recent study showed that between 1996 and 2012, fewer than 8 percent of rules were subject to RFA analysis by our Federal agencies. And although we had hoped that is because agencies made excellent decisions about which rules had those impacts, let me share a quick list of some of the most expensive EPA rules: EPA's greenhouse gas limits on power plants, National Ambient Air Quality Standards for ozone, Boiler MACT, and Waters of the U.S. rule. EPA certified that in each of these they would not have a significant economic impact on a substantial number of small entities.

Each agency defines that phrase for itself and decides which rules to conduct analysis on. Last year, the SBA's Office of Advocacy saved small businesses more than \$1.6 billion in first-year regulatory costs and since 1998 has saved more than \$130 billion. Imagine what could have been accomplished if fewer rules could evade these requirements.

Lawmakers have universally supported the RFA's provisions, but Congress needs to strengthen the law and close loopholes that agencies use to avoid its requirements. Among the reason for the small number of regulations requiring a regulatory flexibility analysis is the exclusion of the indirect effects of regulation. If an agency can claim that it is not directly regulating small entities either because it is regulating further up the supply chain or just regulating governments, it will not conduct the analysis. But this was not the original intent of the RFA, and one of the original authors, a Democratic Senator from Iowa, clearly stated that the scope included both direct and indirect effects.

Unfortunately, the courts disagreed and found indirect effects to be outside the scope of the RFA, and this one change in the RFA would bring many of the rules most costly to small businesses under the act's framework and result in significant cost savings for small businesses. An example of an entire class of regulations exempted from the RFA because of this decision are Clean Air Act rules establishing National Ambient Air Quality Standards. Despite the fact that even the EPA acknowledges these rules often cost hundreds of billions of dollars to implement, no small entities are directly affected by these rules—simply because the Clean Air Act only directly regulates States which, in turn, regulate small businesses. This simple clarification to the law would have significant benefits to our small business economy, all the while ensuring the continued strong protection of air quality. After all, the RFA only requires the analysis of small entity impacts; it does not dictate how an agency will design its regulation. Since the RFA was modeled on the National Environmental Policy Act, its consideration of effects is also helpful to understanding the intent of the authors of this law. NEPA's implementing regulations define the term "effect" to mean "direct effects" and "indirect effects," which are caused by the action and are later in time or further removed in distance but still reasonably foreseeable.

The House has already passed legislation, as we heard, which would close many of these loopholes. The NAM encourages the Sen-

ate to take action on similar provisions to ensure vital improvements to the RFA are achieved in this Congress. The House legislation importantly also addresses regulatory lookbacks through improved Section 610 of the RFA.

While we have appreciated this Administration's efforts on retrospective review, they have not resulted in significant cost savings or a change in culture in Federal agencies. To truly build a culture of continuous improvement and thoughtful retrospective review, different incentives are needed. To incentivize high-quality reviews, Section 610 must be reformed to clean up outdated or unnecessary regulatory accumulation.

I appreciate the opportunity to testify today on behalf of manufacturers around the country, and I applaud you for holding today's hearing.

Senator LANKFORD. Thank you, Mr. Palmieri. Mr. Hietpas.

TESTIMONY OF JERRY HIETPAS,¹ PRESIDENT, ACTION SAFETY SUPPLY COMPANY

Mr. HIETPAS. Thank you, Senator. I really enjoyed the opening comments by the Senators. One of the things that people in the rest of the world think is that folks in Washington just do not get it. I can assure you what I heard this morning in the opening statements and the opening comments has completely disputed that kind of thinking process. You folks get it, and you understand. And so I want to encourage you to, first of all, never give up, never give in, press on, because we are on the same page.

The comments that I have submitted, my written comments do a really good job of identifying the problem. We do not really need to spend a whole lot more time identifying the problem with your understanding of the problem. What we really need to focus on is the solution. And so I am going to take my comments in that general direction based upon just one more little story that identified the problem but also worked through a solution.

One of the things that we do in Oklahoma, other than the temporary traffic control for road construction and all the cool blinker signs and those kinds of things, we put up guardrail but we also stripe the roads. And one of the contracts that we have with the Department of Transportation (DOT) is a requirements contract that, when they come up, we have to bid on this thing. It is an annual contract with renewals that can take it to 3 years, a year at a time.

What we do is, when the Department identifies some striping that needs to be done in a given area, they will issue a purchase order for that work, and we go do it. In order for that work to be scheduled, the Department of Transportation in the fall of the preceding year goes out and drives their sections of roadway—each division traffic engineer does that—and identifies roadways where the striping is starting to break down and come apart and does not clearly identify or delineate the traffic lanes or do a good job for nighttime drivers. And so they will identify these pieces. They accumulate the number of feet of stripe. That comes up with a dollar figure, and they submit all of these things to the Federal Govern-

¹ The prepared statement of Mr. Hietpas appears in the Appendix on page 58.

ment for the funding assistance that they use. So this is done in the fall of the year.

In the following spring of the year, they start issuing these purchase orders against these projects that have all been submitted and approved and the funds approved. Well, the comptroller's office is the one that does all of the funding solutions for the different using departments. They get these funds and tell Oklahoma Department of Transportation (ODOT), the transportation side, go ahead, go to work, we are ready. And so they issue the purchase orders.

Well, in western Oklahoma, we had a series of roads that needed to be striped. They issued the purchase order, and we went out and met with the local people, got ready to start to do the work, and they said, yes, all of these are ready except for this one section of roadway. What is going to happen with this section of roadway, there is an expansion coming on. We have some widening, and a section of it is going to be overlaid. And so rather than stripe that section now, let us just hold off until the fall when that construction work is done, and we will put the stripe on the new surface rather than striping it now and covering that all up and wasting those dollars.

That makes total sense. That is what we want to do. We want to do things that make sense. And so we go out, and we do that work. And, gosh, I think it was about September or October that we get called into a meeting that was being held by the traffic division to complain about the vendor—us—because we just were not prosecuting this work quickly enough and these things were being held open. We had numerous projects like this that were being held open. They are saying, "What the heck is going on?" "We have a problem with this vendor. We need to get them out of here and get a different vendor because they are not completing this safety improvement work."

Well, when the division traffic people came in and sat down with us, they discovered that the dollars that were being hung up and the work that was not being finished is the work that we were holding off waiting for this overlay work so that we would not just waste these dollars. We had scheduled it to where it made sense.

And so what happened is when we got all the people in the room, we found out from the comptrollers that if this work is not finished, the Federal Government closes out on these dollars. These dollars have to be sent back into the pool, and we lose those funds. A little bit of communication, they do the kind of paperwork, and it does not happen anymore. So we have undertaken the responsibility that if this happens, we just contact the comptroller's office.

Now, why didn't we before? We did not know about it. Neither did the division guys out on the roadway know about it. And the comptroller did not want to talk to us because we are a vendor of the traffic division, and so they did not want to step on their toes. And so that one little fix, putting everybody in the room, got this thing done. I encourage you to figure out a way to get everybody in the room so that we can work our way through the regulations and make sense.

Thanks for the opportunity.

Senator LANKFORD. Thank you. Ms. Russell.

**TESTIMONY OF LAJUANNA RUSSELL,¹ PRESIDENT AND
FOUNDER, BUSINESS MANAGEMENT ASSOCIATES, AND MEM-
BER OF THE BOARD, SMALL BUSINESS COUNCIL FOR SMALL
BUSINESS MAJORITY**

Ms. RUSSELL. Good morning, Chairman Lankford, and good morning, Ranking Member Heitkamp. Thank you so much for allowing us all to come in this morning and provide our views.

It is wonderful to hear everyone's different perspective, and, of course, here I am with just another one for you to consider. As you mentioned, I own a firm that is like a management consulting firm. We provide services to primarily Federal Government customers, and we are located right here in the Old Town area. So I hear that often, too, when I go outside of this area, that you are in D.C. We hear it every day. We get it. And sometimes others are like, "You guys are a bit too much for us." But we understand.

So I started my business in 2005 because I was doing some consulting work, and I wanted to do more. And I think that is when every entrepreneur really gets started. They want to do more, right? They have a fire or desire to take that thing, whatever that thing is, that they were doing that they found that they love. I can do more with that. I can make it bigger, better, stronger, faster. I can innovate. And that is what we started our businesses to do.

And we never consider that there will be law, right? There are going to be rules; there are going to be regulations; there are going to be laws. There are going to be things that we have to follow. We do not quite consider that. We might not make plans for that all of the time. But sometimes I realize that half of them are necessary. Sometimes they work well to help and support small businesses, to level the playing field, to give us opportunity that we may not have gotten before. And so I want to take my testimony into that direction in terms of, yes, there needs to be some reform, definitely. This is a very nuanced kind of situation where I would love to see the Federal Acquisition Regulation (FAR) changed into a more common-sense and common-language document that we can all utilize. That is a simple example.

But there are acquisitions—or, excuse me, there are regulations that have been really helpful in supporting small businesses. One of them is actually the financial reforms and looking at Dodd-Frank and assisting small businesses to have a really better playing field when it comes to large businesses. I think for us when we look at the regulations that have really supported us, it is those that actually have also some level of accountability built in, when we are the level playing field with the large businesses, that they can have accountability so that someone is watching out to make sure that everyone is doing what they are supposed to do.

For my business, it also means increasing opportunities for contracting with the Federal Government and making sure we have support once we begin to grow. Amazingly, once a small business expands out of its SBA designated small business size standard—and sometimes that is only \$7 million—then we are out in the woods, so to speak, without additional support or understanding or

¹ The prepared statement of Ms. Russell appears in the Appendix on page 65.

regulation on how we can grow more and get beyond the small business standard.

We also want to compete further in the health care system, and I know that that is an interesting topic for us today, but I believe that the new regulations surrounding ACA have been helpful to small businesses. It has been crucial to helping more small businesses and self-employed entrepreneurs gain access to comprehensive and affordable health coverage. Many provisions of the health care law have been key to making health insurance more accessible and affordable, and for me it has helped my business as well. We try really hard to provide great health insurance and to pay the majority of the cost. We actually pay 80 percent for individual health insurance, and because of our premiums—and after ACA, the premiums have been lowered or maintained. We have actually been able to maintain that and offer an additional 20 percent for—not only the 80 percent for the individual and then 20 percent for the family to ensure that we have full coverage.

I know that prior to that, some small businesses were unable to provide health insurance for their constituents or for their employees, and I think that that is a very important thing. A healthy workforce is a stable workforce, and a stable workforce is going to continue to produce. And a producing workforce is going to continue to grow the economy. When you look at the number of small businesses that are promoting securing the economy and the Nation, enabling some level of health insurance for those small businesses is an important thing.

So when you consider the number of Americans that have small businesses and employ the workforce and the huge impact, we have to change some of the regulations, and we have to ensure there are effective mechanisms to receive small business input. I think that is essential. But our economy does depend on it.

Thank you.

Senator LANKFORD. Thank you. Ms. Harned.

**TESTIMONY OF KAREN R. HARNED,¹ EXECUTIVE DIRECTOR,
SMALL BUSINESS LEGAL CENTER, NATIONAL FEDERATION
OF INDEPENDENT BUSINESSES**

Ms. HARNED. Thank you, and thank you, Chairman Lankford and Senator Heitkamp, for having me here today.

On behalf of the National Federation of Independent Business, I appreciate the opportunity to testify on reforms that would improve small business input in the Federal rulemaking process.

Since January 2009, “government regulations and red tape” have been listed among the top three problems small business owners face, according to NFIB Research Foundation’s monthly Small Business Economic Trends survey. And in our latest report, analyzing December 2016 data, small business owners cited regulations as the second biggest impediment to expanding their business, second only to taxes.

Small businesses bear a disproportionate amount of the regulatory burden as compared to the large corporations. And it is the small business owner, not a team of compliance officers, who is

¹The prepared statement of Ms. Harned appears in the Appendix on page 68.

charged with understanding new regulations, filling out required paperwork, and ensuring the business is in compliance with new Federal mandates.

Every hour a small business owner is spending complying and understanding the Federal regulation is one less hour that she is spending servicing her customers or planning for future growth of her company.

During my nearly 15 years at NFIB, I have heard countless stories from small business owners struggling with a new regulatory requirement. To them, the requirement came out of nowhere, and they are frustrated that they had no say in its development. That is why early engagement in the regulatory process is key for the small business community.

It has been two decades since the enactment of the Small Business Regulatory Enforcement Fairness Act. These amendments to the Regulatory Flexibility Act may not be well known to the average American, but they have positively impacted small business owners and their customers in every State across this country.

SBREFA has been instrumental in tamping down the one-size-fits-all mentality that can be found throughout the regulatory state. When followed correctly, it can be a valuable tool for agencies to identify flexible and less burdensome regulatory alternatives. However, these last 20 years have also exposed loopholes and weaknesses in the law, and it allows Federal agencies to act outside of the spirit of SBREFA when it comes to small business regulation.

NFIB supports reforms that would expand SBREFA's reach into other agencies. Each agency should be required to comply with SBREFA, and Small Business Advocacy Review (SBAR) panels should be convened before every economically significant rule is promulgated. SBAR panels allow an agency to walk through a potential proposal with small business owners, either in person or on the phone, receive feedback and other input for those that will be directly impacted by regulation, much like what Jerry was mentioning earlier.

NFIB also supports legislation that would account for the indirect cost of regulation on small business. Federal agencies are quick to proclaim the benefits of their proposals, but they decline to analyze and make publicly available the indirect costs to consumers. Whether a regulation mandates a new manufacturing process, sets a lower emission limit, or requires implementation of new technology, the rule is going to increase the cost of producing goods and services. These costs will be borne on small business consumers that purchase them and should be included in the calculation when agencies analyze the costs and benefits of new regulatory proposals.

NFIB supports legislation that would allow for judicial review of RFA compliance during the proposed rule stage. 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 wait until the rule is promulgated before legally challenging it. Unless a court stays enforcement of the rule, small businesses must comply with it while the battle over its certification is fought in court. This system im-

poses unnecessary costs and regulatory burdens on small businesses and it is inefficient.

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 (EO) 13563, and increase agency focus on compliance assistance. Finally, work still needs to be done to ensure agencies comply with the letter and the spirit of SBREFA.

Small businesses are the engine of our economy. Yet over the last several years, the crushing weight of regulation has been a top reason preventing them from growing and creating jobs. NFIB looks forward to working with this Congress to pass regulatory reforms that would improve current law and level the regulatory playing field for small businesses.

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

Senator LANKFORD. Thank you all for being here, and thanks for your testimony on where you are.

The Chairman and I, and Ranking Member will defer on this for our questions on the end. Senator Peters, would you like to be able to ask some questions initially?

Senator PETERS. That would be great. Thank you, Mr. Chairman and Ranking Member Heitkamp for that.

Senator LANKFORD. Thank you.

Senator PETERS. And to our witnesses, thank you for your testimony here today. It is important for us to have a thorough review of regulations to make sure that small businesses have the opportunity to be successful. But I think all of you would agree that it is also a very careful balancing act, and the fact, as Mr. Palmieri mentioned, from your association you realized that regulations are important in areas of workplace safety, workplace health, and the list goes on. And my experience in working with a lot of small businesses and being in private business for 20-plus years is most employers want to do that. And, in fact, they like the fact that the regulation is in place so that as they are good actors, they want to make sure everybody else is a good actor as well; otherwise, you have to compete with companies that are taking shortcuts and are actually hurting perhaps their employees in dealing with safety and health. And then that puts them at a competitive disadvantage, and then you get a race to the bottom. So we have to have those types of regulations in place.

But having said that, there are a lot of crazy regulations as well out there that we need to fix. I was involved with one as a Member of the House. I come from Michigan where the auto industry is big. Auto dealers are an important part of that, and they had forms that they had to have customers fill out to confirm that their automobile met the Clean Air Standards and had the catalytic converters. It was something that was put in in the 1970s. And the automobile coming off the assembly line has all that now. It is not necessary to have that paperwork, and so we worked to get rid of that. And, unfortunately, it actually took an act of Congress to get rid of paperwork that auto dealers forced their customers to sign, which was just added work and problems.

So we have to strike that balance, and I know that is what this Committee is all about, trying to do that. And I have heard some testimony, and I would like some more specifics, similar to the specific that I had with the piece of paper for the auto dealers. I have heard broad issues of concerns with taxation. Taxation is obviously beyond the scope of this Committee. I understand people have issues with the IRS. Issues with the Affordable Care Act have come up. And I am going to ask you a question, Ms. Russell, later about that. But as far as specifically now, and particularly, Mr. Palmieri, with manufacturers, that is incredibly important to me, especially small manufacturers, which is the lifeblood of Michigan. We have got our big manufacturers, but it is the supply networks, smaller manufacturers.

If you were to prioritize them, what are a couple things that we should be thinking about in this Committee where we might have to intervene and have an act of Congress, like I did to help auto dealers smooth their process and save money for their customers? Are there a couple specifics? And I am going to ask Ms. Harned as well—you have heard countless stories—if there is something that is just specific to small business that really is an example of what is outrageous.

Mr. PALMIERI. Well, I mean, I think the challenge in identifying that one specific crazy item that affects small business is that for many of our small businesses, what they tell us is it is not that one item, it is not that last rule; it is the accumulation of all of those rules, the 650 major regulations from this Administration, the 500-plus from the last Administration, and the thousands and thousands of restrictions that they face on each stage of their production process.

And so for us certainly the Congressional Review Act, there will be rules that will come up before the Senate and House that are negatively impacting manufacturers at all stages or increase the cost of energy for small businesses or others that will be immediate priorities. There is a list of challenges that we identified with the last Administration's rules, everything from overtime to the black listing rule to others that are at the tops of the lists of manufacturers.

But what we hope to do as well is to identify ways where we cannot repeat the mistakes that we have so far, and that on a rule like the Waters of the United States rule we do that analysis up front: we look at those small business impacts; we consider less costly alternatives. We can only do that if Congress passes reforms of the Regulatory Flexibility Act legislation.

Ms. HARNED. Right. I would agree with Rosario. It really is for the small business owner the death by a thousand cuts or ten thousand cuts when it comes to regulation. It is that cumulative burden.

One of the biggest rules, though, that is most problematic for NFIB members right now still out there is the overtime rule. That is by far and away one that we have heard the most from them on since it was finalized, and we would want to see that eliminated if at all possible.

But when it comes to regulatory reform more generally, Rosario is right. You have so many regulations that are already on the

books, and small business owners may not even know about that they are out of compliance. In fact, most of the time they do not. They do not until the inspector shows up. And if an inspector, to Senator Risch's point, comes to their business, they are going to look for and try to find a violation, and chances are they are going to be able to find one. And that is really the cultural change that I also think we would like to see at the agencies, one, again, that is more on how do we help you comply with the law as opposed to let us do a "gotcha" game once we get there, because small business owners do want to do right by their customers and their community. It does not help their business, which is typically advertised by word of mouth, if they are known as that bad person that is out there trying to pollute the waters or do all of these things that are harmful for our society. And they want to comply, but they cannot possibly be expected to understand and know all of the thousands of rules that may apply to their different businesses.

Senator PETERS. Right. Well, I understand that I am running out of time, lots of questions, but—and I understand there is a layer of many different regulations in place. But it is also helpful to identify some of those that we can try to fix. If you are dying by a thousand cuts and we can eliminate some of those cuts, that is better than keeping the whole thousand in place. And so having that kind of information is something I am willing and I know my colleagues here are willing to look at specifics as well that impact many small businesses, whether it is a flower shop or a hardware store on Main Street or a small manufacturer that is a third-tier manufacturer making parts for the auto industry or aerospace. You know, I want to work with you on that and look for specifics so we can make those kinds of fixes, because making those kinds of individual fixes then highlights the broader problem that will allow us to work in a more comprehensive way as well.

So my staff will be following up with all of you to try to identify some of those things that we can be actively engaged in and try to help. Thank you.

Senator LANKFORD. Thank you, Senator Peters.

Senator Heitkamp?

Senator HEITKAMP. Thank you, Mr. Chairman. You know, we are the Committee that looks at the thousand cuts. That is our job here, and to look at how we can, in fact, create a system where you have a feeling like—or that you actually have had input on the front end, which is one of the issues that we heard this morning, which is it is like input and then this rulemaking takes forever, and it leaves this great deal of uncertainty, which causes a retraction in people's willingness to expand as they are waiting to find out what is that going to look like at the end, and so the chilling factor of pending rules on business development.

But I want to get at two points because, again, we are the big-picture folks here. I know I say that word funny because I am from darn near Canada. Anyway, so let us talk about retrospective or retroactive review.

Senator Lankford and I have been working on this issue. We have been talking about doing it on major rules, making sure that we have embedded within major rules a process for lookback so that we actually—not only do you have that process available, but

you as small business owners commenting can help fashion what that retrospective review is going to look like.

Mr. Palmieri, you mentioned the need for improved retrospective review in the small business space. Do you have specific ideas about how we can improve the 610 review process and how we can get at—every Administration comes in and says, “We are going to reinvent government. We are going to get rid of all these rules.” And you saw it in the Clinton Administration, with some success, and then it just kind of—it is like yeast. It just starts blowing up again. People punch it down, but we never quite get at stopping that cycle of the growth.

And so I am curious about retrospective review and how we should be doing it differently and if you are aware of the work that we have been doing on retrospective review.

Mr. PALMIERI. Absolutely aware of the work you both have been doing. You are leaders on regulatory reform, and we look to you. And certainly your legislation on planning for retrospective review we think is very important, and we are supportive of that legislation.

As far as improving the process overall, I think the challenge that most Administrations, Republican and Democratic Administrations alike, have faced is that they try to do it alone; they try to do it without Congress. And when they try to do it without Congress, when they direct their agencies, “Go and look for all the regulations you can fix,” it is fix on your own. Right? So as soon as they run into a statutory requirement, they say, “Well, we cannot touch this rule because it is required by statute.” Or, “If we tried to reform or undo or change, we would need to go to Congress first.” And so that ends their discussion.

So unless there is a combined Congressional-Administration discussion that results in a final product, either the Administration being required to send you a package of legislative reforms to implement those changes from retrospective review or, like Senator King and Senator Blunt, with the Regulatory Improvement Act, a commission-based approach where the two entities are working together and there is clearly a legislative package that will come to you, we will never realize the full benefits of retrospective review.

And then certainly in my testimony and other places, much more thoughtful people than me have suggested—please.

Senator HEITKAMP. I do not mean to interrupt, but I am really intrigued by this idea that we then—anyone who has kind of watched these hearings that the Chairman and I have had know that I hit on this all the time, that we have a real fun time as Members of Congress beating up on the bureaucrats. But the bureaucrats, feel many times like, wait a minute, you guys are the ones who wrote these rules, or you know that this has been a problem. Let us take Waters of the United States. We have been in and out of the Supreme Court on Waters of the United States, back and forth, for 30 years. Isn't it time for Congress to legislate and say this is the lane? As long as we are just letting EPA and the Court decide, they are going to spill out, then the Supreme Court comes, and then they spill out, and we do not get any certainty to American business.

So I want to ask you about this idea of submitting a legislative package, the regulators saying, "Look, we think this is crazy. We do not want to do this, but we have to do it because it is a mandate, and we do not want an Inspector General (IG) report. We do not want a Government Accountability Office (GAO) report on this. Here is your list of legislative fixes that we can all agree."

Has that ever been done? Or, has that ever been embedded in any regulatory reform package that you are aware of?

Mr. PALMIERI. Not that I am aware of.

Senator HEITKAMP. It is a really good idea. It is a really good idea. And I wonder, as we kind of move forward, to think about that, because I totally agree with you. It is like talking over each other and pointing fingers, and we get nothing done. It is just an excellent suggestion. Thank you so much.

Ms. HARNED, could you offer any insights for us in this lane as well?

Ms. HARNED. Well, yes. I would agree with Mr. Palmieri that, regulatory—and you and Senator Lankford, retrospective review is critical because we have so many laws on the books that are not—or regs on the books that are not needed anymore, but you do have the statutory backup. And one of the things I would say also, over the last decade or so, we are seeing so many of the laws that are coming out of Congress that are giving the agencies even more authority and have much more ambiguity throughout that, which lets the bureaucrats make all of the decisions in the end. And we really think that we need to go back and especially tailor the legislation that is coming out of Congress at the beginning that really is getting your intent into the agencies' hands so that they really have a very clear road map of what they are looking at going in. That has not been happening. The Affordable Care Act actually is a great example of that, as are a number of acts.

And so that would be one other thing I would add, is that there just needs to be more clarity in the drafting in the beginning when new mandates are going to go into effect.

Senator HEITKAMP. That presupposes that this is not done on purpose. We all know this is purposeful. It is like we cannot deal with that, it is too contentious, we are going to send it over there and then make judgments about the decisions they make on either side, depending upon who is in charge. That is no way to legislate. That is absolutely ignoring our constitutional responsibility. I totally agree.

I want to get at the other issue that I think is critical, which is State and local regulation and the intersection between State and local regulation, because we have not quite had a discussion here about that, and whether any of you on the panel can offer some suggestions on how we can institutionalize better coordination, better dialogue, more opportunities for you to better understand how all of this works together, and we will start with you, Ms. Russell.

Ms. RUSSELL. Thank you. That is actually a very interesting topic for my company. We are about 100 employees, and we cover about 15 States. And every single State is completely different. Everything we do when it comes to taxes or human resources (H.R.) or whatever within that State and for those individuals, it varies. And so it is a tough question for us because, of course, we have the

Federal rules and regulations, the Department of Labor, and then we have those things that each State is mandating.

We have actually had to run separate payrolls sometimes because of one State needing it this way or one State needing that way, in different formats or timing. And that would be something awesome if we could get every State on the same page. How do we do that? Right? Every State is run differently; every State is governed differently, and their individuals from that perspective. And that would be extremely helpful, I know, for small businesses looking at the State level, when you are looking over multi-states for employment.

Senator HEITKAMP. Not to interrupt because I want to hear from everyone, and we run kind of a loose ship here. If I can just offer a couple more?

You look at the Uniform Commercial Code, which was designed to create—for all of these various jurisdictions to come together and say here are commercial rules so that it is easier to do business across borders. So it is a great model, but now we have kind of—with all of the business interaction and with more multi-state businesses, we do not have something that is similar to that on payroll. We do not have something that is similar to that on other kinds of, the Occupational Safety and Health Administration (OSHA) regulations where you can feel comfortable if you are in compliance in Oklahoma that you are going to be in compliance in North Dakota. And, I am a big believer in the Tenth Amendment. I came out of State government. And so I am not someone who says that there should be mandates here, but I think there is a great interest that I have in trying to incentivize States to coordinate better, to try and create opportunities for regional businesses, so that those small businesses can grow.

So I guess, in Oklahoma, what do you see from your perspective? Does your business, Jerry, go regionally, or are you just in the State of Oklahoma?

Mr. HIETPAS. We have done business in other States. We actually have an office in Topeka, Kansas, which is the northern annex of Oklahoma. [Laughter.]

But my perception of your question, and reshape me if I am headed in the wrong direction, but my understanding of the question is how do States perceive what is required of them of the Federal law and the regulations that they put in place in order for us to meet and for them as well to meet the Federal law.

What we see on our side of the deal, we have, of course, in our mainstay the Manual on Uniform Traffic Control Devices, which is a Federal document, part of Title 47, so that signs and barricades and the methodology is uniform across the United States. But each State, first of all, adopts that as their basic, but every regulation they put in place beyond that is their perception of what it takes in order to meet the Federal law.

We find the same thing with our compliance in the Davis-Bacon, and part of my submitted testimony has to do with how do we determine wage rates. Well, in Oklahoma, it is done a certain way so that we have like 9, 10, or 11 different wage rates based upon regions just so that Oklahoma's version of compliance with the Davis-Bacon wage law for fair wages for the construction employ-

ees makes sense. It is different for us when we go to Kansas. We have their perception of that same law where we are doing our certified payroll reports.

And so each State I believe is doing their best to come up with their own regulations and their own operations in order to, from their perception, meet the requirements of the Federal law. I do not know if there is a way that we can get the folks together and say, OK, what we really need from you at the Federal level is this kind of information in this kind of a format, and that would, in my opinion, cause uniformity at least in regions, but very possibly all the way across the entire country.

Senator HEITKAMP. That is a great specific example of what I am getting at, but, again, we are up here, we are not the Commerce Committee that deals with the transportation issues. So we are trying to figure out how we put opportunities in place to have that discussion and maybe have a greater collaboration with State and local entities about what we are hearing here about regulation, either implementing Federal programs or just—payroll is a great example. I mean, every State is going to have a different kind of requirement. They may have different safety requirements beyond what OSHA has, and you have to know all of that. And there has to be—in North Dakota, we implemented one-stop shopping so that we could get all of—whether it workers' comp and unemployment and, when I was tax commissioner, registration for sales tax, retail licensing.

So we tried to consolidate where people would go, but, you look at the different definitions of employer, there is just a classic example. Maybe we have one here for the IRS, one here for OSHA, one here for all of the other provisions, and all of that creates compliance costs.

And so, Mr. Palmieri, can you offer anything on State and local regulation?

Mr. PALMIERI. Sure. I mean, I think one place to look for feedback on this issue is offices of kind of State economic development entities, because the best ones are focused not just on providing extra resources or whatever, but helping a business, a manufacturer or other that wants to build a new facility to go through the permitting process in their State. And they can identify for you, here are the things that we have improved in our State and made easier than maybe another State, but here is the Federal overlay of things that still make it more difficult for us to help a business build a new facility, increase jobs, or retain jobs in a State. And I think that would be one place to go.

I would say at a minimum the Office of Advocacy in SBA had a program for a number of years where they were encouraging States to adopt their own regulatory flexibility laws, so actually being advocates at the State level because of exactly what you have identified for reforms to make State regulation more small business friendly as well.

Senator HEITKAMP. Before we populate the States with that model, we need to make sure that the Office of Advocacy gets listened to here in Washington, DC.

Just one last comment, and then I will yield back to the Chairman.

Ms. HARNED. Yes, thank you, Senator Heitkamp, for the question. We have actually a very active member in Texas who really points up the issue quite well. He has been very much—he is in partnership with the Texas safety and health organization down there. They have inspected his business. He has strong workers' comp insurance. That person has inspected his business. And I have spoken to him and even the commission down there, and I said, well, if somebody—you go in and you say this business is good, they have taken care of everything we had, if we had any concerns. What does that mean at the Federal level? Basically nothing. And that really is something that I think we should fix. We need to eliminate the number of boxes that business owners need to check. They need to be able to know, hey, OK, I checked this box, I am good, and not worry that there is somebody who is going to come around the corner the next day and say, oh, but you are not because you have not gotten my box checked.

There has to be more collaboration in that area, I think, to minimize the burden on them and the people that are coming to them with different requests and concerns.

Senator LANKFORD. All right. So how do you do that? Because that is something I hear commonly from different companies. I will talk to some manufacturing location or some business, and they will say, "Hey, the inspector for XYZ entity just left." And I will go, "Great. How did it go?" "It went terrific. Next week I have a different inspector that is coming in from a different group, and I understand 3 weeks from now, we just contacted that a different inspector is coming in."

All of them have their own silo. All of them have their own requirement to be able to check things off. Each of them carries with them the opportunity to be able to do a fine for someone or to be able to step in and help. How do you coordinate all those?

Ms. HARNED. Well, I think maybe, this is just some thoughts I have had, that the Federal agencies can try to create these strategic partnerships, work with the State and—at a minimum, start with the State organizations and see are we good here, is there even an issue in the State? Is this State doing—and at least giving them—

Senator LANKFORD. In environmental law areas, EPA often delegates to in our State the Department of Environmental Quality, and it says here are all the standards and things that we are looking for. The State can do this. If you add additional requirements, you are welcome to, but this is the minimum standard. And so then that State entity would sign off on that. They would do the inspections. And if the State has signed off on it, then the Federal Government would accept that. Is that the model you are proposing?

Ms. HARNED. Well, I do not want to speak formally for NFIB on that because we would want to discuss that more internally, but I do think that you need to find a solution where you are getting—you are having less boxes that need to be checked. And to me, that idea is starting to get you there.

Senator LANKFORD. OK. Mr. Hietpas, how many pages of regulations do you think your business has to comply with? Have you ever dared to guess at how many pages of requirements you have?

Mr. HIETPAS. Absolutely not. Just this little packet right here represents just the payroll section. And it is not all of it. It is just the highlights. No, I do not think I could pay someone full-time that could sit down and read it and complete the process within a year.

I think more typically than anything, we find out about the regulations after we violate one, and go——

Senator LANKFORD. You mean you do not have a full-time employee that is reading the Federal Register every day? [Laughter.]

Mr. HIETPAS. Thank goodness not. That would be a difficult position to keep filled.

Senator LANKFORD. Yes, it would, actually. I do fear that at times agencies do believe, “I posted that in the Federal Register. Every small business in America should have seen it.”

Mr. HIETPAS. I am absolutely convinced that you are correct and that that is the common belief. Your solution that you offered, as you started this question, makes a lot of sense to me. And I can appreciate that Karen cannot speak because she has a thousand voices behind her. I get to speak for one, with an understanding of knowing about the road construction community and the sub-contractors that back that up, that if we had the State authority, knowing what it takes to check all the Federal boxes, we can talk to them, we can figure out what pieces are missing. And if we run into an issue like I did with my example that I did in my testimony, we can sit down and get that worked out pretty quickly and quickly come into compliance. We do not want to sit and battle Federal regulations. We have other things to do.

So knowing what to do, do it right the first time, and moving on just makes a ton of sense, and it is easy for us to employ folks to go to work at that point.

Senator LANKFORD. OK. Ms. Russell, you have a comment on that?

Ms. RUSSELL. I did. Thank you. It would be interesting—and, of course, the innovation part starts to come out. It would be interesting if we really were able to sit down and understand State to State what is it so different that you are requesting that is not already requested at the Federal level. I do not know if that kind of analysis has ever been done, get all of the State—he was mentioning—the economic development individuals in one room or four rooms if you want to do something like that and work through, well, what is so different from Oklahoma to Kansas in that area? We have to look at one area at a time. What is so different? Is there a way that we can consolidate that at least into one form? You have those neighboring States that have the same industry that could potentially have one form. That is a start. Now let us take that one form and see how far we are from Federal. That is one start.

Senator LANKFORD. OK. Mr. Palmieri, there has been some conversation about two different terms that Congress put into statute back in 1980: “significant economic impact” and “substantial number of small entities.” Those have never been defined, and they just kind of sit out there. Is there a need to get some sort of definition and to get some sort of clarity on those?

Mr. PALMIERI. I think there is. Certainly, each agency defines for itself what those words are today. It gets some assistance on compliance from the Office of Advocacy. But the Office of Advocacy is not in control. It does not have the authority it needs to be able to identify across the government what those words mean. And so whether it is through rule-writing authority for them, kind of, again, the National Environmental Policy Act (NEPA) model, The Council on Environmental Quality (CEQ) wrote the rules that everybody lives by and all agencies live by, as opposed to each agency deciding for itself what a "significant economic impact" would mean. I think that would go a long way.

If you look at the legislative history, back in 1980, they felt we did not really have a grasp of the regulatory system at that point, so it was hard for them to put into statute stronger language. Clearly, I think we are in a better place. We have resources, people who know how agencies evade these rules when they should not and what it means. I think we are in a much better place to give someone the authority to define these terms, whether it is Congress or advocacy.

Senator LANKFORD. Let us just take the Office of Advocacy. Is it in the right spot? And does it have the authority that it needs?

Mr. PALMIERI. It does not have the authority to write governmentwide rules to define those terms. It can provide guidance, but unless you amend the law, they do not have the authority to do that. And even if they did, agencies would not listen to them.

Senator LANKFORD. So take the model of the Office of Management and Budget (OMB) and the Office of Information and Regulatory Affairs (OIRA), and if there is a significant rule that is being promulgated, OIRA has a responsibility to be able to check it, come back. They have an internal back-and-forth to be able to do that, but that is a requirement that is set into place by the Administrative Procedure Act (APA). That model does not seem to exist. Every agency just determines on its own this is not significant or this does not really reach a significant number of groups, and so I do not have to talk to anyone. I just put it out there, and the Office of Advocacy can raise their hand or can write a letter but really cannot force someone to say let us sit down and talk about that.

Mr. PALMIERI. So right now it depends on the relationship between OIRA and the Office of Advocacy. If there is a strong cooperative relationship there, OIRA can be an enforcer of those rules. In different times and in different administrations, there have been, you know, clear relationship Statements, a memorandum of understanding, but to us I think as we are talking about rewriting the law, it is a perfect opportunity to give that authority to advocacy, to be able to put themselves in a position to answer definitively for the government when someone is doing that or not. Certainly, they have the ability to define that on the judicial review side. Why not have them do it up front?

Senator LANKFORD. Go ahead.

Senator HEITKAMP. I was thinking maybe Advocacy belongs at OMB and not at SBA.

Mr. PALMIERI. Well, so it is an independent entity.

Senator HEITKAMP. Right.

Mr. PALMIERI. It just shares, space and resources. And where it sits would not matter to us as much, but I think if you talk to folks who work at Advocacy, there is probably something about being kind of a part of that.

I have also seen proposals years ago of spinning off the Office of Advocacy and making it its own independent commission so that it was free of all agencies and had more independence. But to us, what is most important is that it has resources and authority because it does excellent work across Democratic and Republican Administrations and is the only voice sometimes that will raise its hand against the Administration's priority, whether it is EPA or OSHA or others, and say, "We disagree." And that is such an important voice to have in this process.

Senator HEITKAMP. Right, I could not agree more. And when we are talking about taking that model and populating it in the States, we need to refine it here. Because I sit on the Small Business Committee, we hear from the Advocacy folks, and I think there is enormous frustration that they do great work, they point out all the problems, and it just falls on deaf ears because someone says, "We do not agree with you."

There needs to be a very strong message from Congress that these are our folks, these are our folks who are doing the watchdog work of Congress, making sure that we are not overly and unnecessarily burdening small business, or at least we have that perspective.

So we are very interested in what we should be doing to reform or enhance or make that an entity that feels like, man—that the agencies feel like, man, we better find out what they are going to say, because there are going to be a whole lot of people up on Capitol Hill not happy if these folks say they were ignored.

Senator LANKFORD. And years ago, Congress stepped in on what is now affectionately called the "SBREFA panels" and said there needs to be a gathering of individuals, much like what Mr. Hietpas was talking about earlier, make sure everybody gets in the same room to be able to have a conversation about its effect. The concern is those have not been effective, so I am interested in any kind of input. The design was to get more people to be able to talk about a rule before it is finalized to specifically talk about small business entities. It only affects EPA, OSHA, and the Consumer Financial Protection Bureau (CFPB). They are the only ones that are required to do it. Then the question is: Should this be expanded and should there be a great conversation happen on it? And I am open to anyone for input here.

Ms. HARNED. Well, NFIB has long recommended that it be expanded to all the agencies. We think it is critical—

Senator LANKFORD. Independent and executive.

Ms. HARNED. Absolutely. Again, as Mr. Palmieri was saying, so often Advocacy is the only small business representative at the table. If we can get other small business owners—again, it is easy to talk on the phone. These people do not necessarily have to come to town. But to actually get them to say what this will actually mean for their business is critical, and also ensuring that it is a true small business owner, and by that I mean small business is defined broadly, right? A business that has its own quality assur-

ance officer, that is wonderful that it has the resources to employ that person. But we need to worry about the businesses that do not have that person and what their perspective is when these rules are being created.

Senator HEITKAMP. So your perspective is some of the solutions that come out of Advocacy are geared toward businesses that may not really need that kind of assistance compared—or they do not reflect what is actually happening for truly smaller businesses?

Ms. HARNED. Oh, I am sorry. I did not mean that for Advocacy. I meant on the Small Business Advocacy Review panels, where you do have a panel process.

Senator HEITKAMP. OK.

Ms. HARNED. Sometimes they are supplied primarily——

Senator HEITKAMP. They are populated by people who you think do not really understand what that is for the five-guy body shop——

Ms. HARNED. Correct.

Senator HEITKAMP. There is no way he even has the ability to do payroll. He contracts all the business stuff out. He does not want to think about this, but all of a sudden he is stuck with some new rule on, what a spray tent will look like, and he is not represented or she is not represented.

Ms. HARNED. Correct. And part of that also is, the time that it will take for the small business owner to participate and finding that person, right? But that is also where technology can be so beneficial so that it does not seem like such a cumbersome ask for them when the government is asking for their opinions, because I think that also would help get more engagement from that community in this process.

Senator LANKFORD. OK. Fair enough.

So there has been some conversation, I have heard several of you mention this as well, this issue about direct cost and indirect cost and trying to estimate what is the real effect on a small business as well. What are the recommendations that you have to be able to help correct this issue? And how can we really know the actual effect on a business? Mr. Palmieri.

Mr. PALMIERI. So this is just an error in interpretation of this law, and so it is a simple fix, just to make clear that when we say “significant economic impact,” that is direct effects and indirect effects. And we have to say it in the law; otherwise, agencies will never follow it. And so that small number of rules that ever get this small business impacts analysis, one of those reasons is because they get to say a whole suite of their rules will never meet that definition because they only have indirect effects. And we know for so many of our small businesses, they are not often the directly regulated entity. Right? So we are regulating their power supplier, we are regulating one of the larger businesses, and they are a subcontractor to that business. And so there are all sorts of reasons why small businesses are often not the direct intended target of the rule, but are the ones that are most affected or most disproportionately affected. And so just fixing that in law, making it very clear, “No, Congress means indirect effects also,” will solve this problem.

Senator LANKFORD. Other comments on that?

Ms. RUSSELL. I would agree. Indirect, you are still expending resources, you are still expending money, you are still expending the time. Just because they would state it differently, it does not lessen the impact of the small business.

Senator LANKFORD. All right. It is fascinating to me, the number of times that I will talk to an agency, and they will tell me, "This does not affect a small business because this is only a regulation that was designed for larger businesses." And that does not seem to be in touch with the basic supply chain conversation, much less the actual effect that it is going to have in so many other ways.

Let me ask you a question about implementation timelines. It was one of the many things that came up during many rules that are rolled out. Is there a need for a different implementation timeline on a new reg for small businesses versus large businesses? The best example here, Mr. Hietpas has already admitted he does not read the Federal Register every day. There is a compliance person that is researching that out for most large businesses, and down the hall there is a group of attorneys that are chasing that down. But for a small business, they typically will have an annual update from someone that they have hired or from someone from some organization that sends out information to them.

Is there a different timeline needed to say large businesses, medium to large businesses, your implementation timeline is 6 months, small businesses get a year to be able to implement that? And if so, can you think of examples?

Ms. HARNED. Yes, thank you, Senator, and this is a critical issue. You see this not just in regulation. Quite frankly, you see it in just how the world works for a small business owners. You look at data on how long it took small businesses to really embrace even things like the Internet and, new technologies. They are always going to take longer than a large corporation to be able to understand and embrace and incorporate that into their business. So it is critical when it comes to regulation that implementation dates are extended for them because, again, they may not even know that the rule exists by the time it becomes effective. Meanwhile, the large corporation has already cleared the path and is in compliance, and you have to build in time for them to know the rule exists, understand what the rule means, and comply with it. And because of their limited resources, their limited manpower, it is going to take more time for small business owners.

Senator LANKFORD. All right. Mr. Hietpas.

Mr. HIETPAS. One more element that tags onto Karen's statement is being able to build the costs in, figuring out what the cost is of compliance and building that in. We just started a project on I-235 in Oklahoma City to just take care of the railroad bridge widening of that particular roadway. The contract length is 430 calendar days. And so if a new regulation is put in play and we have 6 months to comply, and because of certain elements of that regulation, it is going to add about \$2,000, \$3,000, \$4,000 to that I-235 project, I am stuck. That is just another investment in a compliance opportunity.

The striping contract that I was talking about earlier was a one-year contract with two opportunities for extensions, and those opportunities are based upon what happens to our costs. And so if our

costs escalate sharply, we do not extend the contract. We put the thing back out for rebid. So we sign up on the new one, have 6 months to comply, and, again, we are stuck with the deal.

So in many cases, a new rule will come down, the larger companies figure out what it is, and then those larger companies that hire me to do the work, I will go ahead and do the work. And like an example I put in my written testimony, here are all the new rules from the Housing and Urban Development (HUD). All we were doing was striping a section of roadway on a project that was funded with HUD dollars using State of Oklahoma specifications, working in the city of Moore. Did I anticipate that I was going to have my office staff work on the paperwork for 2 weeks in order to get paid? That was not included in that bid.

But, it took us 4 hours to stripe the job and 2 weeks to do the paperwork in order to be paid. It was striping a roadway using the State standards on a road inside the State of Oklahoma. Everything was what we knew and understood. We just did not understand HUD's set of rules.

Now, I am not even completely convinced that HUD had all of those kinds of things. What I am convinced of is that the city of Moore, in anticipating what it would take in order to get all the qualifications met for the HUD funding for that particular roadway, that this was their interpretation of the paperwork. Again, legislating—getting people in the same room, figuring out here is what is produced, here is what we do, will this meet your standards, yes or no? And if not, what minor modification do we need to make in order to do that? I think that cuts through a whole lot of this stuff, but, unfortunately, we are talking with people at a local level—or at a lower level, and we have one of these buildings someplace where HUD's main office is. Someone there said this is what it is going to take to comply with Congress' intent of the law, and so the regulations are passed down so that they get their paperwork, and by the time it finally gets through, we have complied with the law, but we may have been able to do it with a lot less hoops to jump through.

Senator LANKFORD. All right. With that same comment, Ms. Harned, you mentioned in your list, which was a very good list of practical ideas, the waiver for first-time paperwork violations. Walk through that.

Ms. HARNED. Yes, this has been something, again, that NFIB has long advocated for because, again, small business owners do not necessarily know when they are out of compliance. Giving them the chance, letting them know that it is not going to be a "gotcha" game, that just because they get dinged on something, they are going to be given an opportunity to correct it. Then if they do not correct it, they are the bad actor that needs to be punished. But if they do not know that they are out of compliance with one of a thousand regulations, at least giving them a break on the first time, especially when it is not a big safety—not an imminent safety issue or something like that and a paperwork violation, we really think is the right thing to do.

Senator LANKFORD. Mr. Palmieri.

Mr. PALMIERI. We also support that legislation, and I would just say that your new Democratic colleague in the Senate, Senator

Tammy Duckworth, from Illinois, also introduced a version of that legislation when she was a member of the House. So we think there is a real bipartisan opportunity to address that and just to say again it is a focus on compliance assistance. What we are trying to get our small business to do is to be in compliance, to be aware of the rules before they get a \$10,000 fine. And, unfortunately, I have had small businesses who have testified before this Committee who have told you that, they missed a signature on a form, and they got a \$10,000 fine that took them months to negotiate, a reduction. But that is often the impression that is left about the relationship between small businesses and the Federal Government, is there is no outreach, there is no assistance, there is no education. It is do it right, or my only response is a big financial penalty. And it does not serve anybody's ends.

Senator LANKFORD. No, it does not. And Senator Heitkamp and I have talked about this before. There is a manufacturer in Oklahoma that did not submit the form about conflict minerals saying, "We do not use conflict minerals," which they do not. So because they did not submit the form saying they had nothing to submit, they were fined \$100,000. A form that said, "We have nothing to submit, that is a \$100,000 fine. And at some point, this looked rational to someone in D.C.? But it does not look rational to anyone else.

Senator HEITKAMP. And here is another example: A contractor of mine had a project in San Francisco. It got stalled out for funding, and I think there was a disagreement about how they were going to do it. They had to file Davis-Bacon reports every week saying, "I did not employ anyone," for 2 years. You know, 104 reports saying, "I have nothing to report," or they would have been fined.

And so those are the things that I would hope, regardless of where you are on the political spectrum, we all could agree that is just crazy, that is just wrong.

And so I think that in this area there is going to be some low-hanging fruit that will be really easy to work on, and then there is some systemic kinds of discussions, whether it is judicial review, which we go back on—I mean, we kind of know——

Senator LANKFORD. Which I am right on, by the way.

Senator HEITKAMP. Yes, sometimes. [Laughter.]

Guidance which we go back and forth on. I kind of try and explain to the Chairman that sometimes people need guidance, and that is very valuable.

Anyway, but if you went and looked at low-hanging fruit, I think you had a great list. I think we are going to need to kind of examine that, Karen, and try and figure out how much of that would be easy to do. But we are really committed to listening, really committed to a system where people do not feel like there is an adversarial relationship in accomplishing the work of the people of this country.

And so I just want you to know—I am going to have to scoot off here in a little bit because I have another appointment, but I want you to know that this is just a great beginning for our Committee, having you all here. I want to thank you for your input, thank you for your statements. And I look forward to continuing the dialogue about so many good ideas that have been advanced here.

Senator LANKFORD. Thank you.

Any other final comments from any of our witnesses?

[No response.]

Senator LANKFORD. I do appreciate very much your testimony, both your written testimony and your oral testimony. We look forward to following up in the days ahead to be able to continue to gather practical ideas as we are trying to pull together, as Senator Heitkamp said, a practical list of legislative solutions to be able to move through this process. There is bipartisan agreement on those areas. Where there is bipartisan agreement, we should seize on it and be able to move and be able to see how much can be done to be able to help in this area related around a small business regulatory scheme.

Before we adjourn, I would like to announce that on February 9, the Subcommittee will hold a hearing on the State of the Federal workforce entitled, "Empowering Managers: Ideas for a More Effective Federal Workforce."

That concludes today's hearing. I would like to thank the witnesses again for their testimony. The hearing record will remain open for 15 days until the close of business on February 3, for the submission of statements and questions for the record.

Thank you all again. This hearing is adjourned.

[Whereupon, at 11:39 a.m., the Subcommittee was adjourned.]

A P P E N D I X



Opening Statement

Hearing before the Regulatory Affairs and
Federal Management Subcommittee,
Thursday January 19th at 10 AM

**"Improving Small Business Input on Federal Regulations:
Ideas for Congress and a New Administration."**

Good morning and welcome to today's Subcommittee hearing titled "Improving Small Business Input on Federal Regulations: Ideas for Congress and a New Administration."

In the 115th Congress, this Subcommittee looks to continue our examination of the federal regulatory process and look for solutions to increase transparency, accountability, and efficiency.

Today we look at how federal regulations impact small businesses and whether agencies should be required to take more seriously the impact on small businesses during the rulemaking process.

According to the Small Business Administration, there are 28 million small businesses in the United States which account for 55 percent of all jobs and 66 percent of all new jobs since the 1970s. Despite the importance of this sector for our economy, small business owners continually tell me that they do not feel that Washington hears their voice.

The annual federal regulatory burden is huge – nearly \$2 trillion dollars – and the burden falls disproportionately on small businesses.

A recent study by the American Action Forum found that every 10 percent increase in cumulative regulatory costs results in a loss of more than 400 small businesses. As regulatory costs rise, small businesses disappear.

Agencies do not draft rules with the intent to close small businesses, but, unfortunately, that is a frequent result.

One way to avoid unnecessary burdens to small businesses is to have real, meaningful consultation with stakeholders.

Currently, agencies are required to consider the regulatory impact on and consult with small entities pursuant to the Regulatory Flexibility Act and the Small Business Regulatory Enforcement Fairness Act. However, in reality agencies do not genuinely take into account the views of small businesses.

During today's hearing we will discuss ideas to address this problem – to ensure that agencies truly consider the effect of rules on the small business sector of the economy.

When entrepreneurs open their own business, their goal is to provide for their family and serve their community by offering a product or service. Each moment a small business spends trying to understand and comply with overburdensome federal regulations is time that is not spent growing their business.

This past December, the National Federation for Independent Business reported a 38 percent jump in small business owners' belief that the economy will improve.

According to The NFIB's index, small business optimism increased by 7.4 points in December to 105.8, up from November's 98.4. It's the largest month-over-month index change since it began in 1986.

In fact, members' perceptions that business conditions will improve, especially in the area of regulatory burden, accounted for 48 percent of the month's increase.

We have the opportunity to implement changes that would make it easier for small business owners to participate in rulemaking and truly have their concerns considered. We must turn their optimism into reality.

I look forward to discussing ways to deliver these results for small businesses today with our witnesses.

With that, I recognize Ranking Member Heitkamp for her opening remarks.

Opening Statement of Ranking Member Heidi Heitkamp

Subcommittee on Regulatory Affairs and Federal Management

***Improving Small Business Input on Federal Regulations:
Ideas for Congress and a New Administration***

Thursday, January 19, 2017

As Prepared

Thank you Mr. Chairman. I look forward to working with you for another Congress. Our subcommittee was busier last Congress than some full committees. I am certain we will have two more years of productive and bipartisan work on our subcommittee.

Small businesses play a crucial role in our nation's economy and overall prosperity. The vast majority of businesses across our nation are small businesses.

Small businesses are especially critical in my state of North Dakota. Ninety-six percent of businesses in North Dakota are small. These small businesses are the backbone of North Dakota's economy and the prime source of job creation. I am proud to represent North Dakota's small businesses in Congress, on this committee and on the Small Business Committee, where I also serve.

It's been my privilege to travel across my state and visit the wide variety of small businesses that call North Dakota home to visit and hear about their needs first-hand. From main street brick and mortar retailers in Grafton and Grand Forks to cutting edge innovators in the Unmanned Aircraft System industry, like Packet Digital in Fargo, to NewKota, an oilfield service business in Minot, North Dakota that specializes in steam heating frozen rig pipes – the needs and concerns of these small businesses are as diverse as they are.

It is absolutely critical that Congress always be working to ensure small businesses can prosper. Congress must seek out policies to help small businesses innovate and thrive. I am proud that, on the Small Business Committee, I have been a strong advocate for small businesses and startups in our country's more rural states like North Dakota. Because we know that innovation doesn't just happen in our country's biggest cities and that we must foster and promote the innovative and entrepreneurial ideas that are emerging in our heartland.

It is also critical that Congress make sure its policies do not unfairly or unintentionally hamper small businesses. Unintended consequences are always something that must be carefully examined and considered – especially when working in the regulatory space.

This is an important hearing. Small entities are often at a severe disadvantage compared to their larger peers when it comes to coping with and managing federal regulations. Small businesses often struggle to get the information they need to fully comply. And they want to comply.

That is one thing I hear when I talk to small business owners in North Dakota. They want to be good neighbors, good citizens. They want to produce safe products that their customers want to buy and they want to operate on a level playing field.

One small business owner in North Dakota that I have gotten to know is Kari Warberg Block, who owns Earth Kind in Bismarck. They are a pest control developer, designer and bio-manufacturing pioneers. I had hoped to get Kari out to Washington to testify at this hearing, but due to the late-breaking nature of this hearing that was not possible. I have a statement for the record from Kari that I'd like to submit at this time. When you speak to Kari about federal regulatory policies, you get a simple answer that is difficult to turn into action. She talks about needing more commonsense from agencies, more small business smarts from agencies, more understanding, and more outreach and feedback.

I hear the same from small business owners all across my state. Kari says the solution is not fewer regulations, but better regulations and better compliance assistance. We need a less burdensome process that makes it easier for small businesses to connect with right people.

To me that is one of the key questions we must tackle in this space- how do we make sure that agencies engage in the way that small businesses need, and that includes protecting the ability of agencies to promulgate fair and well-analyzed rules in a timely fashion?

Much of the discussion in this area has focused on the importance of considering the impact of regulations on small businesses. We need to examine how to obtain meaningful input from small businesses in the regulatory process, and if improvements to the Regulatory Flexibility Act are needed to ensure federal agencies are responsive to the needs of small businesses.

I look forward to hearing from the witnesses on that topic, as well as how we can bring small-business North Dakota common-sense to the regulatory process.

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Statement for the Record

Senator Jeanne Shaheen

Ranking Member, U.S. Senate Committee on Small Business & Entrepreneurship

January 19, 2017

Chairman Lankford and Ranking Member Heitkamp, I appreciate the opportunity to provide a statement on the Regulatory Affairs and Federal Management Subcommittee's hearing on ways to improve small business input on federal regulations.

As the Ranking Member of the U.S. Senate Committee on Small Business & Entrepreneurship, I appreciate the critical role that small businesses play in our economy, especially in rural communities across the country. In my home state of New Hampshire, small businesses make up 96 percent of all employers. Nationwide, small businesses are responsible for two thirds of all job creation.

As a former small business owner, I have first-hand experience with the many pressures small businesses face, including access to credit, meeting payroll, the cost of health care and many other challenges. Small business owners have enough to worry about: Our job should be making their lives easier, not harder.

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

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

For that reason, we need a regulatory process that works for all stakeholders - including America's small businesses.

I am very interested in looking at ways to improve the regulatory process so that federal agencies receive better input from small businesses, while also protecting the ability of federal agencies to promulgate fair rules in a timely fashion that protect the public, workers and the environment.

One key to an effective regulatory process is to ensure that federal agencies comply with the Regulatory Flexibility Act (RFA), which requires them to work with the Small Business Administration (SBA) to conduct outreach and generate real input from small businesses. Congress has a responsibility to conduct better oversight to ensure that federal agencies are following this process and minimizing the regulatory burden of new rules on small businesses.

I've also heard from small business owners that one of the most meaningful ways to help them with regulations is to ensure that our federal agencies – including the SBA – are actively helping them comply. Enhancing federal outreach and assistance to small businesses will help level the playing field by making rules easier to understand and follow.

We also need to repeal outdated and duplicative regulations that no longer make sense and simply add to the regulatory burden facing small businesses. That's why I cosponsored Senator

King's Regulatory Improvement Act to identify antiquated, unnecessary regulations that no longer make sense and create an expedited process for Congress to review or repeal them.

I appreciate the opportunity to discuss potential reforms to the regulatory process. The goal of efforts to reform the rulemaking process should be to improve small business input and make rules easier to understand, without imposing additional mandates that will grind the regulatory process to a halt or threaten critical protections for the public, including many small businesses.

I look forward to working my colleagues on the Homeland Security and Government Affairs Committee, including Senator Heitkamp, who also serves on the Small Business Committee with me and our Committee Chairman Risch, to improve the regulatory process for small businesses.



Leading Innovation. Creating Opportunity. Pursuing Progress.

Testimony

of Rosario Palmieri

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

before the Subcommittee on Regulatory Affairs and Federal Management
Committee on Homeland Security and Governmental Affairs
U.S. Senate

on Improving Small Business Input on Federal Regulations:
Ideas for Congress and a New Administration

January 19, 2017



TESTIMONY OF ROSARIO PALMIERI, VICE PRESIDENT, LABOR, LEGAL AND REGULATORY POLICY OF
THE NATIONAL ASSOCIATION OF MANUFACTURERS
BEFORE THE
SUBCOMMITTEE ON REGULATORY AFFAIRS AND FEDERAL MANAGEMENT
COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
U.S. SENATE

JANUARY 19, 2017

Chairman Lankford, Ranking Member Heitkamp and members of the Subcommittee on Regulatory Affairs and Federal Management, thank you for the opportunity to testify about federal regulations and how the rulemaking process impacts U.S. small businesses, particularly small manufacturers.

My name is Rosario Palmieri, and I am the vice president of labor, legal and regulatory policy for the National Association of Manufacturers (NAM). The NAM is the nation's largest industrial trade association and voice for more than 12 million men and women who make things in America. The NAM is committed to achieving a policy agenda that helps manufacturers grow and create jobs. Manufacturers appreciate your attention to the regulatory burdens that are impacting their competitiveness and growth. In particular, we thank the chairman and ranking member for their efforts to improve our regulatory system.

The subcommittee's attention to the requirements contained in the Regulatory Flexibility Act (RFA), the Small Business Regulatory Enforcement Fairness Act (SBREFA) and other statutes designed to increase agencies' sensitivity to regulatory effects on small businesses is important as the new Congress and the new administration examine ways to improve our regulatory system. Chairman Lankford and Ranking Member Heitkamp, your bipartisan efforts at regulatory reform during the last session of Congress were highly admirable, and manufacturers stand ready to work with you to continue that momentum so that reform can become reality.

I. Manufacturing in the United States

Manufacturing in the United States lost 2.3 million jobs in the last recession. Since then, we have gained back 822,000 manufacturing jobs. Yet, the sector has struggled over the past two years from global headwinds and economic uncertainties. Manufacturing employment declined by 45,000 in 2016, with essentially stagnant production growth. On the positive side, signs at year's end indicated that business leaders and consumers were more upbeat about activity in 2017, especially since the election. To ensure that demand and output improve this year, the United States needs not only improved economic conditions but also government policies more attuned to the realities of global competition.

Manufacturing has the highest multiplier effect of any economic sector. For every \$1.00 spent in manufacturing, another \$1.81 are added to the economy. In addition, for every worker in manufacturing, another four employees are hired elsewhere. In 2015, manufacturers in the

United States contributed \$2.17 trillion to the economy (or 12 percent of GDP), and the average manufacturing worker in the United States earned \$81,289 annually, including pay and benefits—27.4 percent more than the average nonfarm business worker.

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

II. The Cost of Regulatory Burdens Facing Manufacturers

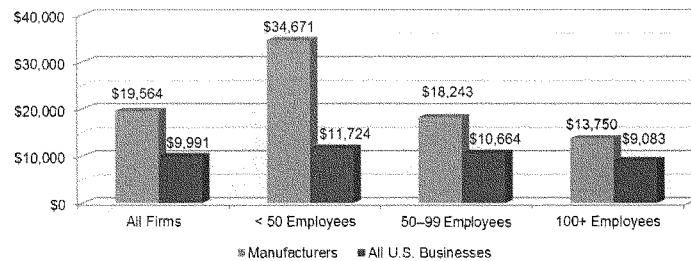
Because manufacturing is such a dynamic process, involving the transformation of raw materials into finished products, it entails more environmental and safety regulations than other businesses. The NAM issued a study¹ on the expansive set of federal regulatory requirements that are holding manufacturers back. Manufacturers face 297,696 restrictions on their operations from federal regulations. Eighty-seven (87) percent of manufacturers surveyed as part of our study indicated that if compliance costs were reduced permanently and significantly, they would invest the savings on hiring, increased salaries and wages, more R&D or capital investment. Regulations impose real costs that impact a company's bottom line, so it is extremely important that our regulatory system be transformed so that we are effectively protecting health and the environment while minimizing and seeking to eliminate unnecessary burdens. Despite the acknowledgment of lawmakers of the problems with our regulatory system, things are getting worse. Ninety-four (94) percent of manufacturers surveyed said the regulatory burden has gotten higher in the last five years, with 72 percent reporting that the burden is "significantly higher."

In September 2014, the NAM issued a report² that showed the economic impact of federal regulations. The report found that manufacturers in 2012 spent on average \$19,564 per employee to comply with regulations, nearly double the amount per employee for all U.S. businesses (see Figure 1). The smallest manufacturers—those with fewer than 50 employees—incurred regulatory costs of \$34,671 per employee per year. This is more than triple that of the average U.S. business.

¹ NAM, "Holding Us Back: Regulation of the U.S. Manufacturing Sector" (January 2017) <http://www.nam.org/Data-and-Reports/Reports/Holding-Us-Back--Regulation-of-the-U-S--Manufacturing-Sector/>

² NAM, "The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business" (September 2014), <http://www.nam.org/Data-and-Reports/Cost-of-Federal-Regulations/Federal-Regulation-Full-Study.pdf>.

Figure 1: Regulatory Compliance Costs per Employee per Year, 2012 (in 2014 Dollars)



The burden of environmental regulation falls disproportionately on manufacturers, and it is heaviest on small manufacturers because their compliance costs often are not affected by economies of scale (see Figure 2). Manufacturers recognize that regulations are necessary to protect people's health and safety, but we need a regulatory system that effectively meets its objectives while supporting innovation and economic growth. In recent years, the scope and complexity of federal rules have made it harder to do business and compete in an ever-changing global economy. As a result, manufacturers are sensitive to regulatory measures that rely on inadequate benefit and cost justifications.

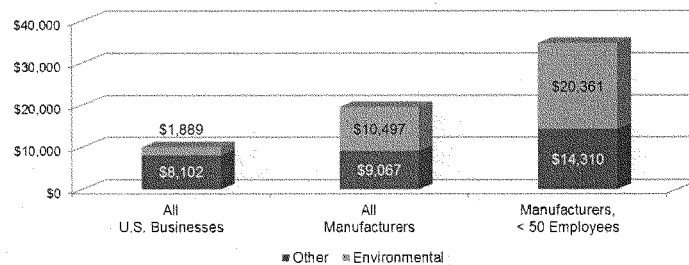
In October 2013, the Manufacturers Alliance for Productivity and Innovation (MAPI) released an updated study³ that highlighted the regulatory burdens placed on manufacturers. The study found that since 1981, the federal government has issued an average of just under 1.5 manufacturing-related regulations per week for more than 30 years. Individually and cumulatively, these regulations include significant burdens imposed on manufacturers in the United States and represent real compliance costs that affect our ability to expand and hire workers.

Manufacturers, particularly small manufacturers, know very well the importance of allocating scarce resources effectively to achieve continued success, which includes increased pay and benefits for employees. Every dollar that a company spends on complying with an unnecessary and ineffective regulatory requirement is one less dollar that can be allocated toward new equipment or to expand employee pay and benefits. Government-imposed inefficiencies are more than numbers in an annual report. They are manifested in real costs borne by the men and women who work hard to provide for their families. In a Federal Reserve Bank of Philadelphia report released last April, nearly 74 percent of manufacturing leaders in the region said that their state and federal regulatory compliance costs had increased over the past few years, with no one noting declines in this trend. In addition, they devoted 5.8 percent of their capital spending costs to regulatory compliance on average, more than what was spent on data and network security (4.7 percent) or physical security (2.8 percent).⁴

³ MAPI, *Growing Number of Federal Regulations Continue to Challenge Manufacturers* (October 2013), <http://www.mapi.net/blog/2013/10/growing-number-federal-regulations-continue-challenge-manufacturers>.

⁴ Manufacturing Business Outlook Survey (April 2016), Federal Reserve Bank of Philadelphia, www.philadelphiafed.org/manufacturing-BOS.

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



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

III. Regulatory Environment

Our regulatory system is in need of considerable improvement and reform. New regulations are too often poorly designed and analyzed and ineffectively achieve their benefits. They are often unnecessarily complex and duplicative of other mandates. Their critical inputs—scientific and other technical data—are sometimes unreliable and fail to account for significant uncertainties. Regulations are allowed to accumulate with no real incentives to evaluate existing requirements and improve effectiveness. In addition, regulations many times are one-size-fits-all without the needed sensitivity to their impact on small businesses. We can do better.

Unnecessary regulatory burdens weigh heavily on the minds of manufacturers. In the NAM Manufacturers' Outlook Survey for the fourth quarter of 2016, 71.2 percent of respondents cited an unfavorable business climate due to government policies, including regulations and taxes, as a primary challenge facing businesses—up from 62.2 percent in March 2012.

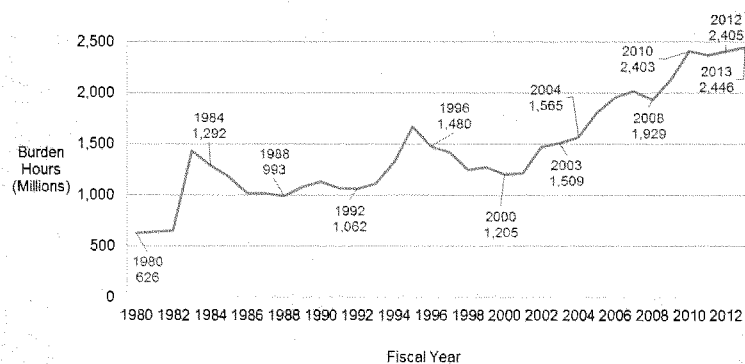
The federal government's own data reflect these challenges. According to the annual information collection budget, the paperwork burden imposed by federal agencies, excluding the Department of Treasury,⁵ increased from 1.509 billion hours in fiscal year (FY) 2003 to 2.446 billion hours in FY 2013, an increase of 62.1 percent (see Figure 3). In other words, federal

⁵ The Department of Treasury's burden estimates include the Internal Revenue Service and account for 75 percent of the total federal public burden imposed. Treasury's burden increased from 6.590 billion hours in FY 2003 to 7.007 billion hours (or 6.3 percent) in FY 2013. See Office of Information and Regulatory Affairs (OIRA), "Information Collection Budget of the United States Government," https://www.whitehouse.gov/omb/infoereg_infocol/#icr.

agencies—excluding the Department of Treasury—imposed more than 279,000 years' worth of paperwork burden on the American public in FY 2013.⁶

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

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



Manufacturers appreciate the need for recordkeeping and paperwork essential to ensuring compliance with important regulatory requirements, but government-imposed regulatory burdens continue to increase despite advancements in technology and both statutory and executive branch directives that federal agencies minimize unnecessary burdens.

As the modern federal regulatory state expanded, Congress grew increasingly concerned about the significant regulatory and paperwork burdens imposed on the public, particularly small businesses. In September 1980, the RFA was signed into law and requires federal agencies to thoughtfully consider small businesses and other small entities when developing regulations. If an agency determines that a regulation is likely to have a "significant economic impact on a substantial number of small entities," the agency must engage in additional analysis and seek less-burdensome regulatory alternatives. In addition to requiring improved regulatory analysis to better determine the small entity impact, the RFA attempted to improve public participation in rulemaking by small businesses. It also requires agencies to publish an agenda semiannually listing expected rulemakings that would impact small businesses and to conduct "lookback" reviews—required under Section 610 of the law—of regulations that affect small entities to identify rules in need of reform.

⁶ In FY 2013, federal agencies excluding the Department of Treasury imposed the equivalent of 7.7 hours of regulatory burden for every person in the United States. In FY 2003, per-person regulatory burden was 5.2 hours annually. This demonstrates that the increase in regulatory burden is far outpacing population growth. Population estimates available from the U.S. Census Bureau, <https://www.census.gov/popest/data/historical/2000s/index.html>.

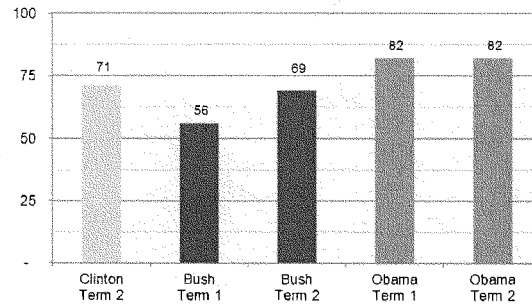
Despite the statutory requirements of the RFA and other reform measures, federal regulatory burdens continue to increase every year. Congress amended the RFA with passage of the SBREFA of 1996. Importantly, SBREFA requires the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA) to empanel a group of small business representatives to help consider a rule before it is proposed. In recognizing the importance of the SBREFA panel process, the 111th Congress expanded this requirement to include the new Consumer Financial Protection Bureau when it passed the Dodd-Frank Wall Street Reform and Consumer Protection Act.

There have also been presidential directives aimed at improving the regulatory state. The NAM welcomed efforts by President Barack Obama to reduce regulatory burdens. The president signed executive orders, and the Office of Management and Budget (OMB) issued memoranda on the principles of sound rulemaking, considering the cumulative effects of regulations, strengthening the retrospective review process and promoting international regulatory cooperation. Unfortunately, these initiatives have yet to provide real cost reductions for manufacturers or other regulated entities. President-Elect Donald Trump has focused much attention on the challenges of our regulatory system. Manufacturers look forward to working with the new administration on substantive regulatory reforms that will support economic growth, not hold it back.

Every administration over the past half century has introduced initiatives designed to reform the regulatory system. These past directives to reduce regulatory burdens were well-intentioned, but any benefits realized by those efforts have been subsumed by the unnecessarily burdensome regulations that federal agencies have been and are promulgating. Based on data from the Government Accountability Office,⁷ 650 major new regulations—defined as having an annual effect on the economy of at least \$100 million—have been issued by the Obama administration through the end of 2016. During President Obama's two terms, a new major regulation was issued every 4.47 days. Manufacturers and other regulated entities have confronted nearly 20 more major regulations per year from the Obama administration (82 major regulations per year) than during the Bush administration (62 major regulations per year). Figure 4 shows the major regulations issued per year since the enactment of the Congressional Review Act in 1996.

⁷ U.S. Government Accountability Office, Congressional Review Act Overview, <http://www.gao.gov/legal/congressional-review-act/overview>.

Figure 4: Major Regulations per Year, Through 2016



Regardless of the political party in charge, these regulations include significant burdens imposed on manufacturers and other small businesses and represent real compliance costs that affect our ability to expand and hire workers. There are numerous examples that highlight the regulatory challenges that manufacturers confront (see Attachment A). The additional costs of these regulations are added to the already significant cumulative burdens of existing regulations imposed on manufacturers and other businesses. There is a failure within the federal government to truly understand the impact of regulatory requirements, such as paperwork and recordkeeping, especially on small businesses.

IV. Reducing Regulatory Impediments

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

Manufacturers support reform proposals to strengthen the RFA and to ensure regulators are sensitive to the burdens placed on small businesses. The RFA's requirements are especially important to improving the quality of regulations and have saved billions of dollars in regulatory costs for small businesses. In January 2016, the SBA's Office of Advocacy—an independent office helping federal agencies implement the RFA's provisions—issued its annual report indicating that it helped save small businesses more than \$1.6 billion in FY 2015 in first-year cost savings. Since 1998, the Office of Advocacy indicates that the RFA has yielded nearly \$130 billion in savings for small businesses. Imagine the positive impact on regulations if agencies were not able to avoid the RFA's requirements so easily.

a. Increase Sensitivity to Small Business

The RFA requires agencies to be sensitive to the needs of small businesses when drafting regulations. Among a number of procedural requirements, agencies must consider less costly alternatives for small businesses and prepare a regulatory flexibility analysis when proposed and final rules are issued. Lawmakers have universally supported the RFA's provisions, but Congress needs to strengthen the law and close loopholes that agencies use to avoid its requirements.

Unfortunately, agencies are able to avoid many important RFA requirements by simply asserting that a rule will not impact small businesses significantly. A recent analysis in the *Administrative Law Review* shows that agencies avoided the requirement of the RFA for more than 92 percent of rules issued between the fall regulatory agendas of 1996 and 2012.⁸ Attachment A of my testimony outlines some of the most significant regulatory challenges currently facing small manufacturers, and most of those rules failed to conduct any small entity analysis or were deficient in significant ways. Among the reasons for this small number of regulations requiring a regulatory flexibility analysis is the exclusion of "indirect effects." One of the original authors of the RFA, Sen. John Culver (D-IA), intended that the scope of the RFA include direct and indirect effects.⁹ Unfortunately, the U.S. Court of Appeals for the D.C. Circuit in 1985¹⁰ disagreed, and subsequent courts have found "indirect effects" to be outside the scope of the RFA. This one change in the RFA would bring many of the rules most costly to small businesses under the act's framework and result in significant cost savings for small businesses. Clear examples of an entire class of regulations exempted from the RFA because of this decision are Clean Air Act rules establishing National Ambient Air Quality Standards. Despite the fact that even the EPA acknowledges these rules often cost hundreds of billions of dollars to implement, no small entities are directly affected by these rules—simply because the Clean Air Act only directly regulates states which, in turn, regulate small businesses. This simple clarification to the law would have significant benefits to our small business economy, all the while ensuring the continued strong protection of air quality. After all, the RFA only requires the analysis of small entity impacts; it does not dictate how an agency will design its regulation. Since the RFA was modeled on the National Environmental Policy Act (NEPA), its consideration of effects is also helpful to understanding the original intent of the authors of the legislation and the Congress that passed the law. The NEPA's implementing regulations define the term "effect" to mean "direct effects" and "indirect effects," which are caused by the action and are later in time or further removed in distance but are still reasonably foreseeable.¹¹

Over the past few years, the House has passed legislation—the Small Business Regulatory Flexibility Improvements Act—which would close many of the loopholes that agencies exploit to avoid the RFA's requirements, including the addition of indirect effects within the scope of the law. The bill has again been introduced as H.R. 33 by House Small Business Committee Chairman Steve Chabot (R-OH). The NAM encourages the Senate to take action on similar provisions to ensure vital improvements to the RFA are achieved in this Congress. Agency adherence to the RFA's requirements is important if regulations are to be designed in a way that protects the public, workers and the environment without placing unnecessary burdens on small businesses. Through careful analysis and an understanding of both intended and unintended impacts on stakeholders, agencies can improve their rules for small entities, leading to improved regulations for everyone.

⁸ See Connor Raso, *Agency Avoidance of Rulemaking Procedures*, 67 ADMIN. L. REV. 65, 69, 99 (2015) (identifying only 1,926 rules out of 24,787 as having completed RFA analyses).

⁹ 126 Cong. Rec. 21,456 (1980).

¹⁰ *Mid-Tex Elec. Coop. v. FERC*, 773 F.2d 327, 342-43 (D.C. Cir. 1985).

¹¹ 40 C.F.R. § 1508.8.

b. Streamline Regulations Through Periodic Review, Section 610

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

Through a thoughtful examination of existing regulations, we can improve the effectiveness of both existing and future regulations. Importantly, retrospective reviews could provide agencies an opportunity to analyze, revise and improve techniques and models used for predicting more accurate benefit and cost estimates for future regulations.

For an agency to truly understand the effectiveness of a regulation, it must define the problem that the rule seeks to modify and establish a method for measuring its effectiveness after implementation. In manufacturing, best practices include regular repriorizations and organized abandonment of less-useful methods, procedures and practices. The same mentality should apply to regulating agencies: the periodic review process should be the beginning of a bottom-up analysis of how agencies use their regulations to accomplish their objectives.

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

To truly build a culture of continuous improvement, the periodic review process must be strengthened. The power of inertia is very strong. Without an imperative to review old regulations, it will not be done, and we will end up with the same accumulation of conflicting, outdated and often ineffective regulations that build up over time. These types of systems need to be reinforced throughout the government to ensure regulatory programs are thoughtful, intentional and meet the needs of our changing economy.

As Michael Greenstone, former chief economist at the Council of Economic Advisers under President Obama, wrote in 2009, "The single greatest problem with the current system is that most regulations are subject to a cost-benefit analysis only in advance of their implementation. That is the point when the least is known, and any analysis must rest on many unverifiable and potentially controversial assumptions."¹² Retrospective review of existing

¹² Michael Greenstone, "Toward a Culture of Persistent Regulatory Experimentation and Evaluation," in David Moss and John Cisternino, eds., *New Perspectives on Regulation*, The Tobin Project, 2009, p. 113, http://tobinproject.org/sites/tobinproject.org/files/assets/New_Perspectives_Ch5_Greenstone.pdf.

regulations should include a careful and thoughtful analysis of regulatory requirements and their necessity as well as an estimation of their value to intended outcomes.

c. Hold Independent Regulatory Agencies Accountable

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

Independent regulatory agencies are required to comply with the RFA. Since independent regulatory agencies are not accountable to the OIRA nor do they participate in interagency review of their rules, accountability mechanisms to ensure executive branch agency compliance with the RFA do not exist for them. A stronger RFA is necessary because the courts are the only backstop to noncompliance by independent agencies.

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

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

V. Conclusion

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

In his January 2011 *Memorandum on Regulatory Flexibility, Small Business and Job Creation*,¹³ President Obama established a goal "to eliminat[e] excessive and unjustified burdens on small businesses and to ensur[e] that regulations are designed with careful consideration of their effects, including their cumulative effects, on small businesses." However, that goal gets farther from our reach with the regulatory accumulation that businesses in this country face. Your attention to regulatory reform has created optimism among manufacturers and others that the admirable goal set by the president can be achieved.

Manufacturers are committed to working toward policies that will restore common sense to our broken and inflexible regulatory system. Too many regulations that have significant effects on small businesses escape the RFA's requirements because unchallenged traditions enable agencies to exploit loopholes. The RFA must be strengthened to ensure all agencies

¹³ 76 Fed. Reg. 3827

carefully consider unintended impacts and costs and are sensitive to the needs of small businesses. The NAM urges the committee to move forward with legislation expeditiously. Jobs and growth for small manufacturers depend on your efforts.

Attachment A: Regulatory Challenges for Manufacturers

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

a. Existing Regulations

Equal Employment Opportunity Commission (EEOC) Employment Information Report (EEO-1) Form Change (81 Fed. Reg. 45479, approved without change). The form change requires all employers with 100 or more employees to submit employee compensation data based on sex, race and ethnicity, categorized in 12 pay bands and 10 job categories. The administration believes this will encourage compliance with equal pay laws, and agencies will be able to target enforcement more effectively by focusing efforts where there are grave discrepancies. The expanded recordkeeping requirements—the EEO-1 Report would expand from 180 data cells to approximately 3,600—put a company at risk of publicly disclosing employees' private information, potentially exposing proprietary information of a company. Moreover, the form change violates the Paperwork Reduction Act—it is unnecessary and duplicative, and the agency failed to employ sound rulemaking principles that are outlined in Executive Order 13563. Information collections, even ones that institute vast, new regulatory programs, are not subject to the RFA.

Federal Acquisition Regulatory (FAR) Council Rule/ Department of Labor (DOL) Guidance: Fair Pay and Safe Workplaces (Contractor Blacklisting, Implementation of Executive Order 13673) (81 Fed. Reg. 58562). The executive order and subsequent rule and guidance, which were published on August 25, 2016, could bar federal contractors from new work if there has been even an allegation of a labor law violation in the past three years. It would apply to contracts valued at \$500,000 or more, and the final rule expanded the proposed reporting requirements to include subcontractors, which would impact small business. First and foremost, the president and the regulating agencies do not have the legal authority to make the regulatory changes outlined in the rule and guidance. By directing the DOL to develop guidance that will establish degrees of violations not included in the underlying statutes, the executive order significantly amended the enforcement mechanisms Congress established for these laws. In addition, the order and implementation disregard existing enforcement powers the administration already has through federal acquisition regulations and labor laws as well as the long-standing process by which suspension and debarment actions are taken. This process is set forth in the FAR and specifically in FAR Part 9.4. Each agency has the ability to determine, through the agency's suspension and debarment official, whether the government should refrain from doing business with a particular contractor because the contractor is not "presently responsible." Factors taken into account for making such a determination include whether there has been a finding of fraud committed on the contract and/or willful and serious violations of other U.S. laws. Furthermore, the agency official may consider whether the contractor has taken measures to remediate past bad actions or eliminated systemic problems from the past. Rather than improving upon these existing processes, the executive order would unnecessarily create additional burdens on contractors and further complicate an already complex contracting process. In October 2016, a nationwide injunction affected the majority of the rule. The ruling strongly affirms the NAM's arguments related to the First Amendment; due process; constitutional, arbitrary and capricious concerns; and other concerns raised in the complaint.

DOL: Federal Contractor Paid Sick Leave Proposed Rule (81 Fed. Reg. 67598). As directed by Executive Order 13706, the DOL finalized its rule requiring all federal contractors and subcontractors to provide to employees seven days of paid sick leave annually, which can be used for personal illness as well as leave allowing for family care. This new mandate will

apply to any contractors' or subcontractors' employees working "on" or "in connection with" any new contracts, and there is no dollar or employee threshold for the requirement to apply. Furthermore, the days accrued will also carry over into the following year. There is a lot of confusion about this new mandate and how it will affect leave programs already in place at certain contractors and subcontractors. Manufacturers that already provide paid time may have to start tracking time in hourly increments if an employee is taking leave under the Family Medical Leave Act.

DOL's OSHA: Improve Tracking Workplace Injuries and Illnesses (81 Fed. Reg. 29623). On May 12, 2016, OSHA published its final rule changing reporting requirements for employer injury and illness logs and permitting the agency to publish the information on its publicly accessible website. While the agency has the statutory authority to collect the information, the statute does not authorize OSHA to make the information publicly available. The rule presents privacy issues for employees as the information contained in injury and illness logs includes personally identifiable information, as well as other private information about individual employees. This information should not be available for public consumption. The employer reports also include information that is unrelated to work activity, which, without context, could mischaracterize a company's safety record. Finally, despite lacking statutory authority, OSHA's update would place companies in enforcement jeopardy if the agency determines that a requirement such as additional training or even reflective clothing is an "adverse action" in response to an employee injury report. In a supplement to the proposed rule, OSHA provided no regulatory text, but it suggested in the questions it posed that a mere posting of a company's safety record could be viewed by the agency as the company discouraging the reporting of incidents. The new requirements inject uncertainty and ambiguity into the workplace safety dynamic. Protections for employees from retaliation in response to injury reports were and are comprehensive and well-established and support company initiatives to improve the health and well-being of employees. Within the final rule, OSHA acknowledges, yet dismisses, commenters' assertions that the rule should have been subject to a small business review panel as required under the SBREFA of 1996. The rule imposes significant consequences, however, including reputational harm from publishing information that is often preliminary and does not reflect actual workplace incidents.

DOL OSHA: Occupational Exposure to Crystalline Silica (78 Fed. Reg. 56274). OSHA finalized the crystalline silica rule on March 25, 2016, reducing by half the permissible exposure limits for crystalline silica and mandating extensive and costly engineering controls. It also will require employers to provide exposure monitoring, medical surveillance, work area restrictions, clean rooms and recordkeeping. The proposal is based on outdated data and would impact 534,000 businesses and 2.2 million workers. The costs of this proposal could far exceed its benefits. An analysis by engineering and economic consultants estimated that the silica rule would impose \$5.5 billion in annualized compliance costs on affected industries. Silica is perhaps the most common construction and manufacturing material in the world; it is a critical component in many manufacturing, construction, transportation, defense and high-tech industries and is present in thousands of consumer products. OSHA's estimate relies upon data from a SBREFA panel that examined a draft rule in 2003, more than 13 years ago. Since 2003, significant changes in the economy and technological advances made in personal protective equipment demonstrate that the proposed changes are unnecessary and overly burdensome. During the rule's comment period and until it was made final in late March, the NAM and other industry stakeholders repeatedly asked OSHA to convene a new SBREFA panel so the most current analysis of costs and other impacts could be considered. These requests were rejected. Manufacturers will now be faced with a new regulation that could force some of our members to shut their doors.

The DOL's Office of Labor-Management Standards: Interpretation of the "Advice" Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act (Persuader Rule) (81 Fed. Reg. 15924). On March 23, 2016, the DOL published its final persuader rule, which provides sweeping changes to the rules that administer the Labor-Management Reporting and Disclosure Act. The agency drastically expanded the definition of "persuader" activity on how employers can seek advice regarding labor-organizing activities and when an entity will have to disclose information to the department. Under the old rules, only those entities that had direct contact with employees regarding labor-organizing campaigns would have to disclose their activity to the DOL. Under the new rule, however, even those consultants who have no face-to-face contact with employees and are educating employers on rights to organize and bargain collectively will have to report to the DOL as persuaders. The only exception to the new definition is if an entity or consultant is only giving advice to the employer (this would include lawyers). These changes would make it more difficult for manufacturers, especially smaller-sized manufacturers, to educate employees on union campaigns or to seek additional information on what is permitted for discussion under the law. During attempted RFA analysis, it was determined that economic impacts to small entities would follow; however, the department stated that it would not have significant impacts on a substantial number of small entities, and therefore, a full RFA analysis was unnecessary. In November 2016, a judge granted motion for summary judgment and entered an order for a permanent injunction with nationwide application.

DOL's Wage and Hour Division: Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees (81 Fed. Reg. 32391). On May 23, 2016, the DOL finalized its increase of the minimum salary threshold from \$23,440 to \$47,776 for employees to be exempted from overtime pay pursuant to the Fair Labor Standards Act. Of significant concern to manufacturers, particularly small firms, is a provision that would automatically tie future salary threshold increases to the Consumer Price Index. Under certain estimates, the minimum salary threshold could be \$70,000 in 2020. In November 2016, a federal judge issued a nationwide injunction preventing the implementation of the rule, asserting that the department likely exceeded its statutory authority.

EPA: Carbon Pollution [i.e., Greenhouse Gas (GHG)] Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units (80 Fed. Reg. 64662). The EPA finalized its much-publicized carbon pollution standard for existing power plants on October 23, 2015, setting first-of-its-kind performance standards for GHG emissions from existing power plants. The EPA's rule will fundamentally shift how electricity is generated and consumed in this country, effectively picking winners and losers in terms of both technologies and fuels. The rule also represents an attempt to vastly expand the EPA's traditional authority to regulate specific source categories by setting reduction requirements that reach into the entire electricity supply-and-demand chain. The requirements will be substantial, potentially costing billions of dollars per year to comply. Some studies estimate that compliance with the rule would cost well over \$300 billion and cause double-digit electricity price increases for ratepayers in most states. Manufacturers are concerned about these potential costs and reliability challenges as electric power fleets are overhauled in compliance with the regulations. Manufacturers are also keenly aware that the EPA is using this regulation as a model for future direct regulations on other manufacturing sectors—meaning manufacturers could potentially be hit twice by GHG regulations. Interestingly, the EPA asserts that its final rule "will not have a significant economic impact on a substantial number of small entities." The regulation is currently stayed by the Supreme Court until litigation is resolved. Thirty-four senators and 171 members of the House

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

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

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

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

EPA: Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units (80 Fed. Reg. 64510). On October 23, 2015, the EPA issued first-ever standards of performance for GHG emissions

for new fossil-fuel-fired electric generating units. The EPA inappropriately concluded that carbon capture and sequestration (CCS) is "adequately demonstrated" for utility-scale applications and its utilization is the basis for the mandated standard for all new coal-fired power plants. As a matter of fact, CCS has not been adequately demonstrated at the utility scale—making a standard that requires it for all new coal plants an effective ban on those plants. Manufacturers support an "all of the above" approach to energy, and the EPA's proposed regulations on new power plants would deselect a fuel source—coal—from the nation's future energy portfolio. Moreover, the manufacturers of CCS worry that the regulation will stifle investment in this promising but as-yet unproven technology. As with its other rules, the EPA asserts that its final rule "will not have a significant economic impact on a substantial number of small entities."

EPA and the Army Corps of Engineers: Definition of "Waters of the United States" Under the Clean Water Act (80 Fed. Reg. 37054). On May 27, 2015, the EPA and Army Corps of Engineers finalized a rule to greatly extend federal jurisdiction of Clean Water Act programs well beyond traditional navigable waters to tributaries, flood plains, adjacent waters and vaguely defined "other waters." The rule gives federal agencies direct authority over land-use decisions that Congress had intentionally reserved to the states. Its vague definitions subject countless ordinary commercial, industrial and even recreational and residential activities to new layers of federal requirements under the Clean Water Act. For manufacturers, the uncertainty of whether a pond, ditch or other low-lying or wet area near their property is now subject to federal Clean Water Act permitting requirements is a regulatory nightmare, which can introduce new upfront costs, project delays and threats of litigation. As of October 9, 2015, the rule has been stayed nationwide by the U.S. Court of Appeals for the Sixth Circuit, pending resolution of litigation. When one considers the number of small manufacturers and farmers that this rule will impact, it is confounding that the EPA certified that the rule will not have a significant economic impact on a substantial number of small entities.

Interagency Working Group on Social Cost of Carbon: Technical Support Document, Social Cost of Carbon for Regulatory Impact Analysis. In May 2013, the administration increased its estimates of the "social cost" of emitting carbon dioxide (CO₂) into the atmosphere (i.e., social cost of carbon). As a result, the new estimates allow agencies to greatly increase the value of benefits of regulations that target or reduce CO₂ emissions. The process for developing the social cost of carbon estimates was not transparent and failed to comply with OMB guidelines and information quality obligations. Many of the inputs to the models were not subject to peer review, and the interagency working group that developed the new estimates failed to disclose and quantify key uncertainties to inform decision makers and the public. Despite wide public concern over the new estimates, agencies are using them to justify the costs of many of the costliest federal regulations. The OMB public comment period initiated at the end of 2013 yielded significant concerns by stakeholders that have never been adequately addressed, and federal agencies continue to rely on the 2013 social cost of carbon estimates that were developed and finalized without any public participation. Guidance documents are not subject to the RFA.

NLRB: Ambush Elections (79 Fed. Reg. 74308). On April 14, 2015, the NLRB's "ambush elections" rule became effective. The new rule shortens the time in which a union election can take place to as little as 14 days and limits allowable evidence in preelection hearings. The NLRB provided no evidence supporting the dramatic change in policy. Business owners would effectively be stripped of legal rights ensuring a fair election, and those who lack resources, or in-house legal expertise, will be left scrambling to hastily navigate and understand complex labor processes. The compressed time frame for elections could deny employees the opportunity to make fully informed decisions about unionization. The rule also requires all

employers to turn over their employees' personal e-mail addresses, home and personal cell phone numbers, work locations, shifts and job classifications to union organizers. Employees have no say in whether their personal information can be disclosed, and the recipient of the personal information has no substantive legal responsibility to safeguard and protect workers' sensitive information. The rule also provides no restriction on how the private information can be used, and employees have no legal recourse to hold accountable an outside group that compromises this important private information. Surprisingly, the board determined that there would be no significant impact on small entities as the RFA would only require they determine the direct burden of compliance associated in cases of representation elections, and not that they consider the indirect cost associated with the rule impacting all companies that would hire legal advice to stay informed or ensure compliance.

NLRB: Joint-Employer Standard (Browning-Ferris Industries of California, Inc. (362 NLRB No. 186)). On August 27, 2015, the NLRB issued a decision in the Browning-Ferris Industries, Inc. case, which redefines the 30-year-old joint-employer standard, calling into question what type of relationship one employer has with another. The previous standard deemed businesses joint employers only when they share direct and immediate control over essential terms and conditions of employment, including hiring, firing, discipline, supervision and direction. Now, however, manufacturers who contract out for any product or service with another company could find themselves in a joint-employer relationship triggering responsibility for collective bargaining agreements and other parts of the National Labor Relations Act. The previous standard is one that all industries understood and had been operating with for more than 30 years. Due to the fact that there has been no change in circumstance in the business community, the change in this standard is unjustified. Manufacturers will now have to reanalyze all business relationships and how they do business in the future. NLRB adjudicatory decisions, even those with widespread effect on businesses, are not subject to the RFA.

b. Currently Proposed Regulations

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

CPSC: Voluntary Remedial Actions and Guidelines for Voluntary Recall Notices (78 Fed. Reg. 69793). In November 2013, the CPSC issued a proposed rule that would place significant burdens on manufacturers and retailers of consumer products and negatively impact the highly successful voluntary recall process. The proposed rule would make voluntary corrective action

plans and voluntary recalls legally binding, increasing enforcement jeopardy and legal consequences in product liability, other commercial contexts or in a civil penalty matter. The proposal would eliminate a company's ability to disclaim admission of a defect or potential hazard. The proposed rule would also empower CPSC staff to include compliance programs in corrective action plans. The CPSC lacks the statutory authority to proceed with binding regulations for voluntary programs. The success of our consumer product recall system is based on a strong cooperative relationship between the CPSC and the companies it regulates. The rule removes long-standing incentives for firms to proactively cooperate with the CPSC and could seriously threaten the Fast-Track recall program, which the CPSC itself highlights as a model of good governance and was implemented as a way to assist small firms to issue effective recalls. Small businesses that would be impacted by the proposed rule include manufacturers, importers, shippers, carriers, distributors and retailers. However, the CPSC failed to include an initial regulatory flexibility analysis in its proposed rule.

c. Anticipated Proposed Regulations

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

**Written Testimony Presented Before the United States Senate
Homeland Security and Governmental Affairs Subcommittee on
Regulatory Affairs and Federal Management
Hearing Titled
“Improving Small Business Input on Federal Regulations: Ideas for Congress and
a New Administration”
January 19, 2017**

My name is Jerry Hietpas. I am the President of Action Safety Supply Co. a road construction related services company located in Oklahoma City and Tulsa Oklahoma. Since our founding in May 1975 our company has continuously served the highway and infrastructure industry in Oklahoma. We are fortunate to have about 160 full-time employees working with us.

We specialize in temporary traffic control devices and service, install guardrail, cable barriers, provide highway striping, impact attenuation devices, manufacture and install the permanent highway signs and sign posts including roadside highway guide signs and the overhead sign structures. We provide and maintain the temporary barriers that separate traffic during construction, the electronic changeable message signs and manufacture, install and maintain the radar trailers that monitor traffic speeds and volumes that provide the information that gets displayed on the electronic signs.

Our company and employees are dedicated to making highway work zones as safe as possible for the road user and our customers, the highway contractors and state agency personnel as they work to improve and maintain our highway system.

We recognize the need you have to provide oversight and how you are held accountable to the taxpayers for their resources you commit on their behalf to build and maintain our National Transportation System. You must be able to assure yourselves that good value is received in exchanged for the investment made. Sometimes it seems that as you implement the laws, compliance with the regulations that govern the process carry a higher value than the collection of meaningful data, achieving lower costs or a higher quality end result.

In the interest of time, my testimony will focus on three areas today:

- 1.) The U.S. Department of Transportation, Federal Motor Carrier Safety Administration regulations as they apply to road striping trucks and truck mounted attenuators (crash cushions) with a small detour into hours of service regulations.
- 2.) The minimum pay rates paid to highway workers on federally funded projects as required under Davis-Bacon Act and administered by the U.S. Department of Labor and what appears on the surface to be an arbitrary application of the regulations used to establish geographical areas of the application of wages to pay.
- 3.) A completely different type of wage, hours, trade and demographics data that was required on a recent Housing and Urban Development project where we did some striping on a relatively minor project and a discussion about additional documentation requirements during the last round of stimulus projects.

USDOT Number Regulations

The USDOT Federal Motor Carrier Division **REQUIRES** that a company obtain a USDOT number if it operates vehicles with a gross vehicle weight of 10,001 pounds or more and the company transports hazardous materials. The company also must work in multiple states. Some states, such as Oklahoma, require that a company obtain a USDOT number even if it only does business in Oklahoma (Intrastate carrier). The primary purpose of the USDOT number is for tracking a company's safety record.

We stripe roads with a type of epoxy marking material. While this material has lasted up to 10 years when properly applied on high-volume roads and Interstate Highways providing great cost vs. benefit value, it has one component in it that is caustic and is therefore listed as a "hazardous" material and requires the vehicle to carry placards. Our company must be listed as a Hazardous Materials Carrier (HAZMAT) because of using these materials and is subject to all of the regulations. It makes sense. We all want our motor carriers, **ESPECIALLY** our HAZMAT carriers to be safe operators. Repeated accidents by a HAZMAT carrier will trigger increased inspections by enforcement authorities including stopping and inspecting vehicles with that USDOT number when seen traveling down the highway.

I mentioned our Truck Mounted Attenuator trucks. (TMAs) These vehicles by design must be 10,001 pounds or more to safely operate as an attenuator. The primary purpose of this "crash" truck is to follow slower moving operations (such as striping operations) and protect our employees from injury if a vehicle strikes our slower moving equipment. These trucks must carry our USDOT number.

TMAs have a secondary use as well. When the permanent attenuator, such as those protecting bridge piers, are damaged in an accident, a TMA can quickly be deployed to take the place of the damaged attenuator until it can be repaired. This action keeps the bridge safe in case a subsequent accident occurs. We routinely respond to the Oklahoma Department of Transportation's (ODOT) requests to provide our TMA trucks to protect these damaged permanent attenuators until they are repaired. In this application, our trucks get hit. Many of the hits are hit and run but in some cases a wrecker is needed. If that were to happen, a reportable incident has happened. To make it easy to know when reports are needed and filed, enforcement people use the following criteria. If an accident requires a hearse, nurse or wrecker a reportable incident occurs.

Because of the frequency of these accidents, our company a HAZMAT carrier, was identified as an unsafe carrier and was "flagged" and given increased enforcement. Our crews driving to or from a striping job were stopped and inspected on a daily basis. Countless crew hours were lost during these safety inspections that were simply caused because our TMA trucks were involved in too many reportable accidents. The only way to reduce the number of these accidents was to not respond to ODOT's requests and get out of that business. As of late, we only get stopped on the side of the road and inspected a couple of times a month. The inspections continue to cost us time and money. Inspectors concerned with complying with the process are costing us a lot of money.

Davis-Bacon Wage Rates

Attached to my testimony is a colored map of the State of Oklahoma. These colors correspond to the different minimum wage rates required to be paid to construction workers on federally funded projects in the various class codes and geographical areas of the state. The corresponding rates are color coded as well and attached for your reference.

HISTORY

The Davis–Bacon Act of 1931 is a United States federal law that establishes the requirement for paying the local prevailing wages on public works projects for laborers and mechanics. It applies to "contractors and subcontractors performing on federally funded or assisted contracts in excess of \$2,000 for the construction, alteration, or repair (including painting and decorating) of public buildings or public works".

CURRENTLY

The Davis–Bacon Act was entered into the United States Code as 40 U.S.C. §§ 276a-276a-5, but has now been re-codified as 40 U.S.C. 3141-3148. The Act covers four main areas of construction: residential, heavy, buildings, and highway. Within these areas are further classifications, including craft positions such as plumber, carpenter, cement mason/concrete finisher, electrician, insulator, laborer, lather, painter, power equipment operator, roofer, sheet metal worker, truck driver, and welder.

The agency responsible for collecting and disseminating the prevailing wage data is the Wage and Hour Division (WHD) of the United States Department of Labor (DOL). The procedure "involves four steps: (1) planning and scheduling of surveys, (2) conducting the surveys, (3) clarifying and analyzing the respondents' data and (4) issuing the wage determinations."

Planning and scheduling surveys: In the third quarter of each year, the WHD distributes a Regional Planning Survey Report, published by the F. W. Dodge division of the McGraw-Hill Information Systems, to regional offices. The regional offices then consider the types of construction planned as well as the age of the current wage determination. This analysis determines when and where surveys will be conducted.

Issuance of surveys: WD-10 survey forms are sent to contractors and subcontractors along with a cover letter requesting information. Letters and forms are also sent to members of Congress, trade associations, and building trade unions to solicit information from them.

Compilation of data: WHD analysts then review the returned forms for completeness, ambiguity, and inconsistencies. If the information received is deemed to be inadequate, the scope of the survey may be expanded. For example, if it is determined that relevant projects have not been completed recently, or that the area is inadequately represented, WHD may conduct telephone surveys to increase the robustness of data.

Publication of data: Once compiled and analyzed, the wage determinations are made publicly available.

The geographical areas determined by the US DOL are cumbersome and arbitrary. There are 9 different wage determinations that incorporate the 77 Oklahoma Counties. Although the statute does make it clear that we will have wage classifications and geographical areas, the USDOL fails to work with local entities to determine what might be the best process for the local departments and contractors. For instance, why have 9 areas when we could have 8 that overlapped with the current 8 ODOT divisions? When we asked this question, we were quickly informed that “things just don’t work like that”. In essence what has occurred is that contractors will simply pay the highest wage determination in order to not have to adjust their workers’ pay downward if they happen to move that worker to a different territory. It is not uncommon for a single project to cross county lines requiring both sets of wage determinations be included in the contract documents.

The Department and contractors certainly spends a significant amount of administrative time on every federal-aid project to verify that the contractor payrolls are in compliance. The numbers are not huge for the administrative burden, but with many federal-aid projects being worked on at any given time, the costs can quickly add up.

A possible solution may be to establish a simple urban and rural area rate and require the Department of Labor to justify any proposed wage rate difference based on a factual comparative report that is specific to that worker classification.

HUD Project Wage and Data Issue

The majority of our work is done on the state roadway system, on city streets or on county roads. We also work with our customers on military bases or airports when needed. We had the opportunity to do striping on a small city street project in Moore, OK. We did not know part of the funding was coming from HUD. The job would take our crew about four hours to complete.

I have with me a 3/8-inch-thick stack of papers including the necessary forms that had to be completed, the instructions for filling out the forms, requirements for additional letters and certification requirements, request for demographic information on the individuals on the crew and a note from our payroll supervisor informing me she had to watch a 30-minute instructional video. All of this had to be completed prior to be able to make an application to receive payment for the work we did.

Our customer told us after the fact that they were told the city was having difficulty getting someone to do this type of work for them. We both agreed that we understood why and it brought back to mind the old story I heard about the military having to pay \$10,000.00 for a hammer. While I cannot testify if that story was true or not I CAN testify that after our experience working on and getting paid for the work on the HUD project, I have a better understanding why it is difficult for the city to find contractors to do the work.

Additional Reporting for Stimulus Projects: The last stimulus projects (American Recovery and Reinvestment Act of 2009 ARRA) required separate reporting in addition to our regular Certified Payroll Report required under Davis-Bacon. It is identified as form 1589 and requires the number of employees used, the hours worked and payroll dollars involved.

Our Davis-Bacon payroll reports are all computer generated because of the volume of reports needed and the data required. ARRA form 1589 was done by hand because of the temporary nature of the need and limited data required. We also did very few of these projects so the time impact to us was limited. My payroll supervisor estimated the additional reporting time she spent over the three-year period was about 300 hours.

Conclusion:

Thank you for the opportunity you have granted me to come and testify before you today and for the willingness of the committee to hear the concerns of small business, our small business, how some regulations have a negative impact and increase costs.

STATEMENT FOR THE RECORD
BEFORE THE SENATE SUBCOMMITTEE ON
REGULATORY AFFAIRS AND FEDERAL MANAGEMENT
ON
“IMPROVING SMALL BUSINESS INPUT ON FEDERAL REGULATIONS:
IDEAS FOR CONGRESS AND A NEW ADMINISTRATION”
JANUARY 19, 2017
LAJUANNA RUSSELL
FOUNDER & PRESIDENT – BUSINESS MANAGEMENT ASSOCIATES, INC

Good morning Chairman Lankford, Ranking Member Heitkamp and members of the Committee.

My name is LaJuanna Russell. I'm the founder and president of Business Management Associates, Inc. (BMA), a business process and human capital management firm with approximately 100 employees. I'm also a member of the Board of Directors and Small Business Council for Small Business Majority, a national small business advocacy organization. Thank you for allowing me to share my comments with you on the impact of federal regulations on small businesses.

I founded my business in 2005 to continue the work I began during my consulting career and to provide jobs to those in need. As a small business owner, I'm all too familiar with the debate about the impact of regulations on entrepreneurs. I'm here to say this issue is much more nuanced than most realize.

Most entrepreneurs start their businesses because they love doing “the thing” they are doing—and want to do it bigger, better and faster than anyone else. We are driven by an internal vision that is unlike most. We believe we see the future and believe we know how to implement some of that future today. We know going in that there are some rules and regulations (tax law, Department of Labor regulations, etc.), but we do not anticipate the preponderance of acts, bills, laws and regulations that we must follow—that seemingly change daily. As a federal contractor, this is quadrupled when you consider the federal acquisition process.

I, like the majority of small business owners, actually believe certain government regulations play an important role and are necessary for a modern economy. According to a poll conducted by Small Business Majority, 86% of small business owners agree. We also believe our businesses can live with regulation if it is fair and manageable (93% of those polled).

In addition, nearly 8 in 10 small employers agree regulations are important in protecting small businesses from unfair competition and to level the playing field with big business. We do believe that government can play an effective role in helping us thrive—as long as the enforcement of regulations is at least as tough on large corporations as it is on small businesses.

Although we may not see regulations as our No. 1 concern—generating sales and increasing revenues will always come in first—regulations do remain an issue that

consume time and resources. But it's important to note that most small businesses are more concerned with issues like demand and job creation. When Small Business Majority asked small business owners what they believe would do the most to create jobs, the majority cited eliminating incentives for employers to move jobs overseas. Next was cutting taxes and then increasing consumer purchasing power. As a small business owner and small business advocate myself, I can tell you that most small businesses are much more concerned with regulations at the local level, especially when you have employees crossing multiple states or jurisdictions.

It should come as no surprise then that the vast majority of small businesses supported tougher regulations for the financial industry under the Dodd Frank Act. Small business owners believe Wall Street should be held accountable for the practices that caused the financial crisis – and we do believe that tougher rules and enforcement will make this happen. Nearly six in 10 small business owners said that for far too long, Wall Street banks and financial companies wrote their own rules, leaving small businesses and consumers vulnerable and without protection. An overwhelming 84% of small businesses support the Consumer Financial Protection Bureau, an entity formed by the Dodd Frank Act and designed to help prevent abusive lending practices by providing clear rules and oversight of financial companies.

Dodd Frank assists in getting small businesses closer to a level playing field with big business. The next step is to get policies in place that ensure regulations are monitored and embed true accountability and consequences for large businesses. We must put policies in place that ensure small businesses, our nation's biggest job creators, have the environment to prosper. This involves implementing a tax code that actually benefits small business owners and closes tax loopholes that only benefit large corporations. Polling numbers speak directly to this point: 90% percent of small business owners believe big corporations use loopholes to avoid taxes that small businesses have to pay, and 72% want to see tax loopholes that favor large corporations eliminated.

For my business, it also means increasing opportunities for small businesses to contract with the federal government and ensuring we have support once we begin to grow. Amazingly, once a small business expands out of its SBA designated small business size standard (sometimes as low as \$7 million in annual revenue), we are immediately thrust into an environment where we are competing with large, billion dollar corporations.

This ability to compete is even further highlighted by the need to ensure that there's a healthcare system in place that helps self-employed entrepreneurs, small businesses and their employees. In order to attract talent, small business owners must be able to obtain and offer robust health coverage.

The Affordable Care Act (ACA) has been crucial in helping more small businesses and self-employed entrepreneurs gain access to comprehensive and affordable coverage. Many provisions of the healthcare law have been key to making health insurance more accessible and affordable for small businesses like mine. In addition to the marketplaces, a multitude of cost containment provisions have gone into effect that are helping to lower costs and provide more stability throughout the system. At BMA, we offer health coverage to our employees and pay 80% of their premiums. We've been able to continue offering robust health benefits because our healthcare increases have been much smaller than they were before the ACA was implemented. In fact, our increase in 2016 was only 3%.

Many small business owners struggled to offer health insurance to their employees prior to the ACA due to cost. The annual 20-30% increases were unbearable. Small Business Majority's opinion polling found that prior to the ACA, the majority of small business owners provided insurance to at least some of their employees, but of those who didn't,

70% said it's because they couldn't afford it. What's more, small businesses paid 18% more on average for health coverage than large companies and received fewer comprehensive benefits.

New research released by the Department of Treasury last week found that one in five 2014 marketplace consumers is a small business owner or self-employed, and that small business owners and self-employed individuals are nearly three times as likely to purchase marketplace coverage as other workers. This shows the extent to which the law is helping small business owners and self-employed entrepreneurs.

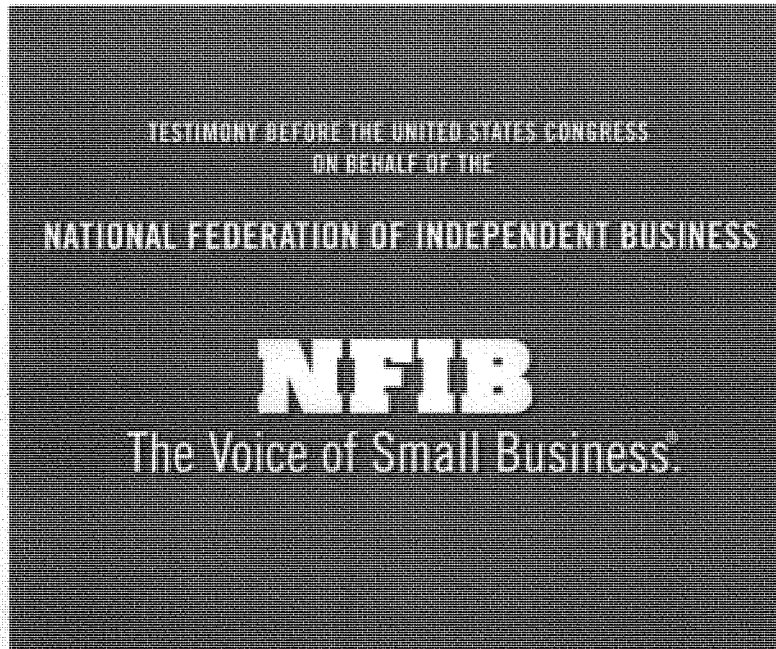
When you consider the number of Americans that small businesses employ and the huge impact to the working class that we can have, it is absolutely critical to implement effective mechanisms to receive small business input when considering regulatory changes. Our economy depends on it – and on us.

Thank you again for the opportunity to comment on this today.

Sincerely,

LaJuanna Russell, Founder and President

Business Management Associates, Inc



Statement for the Record of Karen R. Harned

Executive Director, NFIB Small Business Legal Center

Before the

**U.S. Senate Committee on Homeland Security and Government Affairs
Subcommittee on Regulatory Affairs and Federal Management**

**Hearing on: "Improving Small Business Input on Federal Regulations: Ideas for
Congress and a New Administration"**

January 19, 2017

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

Chairman Lankford and Ranking Member Heitkamp,

On behalf of the National Federation of Independent Business (NFIB), I appreciate the opportunity to submit for the record this testimony for the Senate Subcommittee on Regulatory Affairs and Federal Management's hearing entitled, "Improving Small Business Input on Federal Regulations: Ideas for Congress and a New Administration."

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

Despite the devastating impact of regulation on small business, federal agencies issued 4,084 rules in 2016 – more than 11 each day.⁴ In addition, according to the Administration's fall 2016 regulatory agenda, government bureaucrats are working on at least 3,318 more.⁵

When it comes to regulations, small businesses bear a disproportionate amount of the regulatory burden.⁶ This is not surprising, since it's the small business owner, not one of

¹ NFIB Research Foundation, *Small Business Economic Trends*, at p. 20, January 2017. <chrome-extension://oemmnqcbldboiebfmladdacbdmfmadadm/http://www.nfib.com/assets/SBET-December-2016.pdf>

² *Id.*

³ Wade, Holly, *Small Business Problems and Priorities*, at p. 17, August 2016. <chrome-extension://oemmnqcbldboiebfmladdacbdmfmadadm/http://www.nfib.com/assets/NFIB-Problems-and-Priorities-2016.pdf>

⁴ Data generated from www.regulations.gov

⁵ <https://www.reginfo.gov/public/do/eAgendaMain>

⁶ Babson, *The State of Small Business in America 2016*, <chrome-extension://oemmnqcbldboiebfmladdacbdmfmadadm/http://www.babson.edu/executive-education/custom-programs/entrepreneurship/10k-small-business/Documents/goldman-10ksb-report-2016.pdf>; Crain, Nicole V. and Crain, W. Mark,

a team of “compliance officers” who is charged with understanding new regulations, filling out required paperwork, and ensuring the business is in compliance with new federal mandates. The small business owner is the compliance officer for her business and every hour that she spends understanding and complying with a federal regulation is one less hour she has to service customers and plan for future growth.

During my nearly 15 years at NFIB I have heard countless stories from small business owners struggling with a new regulatory requirement. To them, the requirement came out of nowhere and they are frustrated that they had “no say” in its development. That is why early engagement in the regulatory process is key for the small business community. But small business owners are not roaming the halls of administrative agencies, reading the *Federal Register* or even *Inside EPA*. Early engagement in the rulemaking process is not easy for the small restaurant owner in Norman, Oklahoma or small manufacturer in Bismarck, North Dakota. As a result, small businesses rely heavily on the notice-and-comment rulemaking process, small business protections in the Regulatory Flexibility Act (RFA), and internal government checks like the Office of Advocacy at the Small Business Administration (SBA) and Office of Information Regulatory Affairs (OIRA) to ensure agencies don’t impose costly new mandates on small business when viable and less expensive alternatives to achieve regulatory objectives exist.

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 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 it comes to small business regulation. 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 particular issues that continue to plague small business 20 years after SBREFA became law.

Regulatory reform is needed to ensure that SBREFA protections are expanded to other agencies, indirect costs of regulation on small business are taken into account, 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.

The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business, September 10, 2014. [chrome-extension://oemmgcbldboiebfhladdacbfmadadm/http://www.nam.org/Data-and-Reports/Cost-of-Federal-Regulations/Federal-Regulation-Full-Study.pdf](http://www.nam.org/Data-and-Reports/Cost-of-Federal-Regulations/Federal-Regulation-Full-Study.pdf).

NFIB Supports Expansion of SBREFA Protections to All Federal Agencies

NFIB supports reforms that would expand SBREFA's reach into other agencies. SBREFA and its associated processes, such as the Small Business Advocacy Review (SBAR) panels, are important ways for agencies to understand how small businesses fundamentally operate, how the regulatory burden disproportionately impacts them, and how the agency can develop simple and concise guidance materials that are designed with the small business owner in mind.

Department of Labor "Overtime" Rule

The Department of Labor (DOL) "Overtime" Rule demonstrates the need for expanded SBAR panels. On May 18, 2016 DOL issued its "Overtime" rule that would increase the salary threshold from \$23,660 a year to \$47,476 for executive or "white collar" employees. The rule would also automatically increase the salary threshold every three years.⁷

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 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 take into account 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. Typically, the duty of compliance officer falls to the business owner or the primary manager. These individuals are generally not experts in wading through regulatory text, so familiarization time is greater than for large companies. Alternatively, a small business could hire an outside expert to devise a compliance plan, but this cost will also be significantly greater than what a firm with in-house compliance staff would endure.

Second, the IRFA overestimated the wage increases employees are 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 is 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 be "bad news" for both

⁷DOL's overtime rule was initially scheduled to take effect on December 1, 2016 until a federal district court in Texas issued a preliminary injunction enjoining the rule from being enforced while its legality is considered by the courts. NFIB is a plaintiff in one of the lawsuits challenging the rule.

employers and employees.

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

Under DOL's rule, Mayfield predicted that he'll need to move the managers back to hourly positions as there is simply no way he can afford to pay over 10 managers \$47,000 each. As a result, he predicted the skill level of his managers will decrease. Moreover, Mayfield noted that rather than giving managers overtime, he would likely hire a few more part-time employees. What he would not do would be to pay managers overtime; instead he would continue to strictly enforce a no-overtime policy. Overtime costs, he said, could not be passed on to customers nor could the business afford to absorb added labor costs.

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

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 a 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 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. There are instances where EPA and OSHA have declined to conduct a SBAR panel for a significant rule and/or a rule that would greatly benefit from small business input.

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.

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.⁸ The rule requires states to reduce carbon emissions by shutting down many coal-fired power plants. President Obama's administration has stated that EPA's rule will "aggressively transform ... the domestic energy industry" and sweeps virtually all aspects of electricity production in America under the agency's control.

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

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

NFIB supports legislation that would require federal agencies to make public a reasonable estimate of a rule's indirect impact on small business.

⁸ 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. On February 9, 2016, the Supreme Court stopped EPA and the states from implementing the rule until the courts can determine whether or not it is legal. 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.

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 wait until the rule is promulgated before legally challenging the agency's determination that the rule will not significantly impact a substantial number of small entities. Unless a court stays enforcement of the rule, small businesses must comply with it while the battle over its certification is fought in court. This system imposes unnecessary costs and regulatory burdens on small business and is inefficient.

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 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 victorious – a federal 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. 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.

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 is committed as a result 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. 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 made up by the Supreme Court in the 1984 *Chevron* case. In *Chevron*, the Supreme Court decided that courts should defer to reasonable interpretations by agencies of statutes the agencies administer, when the statutes are ambiguous. Unfortunately many statutes are ambiguous. Courts now routinely let agencies decide what the law means. The *Chevron* Doctrine gives too much authority to 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." In short, we pay judges, not bureaucrats, to determine in a court case what the law means.

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

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 law and enforce law. With *Chevron* overturned, federal agencies would no longer have the power to make up the law under the guise of interpreting ambiguous statutes and then enforce the law they made up, through agency proceedings and in courts. 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 of the less-burdensome alternatives that were considered. Each agency should provide an evidence-based explanation for why it chose a more-burdensome versus less-burdensome option and explain how their rule may act as a barrier to entry for a new business. To this end, NFIB would support third-party review when the agency and the SBA Office of Advocacy disagree on small business impact. If the disagreement occurs then the analysis would be turned over to 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 help 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 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.⁹

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 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.¹⁰

Twenty 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.

⁹ NFIB, joined by the U.S. Chamber of Commerce, challenged the rule in a federal court in Oklahoma arguing, among other things, that EPA is acting outside of its authority under the Clean Water Act and the rule is an unconstitutional infringement of state rights to regulate intrastate lands and waters. On October 9, 2015, the 6th Circuit Court of Appeals stopped EPA and the Army Corps from moving forward in implementing the rule until the 6th Circuit can determine whether or not it is legal.

¹⁰ <https://www.sba.gov/advocacy/1012014-definition-waters-united-states-under-clean-water-act>

Conclusion

Small businesses are the engine of our economy. Yet over the last several years the crushing weight of regulation has been a top reason preventing them from growing and creating jobs. 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.

Kari Warberg Block Statement for the Record

RAFM Hearing, Jan. 19, 2017

“Improving Small Business Input on Federal Regulations: Ideas for Congress and a New Administration”

I’m Kari Warberg Block and my story, as a small business owner, is like many others. I found a solution to a problem and with little more than an idea and a lot of passion, I turned it into a thriving business. For many small business owners, the challenge of navigating the complex federal regulatory policies is daunting and sometimes impossible. As a pest control developer, I feel that the need for regulatory policy around the protection of human and environmental health is imperative. In fact there should be more, not less regulation, but I would strongly advocate for a more common sense approach.

I started my company, EarthKind®, in Bismarck, ND ten years ago. As the wife of a farmer and daughter of an entomologist, I couldn’t understand why, at the time, 98 percent of pest control solutions sold were kill methods and poisons. I certainly didn’t want to risk the safety of my kids, pets and the wildlife by using rodent poison. So I invented a bio based alternative called Fresh Cab®, and today, because of the success of that invention, the eight most toxic baits and bars have been removed from store shelves. And, as a result of consumer demand, retailers want more.

Currently, over 90 percent of locally available DIY pesticides are hazardous, and unsafe, to use in the home. According to a recent report from Mintel, people want pest control options that are fast acting, non-toxic and safe, especially if there are children and pets in the household. In fact, 61 percent of pest control product users prefer to use natural, non-chemical alternatives in the home. Local access to safe, effective and affordable bio pesticides requires entrepreneurs willing to take on risks, and Federal policy that empowers our nation’s innovators to make it happen.

From the outset, we have worked to bring the same gold standard to 'natural' that's been expected from traditional pest control products by acquiring Federal EPA registrations. But, it has not been easy. In reality, only the largest of businesses can effectively navigate or afford the current Federal EPA requirements to meet the unmet consumer demand. Why we have succeeded where others have failed is because I refused to give up. It shouldn't have to be like that. As an entrepreneur who's seen the process full circle, risking everything I had to see it through, I can assure you that less regulation is NOT the right answer. It's smarter regulation that's needed.

Here's an example of what I mean.

The first Botanical Rodent Repellent:

The path to Fresh Cab's FIFRA registration as a minimal risk biopesticide took several years. New protocols were developed to access repellency rates absent the usual dead carcass counts. Lab and field testing was repeated three times, taking two years, at the request of the science review team 'just to be sure.' The independent Trials required animal welfare committees, live caught field mice, and protocol reviews. Product safety tests were done, as was the classic toxic 6 pack required of all toxic products. We persevered. At long last, our product entered interstate commerce in 2007. We happily paid our two federal annual fees, and 50 state licenses and were in business! Although, I question how many other small business owners would be willing to sell everything they owned to satisfy EPA's additional, burdensome, data requests.

Once on the market, we were not allowed to use label language that represented what we'd just proven: that our product was effective, non-toxic, and safe when used as directed. Whereas several other (copy cat) botanical based rodent repellents have been allowed to use those claims on their label, and were NOT required to submit full data packages for federal review due to a 25b exemption. Consumers are confused. Are these products truly safe or effective? The label is all consumers have to go by. This inconsistency is particularly concerning to me in the case of public health risk pests like rodents or mosquitos.

The first wearable botanical mosquito patch:

I wanted to offer a natural alternative to repel mosquitos. I had a proven effective, already EPA registered, natural essential oils infused into a wearable patch ready to go. Perfect for people who don't like, or can't use, sprays, they can simply wear the treatment on their clothing. EPA required human trials, and initiated a human welfare committee as part of the team. This would prove not only cost prohibitive for my brand, but also I would be last to market and not first. Doing it the right way is not always rewarded. I can go to market without any federal review or mislabeling enforcement, but I want to give retailers and consumers the peace of mind of having the level of transparency that an EPA registration should create. There have to be ways to work with entrepreneurs who play by the rules, rather than work against them.

Smarter regulations begin with an understanding of small business and what the regulatory process looks like from their perspective. Small business means just that, maybe only one person wearing many hats and juggling innovation, manufacturing, sales and regulatory moving targets. The current process is very burdensome for small business owners, often requiring them to go over the same thing many times as the agencies are constantly coming back with more questions, or additional data requests that lack relevancy to risk, public need, or even costs for end of life cleanup. Even finding the right person in an agency to connect with is a major challenge.

I have proven to myself and to retailers that working with Federal Policy, not against it, is the only way to ensure a “gold standard” for consumers. It’s the smart thing to do. So, I urge the EPA to streamline some of the processes so more innovation can be brought to market. Thriving small business innovation is crucial to the fiscal well-being of the US economy.

U.S. CHAMBER OF COMMERCE
SMALL BUSINESS COUNCIL

MAXINE TURNER
CHAIR
SMALL BUSINESS COUNCIL

TOM SULLIVAN
VICE PRESIDENT
SMALL BUSINESS POLICY

January 18, 2017

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

The Honorable Nydia Velázquez
Ranking Member
Committee on Small Business
U.S. House of Representatives
Washington, DC 20515

The Honorable Jim Risch
Chairman
Committee on Small Business
and Entrepreneurship
United States Senate
Washington, DC 20510

The Honorable Jeanne Shaheen
Ranking Member
Committee on Small Business
and Entrepreneurship
United States Senate
Washington, DC 20510

Dear Chairmen Chabot and Risch and Ranking Members Velázquez and Shaheen:

On behalf of the Small Business Council of the U.S. Chamber of Commerce, I compliment you on the House passage of H.R. 5, which compiles several regulatory reform bills, including H.R. 55, the “Regulatory Accountability Act,” and H.R. 33, “the Small Business Regulatory Flexibility Improvements Act of 2017,” and urge the Senate to expeditiously consider regulatory reform legislation.

The Chamber represents the interests of over 3 million businesses, the majority of which are small firms. Those small businesses are the economic engine of America and we pledge to work with you on policies that would allow the engine to run at full speed.

The 62 million people employed at small firms represent about half of America’s private sector workforce. And, since 1995 small business is responsible for creating about two-thirds of the net new jobs in our country. The power of small business to create growth, spur innovation, hire workers, and improve communities throughout the United States is undisputed. However, the nation has experienced a decline in start-ups over the past decade and that trend threatens a full economic recovery.¹

¹ Ryan Decker, John Haltiwanger, Ron Jarmin and Javier Miranda, “The Secular Decline in Business Dynamism in the U.S,” Working Paper, 2014, at http://econweb.umd.edu/~haltiwan/DHJM_6_2_2014.pdf.

Undoubtedly, the growth of federal regulation over the past several years deserves part of the blame for anemic economic growth. In fact, complaints about the chokehold of federal mandates among small business owners has risen considerably and ranks as a top issue of concern for small businesses.²

I would like to share how federal regulations have affected my company, Cuisine Unlimited. In February 2016, we were awarded a major catering contract for all food services at the new performing arts center in our hometown of Salt Lake City. This contract meant a major investment in equipment, smallwares, and hiring of more than 50 additional staff, among other investments. Red tape made what should have been a golden opportunity into an unbelievable headache.

We immediately applied for an SBA loan, but soon learned that our 37-year-old, well established company did not qualify, even though we have had numerous successfully managed SBA loans in the past. Three banks informed us that our rating, according to new bank regulations imposed by Dodd-Frank, disqualified us from loan consideration.

Trying to navigate the complexities of the Affordable Care Act and anticipation of the new overtime rules forced us to hire part time staff instead of full-time, salaried positions with benefits. It should not be so hard for us to take advantage of a new contract. Why does it seem as though government is wind in my face instead of at my back?

Unfortunately, my story is not unique. As Chair of the Chamber's Small Business Council, I hear the story from small business owners across the country who are struggling with the weight of over burdensome regulation on their businesses.

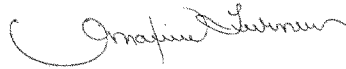
One way to address the problems associated with unnecessary, duplicative, or excessive federal red tape is to guarantee that small business stakeholders like me have a place at the table when regulatory policy decisions are made. That is the concept embodied in the Regulatory Accountability Act and the Small Business Regulatory Flexibility Improvements Act included in H.R. 5 that passed the U.S. House of Representatives last week.

The U.S. Chamber of Commerce's Small Business Council is pleased that our new director, Tom Sullivan, has worked throughout his entire career to influence regulatory policy on behalf of small business. As Chief Counsel for Advocacy at the U.S. Small Business Administration from 2002-2008, Tom worked tirelessly to ease the weight of federal regulation on Main Street small business. He joins me, and the entire Council, in our desire to enact regulatory reform that would result in lasting red tape relief for America's small business community.

² Holly Wade, "Small Business Problems and Priorities," NFIB Research Foundation (August 2016), Page 14, (finding that government regulations moved up in importance from ranking fifth in 2012 to its current second place ranking (behind cost of health insurance) at <http://www.nfib.com/assets/NFIB-Problems-and-Priorities-2016.pdf>).

Thank you for considering this letter and thank you for your leadership on small business policies. Please do not hesitate to contact Tom Sullivan at the U.S. Chamber of Commerce at (202) 463-3192 for any additional information about the views expressed in this letter.

Sincerely,

A handwritten signature in dark ink, appearing to read "Maxine Turner". The signature is fluid and cursive, with a large initial "M" and a long, sweeping underline.

Maxine Turner
Founder, Cuisine Unlimited
Salt Lake City, Utah



Owner-Operator Independent Drivers Association

National Headquarters: 1 NW OOIDA Drive, Grain Valley, MO 64029
Tel: (816) 229-5791 Fax: (816) 427-4468

Washington Office: 1100 New Jersey Ave. SE, Washington, DC 20001
Tel: (202) 347-2007 Fax: (202) 347-2008

To: U.S. Senate Subcommittee on Regulatory Affairs and Federal Management
Chairman James Lankford and Ranking Member Heidi Heitkamp

On behalf of more than 160,000 independent owner-operators and professional truck drivers, the Owner-Operator Independent Drivers Association (OOIDA) submits these brief comments for the record in connection with the January 19, 2017 hearing entitled, "Improving Small Business Input on Federal Regulations: Ideas for Congress and a New Administration."

As you know, the trucking industry plays a vital role in the United States' economic wellbeing and is solely responsible for transporting 69% of the nation's goods and commerce. The vast majority of trucking companies based in the US are small businesses, as 96% of all motor carriers have less than 20 trucks in their fleet and 87% of motor carriers have fleets of just six or fewer trucks. In fact, owner-operator companies with just one truck represent roughly half of the motor carriers registered with the Federal Motor Carrier Safety Administration. In short, small business truckers are truly the backbone of our nation's economy.

Small business truckers also represent the safest and most diverse operations on the road. Their activities impact all sectors of our economy, including agriculture, household goods movement, consumer products, oil and gas, the military, sports and entertainment, and construction. Day in and day out, small business truckers transport nearly everything we eat, drink, or rely upon in our society. When disasters strike, small businesses, because of their versatility and flexibility, are the first to arrive with relief supplies and the materials needed to rebuild communities. The importance of small businesses in the trucking industry cannot be overstated and should not be ignored.

Yet, for far too long government agencies have failed to appreciate the significance of small business truckers as well as their wide ranging types of operations. Federal agencies tend to apply a "one-size-fits-all" approach to their regulatory rulemakings that punishes small businesses, stifles competition, and overregulates a vital US industry. In the past, OOIDA has offered suggestions on how to reform the Regulatory Flexibility Act (RFA), having provided testimony in 2007 at a hearing held by the U.S. House of Representatives Committee on Small Business on a similar topic. Since 2007, OOIDA has seen very little change as small businesses still struggle in a regulatory climate that gives large companies greater voice and consideration throughout the entire rulemaking process. While agencies have improved upon outreach and afforded greater opportunity for small businesses to comment, the resulting rules are continually applied to small businesses just as they would for large businesses without consideration of the practical impact, which generally is far greater on the smaller sized companies.

Who the Agencies Chose to Listen to in Advance of Rulemakings?

On January 11, 2017, the U.S. Department of Transportation announced the launch of a new federal advisory committee focused on vehicle automation. The committee will provide the Department insight and guidance on the development and deployment of automated vehicles, while identifying research, policy and regulatory opportunities to help advance the technology in a safe and responsible manner. The committee is comprised of more than 20 CEO's, elected officials, and academics, but does not feature a representative of small businesses. Automation technology is undoubtedly a game-changer for the future of the trucking industry, yet the Department hasn't included small businesses on the panel. Will small businesses be able to afford the discussed technology? Will this technology eliminate small businesses from an industry reliant upon their services? How will owner-operators be impacted in an autonomous environment? Small business truckers are naturally concerned large companies and academics will lead the discussion about their fate. Unfortunately, agencies too often turn to these large companies when seeking advice.

Small Businesses Are Culpable for Problems Caused by Larger Companies

Nearly ten years ago, the Federal Motor Carrier Safety Administration and the National Highway Traffic Safety Administration were petitioned to pursue a rulemaking to require speed limiters on all heavy duty trucks, meaning that all trucks would be required to set a speed limiter at a determined speed of approximately 65 miles per hour. The agencies admit the rule has a dramatic impact on small businesses noting "...we expect that large trucking companies would absorb the additional cargo with their reserve of capacity of trucks but would need to hire additional drivers." Additionally, the agencies concludes, "Although the proposed rules would apply to all heavy vehicles, the agencies' analysis indicates that this joint rulemaking could put owner-operators and small fleet owners at a disadvantage..." Smaller carriers working at the behest of the larger carriers is not ideal for safety, the consumers or the industry. While the NPRM is still pending, it is astonishing that FMCSA would propose a rule with this dramatic of an impact on 90% of the industry.

Further, this petition was filed by the American Trucking Association -- a trade group representing the interests of the largest corporations in trucking, who typically utilize speed limiters as a method of fleet management. Fleets with hundreds, if not thousands, of trucks realize an economic benefit from controlling speed, however large fleet owners find themselves at a competitive disadvantage with smaller companies who are capable of traveling at the speed limit and with the flow of traffic, which was in part the precipitating factor behind the petition. The agencies offer no breathing room for small businesses and care little for the safety or economic consequences resulting from this rulemaking as the proposal openly details. For instance, small companies cannot as easily absorb the costs of speeding violations and would be forced to become slavish to compliance.

Another example of the one-sized-fits all approach prototypical of the federal rulemaking can be found in one of the most expensive promulgated rules from the Obama Administration. In 2011, Electronic Logging Devices (ELDs) were identified by the administration, at the request of Congress, as one of the most expensive rulemakings proposed by any federal Department. By the

administration's own estimates, which are often notoriously below industry cost analyses, the implementation of ELDs would cost \$2 billion. ELDs are theorized to improve compliance with hours of service (HOS) regulations. However, they are incapable of tracking the amount of time drivers expend during the loading and unloading process – a sizable portion of a driver's work week and where the vast majority of HOS non-compliance occurs. Since ELDs are only capable of tracking when the wheels of the truck are moving and are vulnerable to failures, drivers are still required to keep paper log books. ELDs are admittedly no more reliable than these logs and are not proven to result in any safety benefits. Like speed limiters, large carriers use ELDs as fleet management and productivity tools, whereas small businesses do not share these needs. Again, large carriers filed a petition seeking an across the board mandate of ELDs to eliminate a perceived competitive disadvantage and the agency engaged in an NPRM. The agency has chosen to punish small businesses.

Furthermore, a recently released EPA regulation on heavy trucks has pushed the ten-year regulatory burden on America past \$1 trillion – this equates to an annual cost of \$540 for every American. While attempting to reduce already declining emissions from trucks, the regulation will simultaneously increase the cost of equipment, making it more difficult for independent drivers to purchase new, more advanced vehicles.

Providing Meaningful Assistance to Small Businesses Should be more than Rhetorical

The vast majority of new job creation is from small business entrepreneurship, yet as noted above, small businesses are not rewarded for their important role in the marketplace. Small businesses, particularly small business trucking operations, are generally more versatile, and among the safest operators on the road. We should be encouraging the models they use, not stifling them under a regulatory framework that looks only toward the actions of large corporations for inspiration. The word "flexibility" in "Regulatory Flexibility Act" implies that the government should find less burdensome alternatives to particularly onerous regulations and/or less burdensome alternatives to offer small businesses..

The Small Business Administration Office of Advocacy has stated that since 1998, RFA Implementation through 2007 had saved over \$200 billion, of which \$156 billion are recurring savings each year. Under the Administrative Procedures Act, agencies are required to assess the impact of their regulations on small entities as a key part of the process for issuing regulations, and to use less burdensome alternatives whenever possible. A big part of the RFA is based on the fact that the average cost of regulation was \$2,979 per employee for large firms with 500 or more employees and \$5,532 per employee for small firms with fewer than 20 employees. 96% of all trucking carriers are 20 trucks or less so the greatest burden is on the smaller firms and especially disproportionate for the one truck operators.

We appreciate the Committee's important attention to this matter and look forward to providing a voice for the small operators moving forward.



Jim Nussle
President & CEO

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jnussle@cuna.coop

January 18, 2017

The Honorable James Lankford
Chairman
Subcommittee on Regulatory Affairs
and Federal Management
340 Dirksen Senate Office Building
Washington, DC, 20510

The Honorable Heidi Heitkamp
Ranking Member
Subcommittee on Regulatory Affairs
and Federal Management
340 Dirksen Senate Office Building
Washington, DC, 20510

Dear Chairman Lankford and Ranking Member Heitkamp:

On behalf of America's credit unions, I am writing regarding tomorrow's hearing, "Improving Small Business Input on Federal Regulations: Ideas for Congress and a New Administration." The Credit Union National Association (CUNA) represents America's state and federally chartered credit unions and their more than 100 million members. Thank you for the opportunity to submit this letter for the record of the hearing.

One-Size-Fits-All Regulations Have Harmed Credit Union Members

Credit unions are member-owned financial cooperatives that operate for the purpose of promoting thrift and providing access to credit. One-size-fits-all regulation does not work for Main Street – local credit unions, small banks, and the consumers and small businesses they serve. This regulatory philosophy has created a rigged system favoring the largest institutions who can afford to comply with the "solutions" dreamt up in Washington – the very institutions that caused the financial crisis that hurt so many. Now, over-regulation of small institutions is hurting consumers, costing them time and money, and limiting their choices.

Congress anticipated the possibility of such problems and enacted protections for credit unions and other small financial service providers. As you know, the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) amended the Regulatory Flexibility Act of 1980, to require some federal agencies to hold a SBREFA panel if the agency finds its proposed rule is likely to have a significant impact on a substantial number of small entities. The Consumer Financial Protection Bureau (CFPB) is one of the agencies that must engage in the SBREFA process, and credit union representatives have served as Small Entity Representatives (SERs) on several panels for its rulemakings. While we appreciate that SBREFA adds a layer of protection for small credit unions, we believe the CFPB should be taking the feedback it receives during this process more seriously. Additionally, we believe reforms to this process may be needed to ensure there is more accountability if CFPB rules do not reflect the feedback provided during the SBREFA panels and prior to the publication of final rules.

Handwritten signature of Jim Nussle

There Are Many Small Credit Unions Serving Consumers, and They Are Harmed Most by Overregulation

In the United States, 2,708 out of approximately 6000 credit unions have less than five or fewer full time employees, 2,614 are under \$20 million, and 3,754 are under \$50 million. Despite the large number of small credit unions and the indisputable difference in structure and resources between them and the largest banks, they have been subjected to more than 200 regulatory changes since the financial crisis that they did not cause. This has equated to several thousand pages of new or modified requirements despite already extremely high satisfaction ratings from consumers¹ and despite that credit unions already deliver roughly \$10 billion in savings to 100 million members every year.²

Small credit unions have been particularly harmed by one-size-fits-all rules that do not account for their less complex structure. A recent study found that in 2014 alone, the cost of regulatory burden on credit unions was \$7.2 billion.³ The study also revealed that from 2010 to 2014, regulatory impact on credit unions increased by \$2.8 billion. This represents a 40% increase since 2010, not even counting the effect of asset growth.

One of the most disconcerting issues the study confirmed is that small credit unions bear the brunt of regulatory burden and costs. For smaller credit unions—the three quarters of credit unions with assets below \$100 million—regulatory costs rose from 0.78% of assets in 2010 to 1.12% of assets in 2014, an increase of 43%. Regulatory costs now account for 30% of total operating expenses at smaller credit unions and almost 10% of total operating expenses at these credit unions in 2014 were new regulatory expenses added since 2010. For credit unions with assets between \$100 million and \$1 billion, the increase in regulatory expenses was 40%, and was 28% at credit unions with over \$1 billion in assets. These increases come on top of the already heavy regulation credit unions faced prior to 2010. Notably, these numbers do not even include the very significant costs of other rules implemented after the study such as the Truth in Lending Act and Real Estate Settlement Procedures Act (TILA-RESPA) integrated disclosure and new requirements, the Home Mortgage Disclosure Act new disclosure requirements, and the new Military Lending Act requirements.

While these compliance costs stem from regulations from several different agencies, the thousands of pages of new rules from the CFPB over the past few years are a top concern to credit unions. Going forward, more must be done to protect credit unions and members from the disproportional burden one-size fits all rules cause.

¹ Blyskal, Jeff, "Choose the Best Bank for You." *Consumer Reports*, available at <http://www.consumerreports.org/banks-credit-unions/choose-the-best-bank-for-you/> (Dec. 4, 2015). "Credit unions are among the highest-rated services they have ever evaluated, with 93 percent of their customers highly satisfied."

² Credit Union National Association, *State-by-State Data on the Benefits of Credit Union Membership*, available at <https://www.cuna.org/Legislative-And-Regulatory-Advocacy/Legislative-Advocacy/Legislative-Hot-Topics/State-by-State-Data-on-the-Benefits-of-Credit-Union-Membership/>.

³ Hui, V., Myers, R., Seymour, K., "Regulatory Financial Impact Study." Cornerstone Advisors, Inc., available at <http://www.cuna.org/regburden/> (Feb. 2016).

Credit Unions Have Concerns with the CFPB's Approach toward SBREFA

Credit union employees have taken time and resources away from their daily jobs serving members to provide feedback to the CFPB on extremely complex SBREFA outlines with ideas for proposed rules. During the SBREFA process, these representatives are usually given less than a month to: read and digest complex outlines which can require legal and economic analysis, work to determine how the CFPB's proposals could impact their credit union, and compile data and feedback that the agency itself may not have even collected on a wide scale basis or analyzed. In short, they are often asked to do as much work as a federal government agency, and meanwhile continue to operate their credit union and serve the many members relying on them for financial services. Moreover, they are asked to travel across the country to Washington, D.C. to participate in an all-day-long panel *on their own dime*, as well as participate in several conference calls beforehand.

While this process can clearly be extremely burdensome to the small credit unions that participate, they continue to seek to participate in the SBREFA process and believe the concept of SBREFA is a very valuable one. This is because alternatively, rules that do not account for different institutions' size and structure can be catastrophic, lead to the elimination of products and services, and accelerate small credit union consolidation. Too often in past SBREFA panels, CFPB officials have willfully ignored the feedback credit union representatives have provided to them about the harm rules, not properly tailored to their size and structure cause Community Financial Institutions.

Frankly, there are some serious concerns that the CFPB views the SBREFA process more as a check-the-box exercise, and often has not included the suggestions and feedback small credit unions have provided to it in proposed or final rules, despite the many sacrifices they make to participate in the process. The condensed timeframe of SBREFA and the complexity of the outlines of rules under consideration have also made it difficult for credit unions to analyze and provide feedback on all aspects of the multifaceted outlines before the 60 days ends. On several occasions, some of the major problems that the rule could cause for credit unions were identified after the SBREFA process.

An example of this is the CFPB's payday and small dollar loan rule, which is more than 1300 pages. The CFPB made a number of public statements claiming that credit unions and the National Credit Union Administration (NCUA) Payday Alternative Loan (PAL) were largely not impacted by this rule. However, a closer examination showed that not only were there many regulatory and compliance burdens this rule could cause for credit unions, but aspects of credit union lending, which are not even similar to payday and small dollar lending such as auto refinances, are impacted by this broad one-size fits all rule. For the CFPB process to be more effective, credit unions need more time to review potential rulemakings and transparency from the CFPB during the SBREFA process.

The SBA Office of Advocacy Recently Told the CFPB it did not Properly Consider the Impact on Small Credit Unions in its Payday and Small Dollar Proposed Rule

In the SBREFA process, the CFPB must analyze the cost that those subject to the rule will incur and seek to minimize that impact.⁴ The CFPB's analysis for smaller credit unions in its payday and small dollar rule ignored many potential impacts and cost burdens of the proposed rule on small credit unions. As CUNA outlined in a recent comment letter to the CFPB, its analysis is sorely lacking, ignoring many new compliance burdens and costs credit unions could face if included in this rule, which should instead be aimed at predatory lenders.⁵

The adjustments necessary to comply with this rule could come at a significant cost to small credit unions, and the Small Business Administration (SBA) Office of Advocacy agreed with credit union concerns.⁶ In its comment letter, the SBA Office of Advocacy questioned whether the proposed rule would detrimentally impact the ability of consumers to be able to obtain credit, particularly noting that consumers in rural and underserved areas may be disadvantaged. The SBA Office of Advocacy further expressed concerns that the proposed rule limits options consumers have from law-abiding lenders such as credit unions, as opposed to illegal online lenders, loan sharks or others operating in the shadows. Additionally, the SBA Office of Advocacy stated, "The CFPB's proposed rule may force legitimate businesses to cease operation. Imposing such a regulation will not alleviate a consumer's financial situation. The consumer will still need to pay his/her bills and other expenses. Imposing these strict regulations may deprive consumers of a means of addressing their financial situation."

Most notably the SBA Office of Advocacy urged the CFPB to exempt credit unions and defer to their prudential regulator stating:

The National Credit Union Administration (NCUA) has addressed the issue of payday type loans for credit unions with the PAL program. NCUA is the independent federal agency within the executive branch. It is the chartering authority for federal credit unions and provides federal account insurance to all federal credit unions. NCUA works to ensure safety and soundness as well as compliance with applicable federal regulations in the credit union system. It also works to protect consumer rights and member deposits. **Advocacy encourages the CFPB to recognize the NCUA's expertise in the area of credit unions and exempt small credit unions from the proposed rule.**

In addition to the SBA Office of Advocacy, the NCUA expressed that credit unions should be exempt from parts of the rule and changes are necessary. It is extremely concerning that the CFPB held a SBREFA panel for this rule and supposedly considered the feedback of participants, yet in addition to

⁴ Dodd-Frank Act § 1100G(b).

⁵ CUNA Comment Letter CFPB Proposed Rule Payday, Vehicle Title, and other Covered Loans, available at http://www.cuna.org/uploadedFiles/CUNA/Legislative_And_Regulatory_Advocacy/Track_Regulatory_Issues/Pending_Regulatory_Changes/2016/CUNA%20Comment%20Small%20Dollar%20Loans%20Final%20Letter%20Attachments%2020161005.pdf. (Oct. 5, 2016).

⁶ Small Business Administration Office of Advocacy Letter to CFPB in response to the CFPB's proposed rule for Payday, Small Dollar, and High Cost Loans, available at <https://www.sba.gov/advocacy/10-07-2016-payday-vehicle-title-and-certain-high-cost-installment-loans> (Oct. 7, 2016).

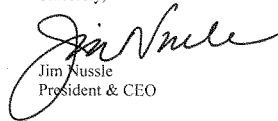
thousands of commenters, several other regulators have taken issue with the proposed rule.⁷ They have reiterated credit union concerns that the CFPB should be treating small financial institutions such as credit unions differently than others who may pose a greater risk to consumers. It seems like there is a clear problem with the consideration feedback from small financial institutions is being given by the CFPB if its fellow regulators feel the need to intervene and express concerns about proposed rules.

Congress Should Encourage the CFPB to Provide More Consideration to Feedback from the SBA Office of Advocacy and Credit Unions

We have received feedback from a number of credit unions that participated on SBREFA panels that they felt that final rules did not include enough changes and/or exemptions to limit impact on small credit unions. As a result, small credit unions have had the most difficulty complying with new mortgage rules even after participating in SBREFA. In August 2016, the Government Accountability Office released a report with observations from some of the earlier CFPB SBREFA panels, which found that out of the 57 SERs who participated, seven stated they were satisfied with the CFPB final rules.⁸ We encourage Congress to continue to analyze whether CFPB final rules properly address credit union and other small financial institution concerns. As outlined in our letter, we believe more transparency, longer timeframes for SBREFA, and fewer burdens on small financial institutions participating could lead to an improved SBREFA process. Specific to the CFPB's proposed rule for payday and small dollar loans, we encourage Congress to consider that not only did the SBA Office of Advocacy express concerns with how this proposed rule will harm credit unions members, but so did the NCUA, credit unions' primary regulator that has overseen them for more than 40 years. Congress should encourage the CFPB to address these important concerns of other regulators. It should also urge the CFPB to more effectively consult with primary prudential financial regulators even before beginning the SBREFA process.

CUNA strongly supports requiring the SBREFA process and the concept that the impact of rules on smaller financial institutions needs special consideration. However, we believe the CFPB needs more accountability to take this process seriously for the protection of small credit unions and credit union members. Thank you for your consideration of our comments.

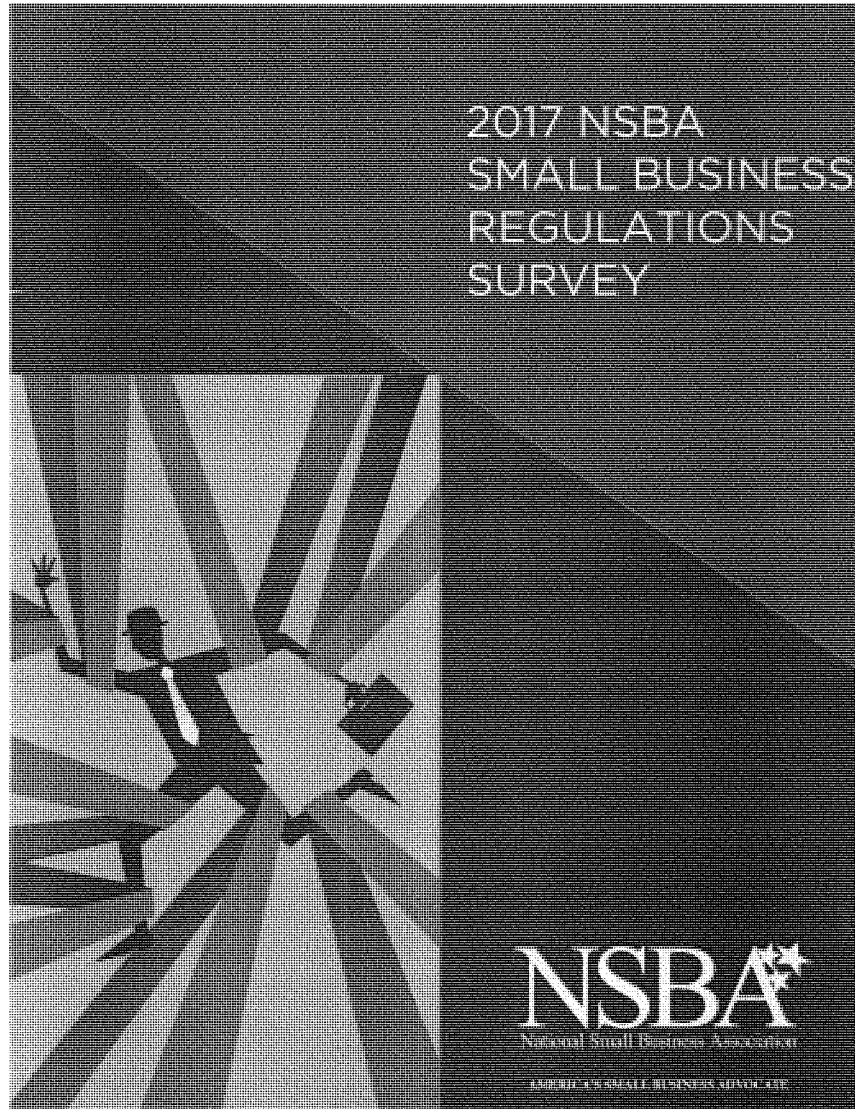
Sincerely,



Jim Nussle
President & CEO

⁷ National Credit Union Administration Comment Letter to CFPB in response to the CFPB's proposed rule for Payday, Small Dollar, and High Cost Loans, available at <https://www.ncua.gov/newsroom/Documents/comment-letter-2016-oct-metsper-payday-rule.pdf> (Oct. 3, 2016).

⁸ Government Accountability Office, Consumer Financial Protection Bureau Observations from Small Business Review Panels, <http://www.gao.gov/assets/680/678964.pdf>, (August 2016).



FOREWORD

The National Small Business Association (NSBA) is the nation's first small-business advocacy organization, celebrating 80 years of small-business representation in Washington, D.C. Focused on federal advocacy and operating on a staunchly nonpartisan basis, NSBA is a recognized leader of America's small-business community. Throughout the year, we conduct a series of surveys, including two Economic Reports and a series of issue-based surveys. Now, for the first time, NSBA has conducted a comprehensive survey on regulations and how they impact America's small businesses.

The 2017 NSBA Small Business Regulations Survey provides quantitative support for the need to greatly reduce regulatory complexity, streamline the web of federal, state and local regulations, and adhere to plain language statutes. Both the need for regulatory relief—as well as a road-map to achieve it—are laid out in this survey packet.

Among the most compelling data in the survey, we found that the average small-business owner is spending at least \$12,000 every year on regulations, and nearly one-in-three spends more than 80 hours each year dealing with federal regulation. We suspect these indicators would be much higher if the survey specified the inclusion in calculations of even long-standing regulations such as the 40-hour work week. It is highly likely that most small firms who took the survey simply considered such long-standing regulations a general cost of doing business rather than a regulatory burden, simply because they've dealt with them for so long.

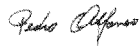
No surprise, when asked what areas of regulation are most burdensome, the federal tax code and Affordable Care Act were the top two. We also found that the small-business owner is the number one regulatory expert in most business and handles the bulk of federal regulatory compliance. Astoundingly, 14 percent of small-business owners report they spend more than 20 hours per month on federal regulations.

Most small businesses say they really started worrying about regulations within the first year of their business. When coupled with the significant regulatory costs associated with a business' first year, it's clear that regulatory burden is a major hurdle likely keeping many would-be entrepreneurs from starting their own business.

The impact of regulatory burden cannot be overstated: more than one-third have held off on business investment due to uncertainty on a pending regulation, and more than half have held off on hiring a new employee due to regulatory burdens.

The 2017 NSBA Small Business Regulations Survey was conducted on-line Nov. 28, 2016 - Jan. 10, 2017 among 1,000 small-business owners. We hope you find this survey informative and useful. Please contact NSBA's media office for inquiries at press@nsba.biz.

Sincerely,



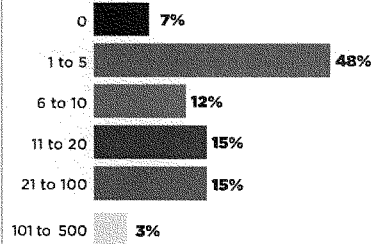
Pedro Alfonso
NSBA Chair



Todd McCracken
NSBA President and CEO

DEMOGRAPHICS

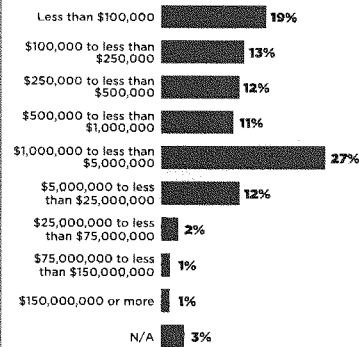
How many total full-time personnel are currently employed by your business?



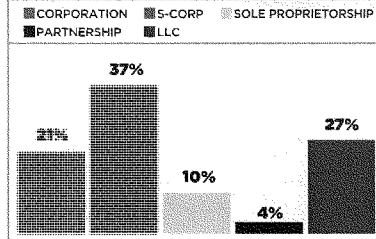
In what region is your business located?

New England	5%
Mid-Atlantic	20%
Great Lakes	15%
Farm Belt	7%
South	26%
Mountain	12%
Pacific	15%

What were your gross sales or revenues for your most recent fiscal year?



Which of the following best describes the structure of your business?



Which of the following best describes the industry or sector in which your business operates?

Professional	13%
Manufacturing	11%
Scientific and Technical Services	11%
Construction	10%
Agriculture, Forestry, Fishing and Hunting	8%
Other Services (except Public Administration)	8%
Information (IT)	6%
Retail Trade	5%
Health Care and Social Assistance	5%
Transportation and Warehousing	5%
Wholesale Trade	4%
Educational Services	4%
Real Estate, Rental and Leasing	3%
Accommodation and Food Services	2%
Finance	2%
Administrative and Support	1%
Arts, Entertainment, and Recreation	1%
Management of Companies and Enterprises	1%
Utilities	1%
Insurance	1%
Waste Management and Remediation Services	1%

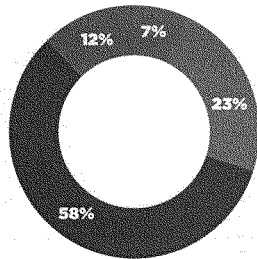
OVERALL REGULATORY BURDENS

It is critical to note that 12 percent of small-business owners say they don't even know the source of regulations impacting their business (local, state or federal)—a clear indicator that the web of local, state and federal regulations is massively confusing.

Nearly half of all small businesses said that regulations related to taxation and health care/health insurance are very burdensome.

Which source of regulation is most burdensome to your business?

☐ Local (city/county) ☐ State ☐ Federal ☐ I'm not sure what the source of regulations impacting my business is



Please rank each of the following areas in terms of the amount of total regulatory burden (including federal, state and local) your business incurs.

1	Tax-related
2	Health care and health insurance
3	Payroll & employee compensation
4	Industry-specific
5	Finance-related
6	Environment-related
7	Retirement/pensions
8	Workplace safety
9	Building-related

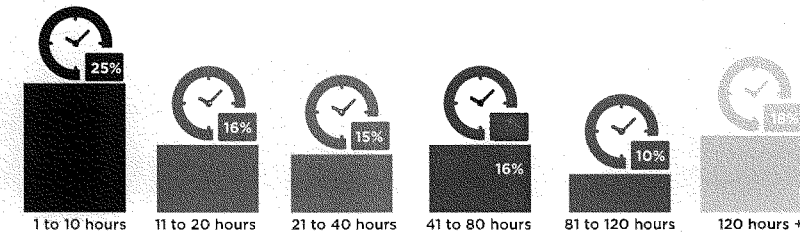
Three-in-four small firms say that federal tax code regulations are very or somewhat burdensome, and two-in-three say that the Affordable Care Act regulations are somewhat or very burdensome.

Please indicate how burdensome each of the following regulatory areas are, or would be if enacted, to your business.

Rank	Regulatory Areas	Very Burdensome	Somewhat Burdensome	Not Very Burdensome	No Impact	Not Sure
1	Federal Tax Code	38%	37%	12%	6%	7%
2	Affordable Care Act	43%	22%	11%	18%	5%
3	Overtime Rules	27%	24%	22%	22%	5%
4	State licensing Requirements	17%	28%	25%	19%	11%
5	Reporting Pay Data by Gender and Race	19%	21%	23%	26%	11%
6	Independent Contractor Test	14%	25%	26%	21%	14%
7	EPA Clean Water Rule	13%	11%	15%	45%	15%
8	Waters of the U.S. Rule	12%	9%	10%	48%	20%
9	Limit Carbon Emissions by Power Plants	8%	8%	10%	55%	19%
6	Fiduciary Rule for Investment Advisers	6%	11%	14%	47%	22%
7	Other	19%	4%	4%	34%	40%
8	Joint Employer Standards	7%	10%	17%	32%	34%

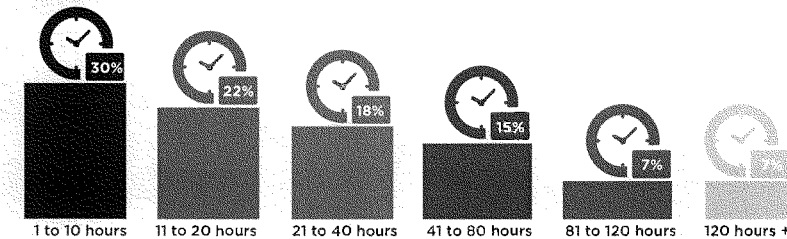
TIME SPENT ON REGULATIONS

Approximately how much TIME do you spend each year dealing with new and existing FEDERAL regulations? (i.e., reading regulations, determining compliance, adjusting work practices, etc...)



Forty-four percent of small firms report spending 40 hours or more each year dealing with new and existing FEDERAL regulations, and nearly one-in-three spend more than 80 hours each year.

Approximately how much TIME do you spend each year dealing with new and existing STATE and LOCAL regulations? (i.e., reading regulations, determining compliance, adjusting work practices, etc...)



When talking about STATE and LOCAL regulations, that number drops slightly to 30 percent who spend 40 hours or more each year.

MONEY SPENT ON REGULATIONS

Approximately how much MONEY in DIRECT costs do you spend each year dealing with new and existing FEDERAL regulations? (i.e.: employee pay adjustments, workplace upgrades, daily work routine changes, attorney fees, etc...)

Less than \$500	21%
\$501 to \$1,000	11%
\$1,001 to \$5,000	19%
\$5,001 to \$10,000	19%
\$10,001 to \$20,000	12%
\$20,001 to \$40,000	8%
More than \$40,000	11%

Nearly half of small businesses report spending more than \$5,000 annually in DIRECT costs and another \$5,000 in INDIRECT costs to deal with FEDERAL regulations.

Approximately how much MONEY in INDIRECT costs do you spend each year dealing with new and existing FEDERAL regulations? (i.e.: time taken away from other business tasks to understand regulations, meet with specialists, etc...)

Less than \$500	20%
\$501 to \$1,000	12%
\$1,001 to \$5,000	23%
\$5,001 to \$10,000	17%
\$10,001 to \$20,000	9%
\$20,001 to \$40,000	8%
More than \$40,000	10%

Approximately how much MONEY in DIRECT costs do you spend each year dealing with new and existing STATE and LOCAL regulations? (i.e.: employee pay adjustments, workplace upgrades, daily work routine changes, attorney fees, etc...)

Less than \$500	26%
\$501 to \$1,000	18%
\$1,001 to \$5,000	24%
\$5,001 to \$10,000	16%
\$10,001 to \$20,000	8%
\$20,001 to \$40,000	4%
More than \$40,000	4%

Looking at the costs of regulations at the STATE and LOCAL level, more than half of small businesses report spending more than \$1,000 in DIRECT costs and another \$1,000 in INDIRECT costs.

Approximately how much MONEY in INDIRECT costs do you spend each year dealing with new and existing STATE and LOCAL regulations? (i.e.: time taken away from other business tasks to understand regulations, meet with specialists, etc...)

Less than \$500	27%
\$501 to \$1,000	19%
\$1,001 to \$5,000	25%
\$5,001 to \$10,000	14%
\$10,001 to \$20,000	8%
\$20,001 to \$40,000	4%
More than \$40,000	3%

Taken cumulatively, the average small-business owner is spending at least \$12,000 every year to deal with the costs of regulation. We suspect that this number would be much higher if the survey specified the inclusion of even long-standing regulations such as ERISA in the respondent's calculation of regulatory costs, which many small firms likely just consider a cost of doing business rather than a regulatory burden.

STAFF REGULATORY RESPONSIBILITIES

The small-business owner is the number one regulatory expert in most businesses and handles the bulk of federal regulatory compliance. In one-quarter of small firms, the owner is spending more than 10 hours per month on federal regulatory compliance. Astoundingly, 14 percent of small-business owners report they spend more than 20 hours per month on federal regulations.

Which of the following people/departments in your firm spend the most time on federal regulatory compliance, including reading new or proposed regulations, making adjustments in work-flow to comply to new regulations, complying with existing regulations and all reporting required for existing regulations.

1	Myself
2	In-house accounting
3	External accounting
4	In-house HR department
5	In-house facilities manager
6	In-house IT department
7	In-house industry-specific department (i.e.: food safety)
8	External IT department
9	External industry-specific department (i.e.: food safety)
10	External HR department
11	Other

Approximately how much time do the following people/departments in your firm spend on federal regulatory compliance, including reading new or proposed regulations, making adjustments in work-flow to comply to new regulations, complying with existing regulations and all reporting required for existing regulations.

Staff Member	% spending more than 5 hours per month
Myself	40%
In-house accounting	34%
External accounting	22%
In-house HR department	23%
In-house facilities manager	16%
In-house IT department	15%
In-house industry-specific department (i.e.: food safety)	16%
External IT department	10%
External industry-specific department (i.e.: food safety)	10%
External HR department	9%
Other	8%

REGULATORY BURDEN BY AGENCY

Please select which one among the following regulatory agencies you find to be the most difficult to work with when it comes to regulatory burden and compliance assistance (excluding requirements of contractors who do business with these agencies).

Internal Revenue Service	29%
Department of Labor	14%
Environmental Protection Agency	13%
A State Agency	9%
The Occupational Safety and Health Administration (OSHA)	7%
Department of Health and Human Services	6%
Equal Employment Opportunity Commission (EEOC)	3%
Department of Commerce	2%
Securities and Exchange Commission (SEC)	1%
Federal Trade Commission (FTC)	1%
Consumer Financial Protection Bureau (CFPB)	1%
Federal Communications Commission (FCC)	1%
Other	14%

Please select which of the following is the biggest cause of regulatory difficulty with the aforementioned agency.

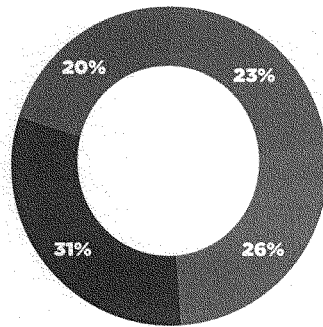
The complexity of rules	23%
The cost of compliance with their rules	23%
Difficulty of interpreting and understanding rules	21%
The volume of existing rules	15%
The volume of new rules	9%
Rules contradict one another within the agency's purview	4%
This agency's rules contradict other agencies' rules	4%

The fact that "complexity of rules" and "difficulty interpreting and understanding rules" combined to comprise nearly half of all regulatory difficulties is clear indication of the need for eased complexity, overall streamlining and adherence to plain language statutes.

START-UP REGULATORY COSTS

How significant a concern was regulatory compliance to you when first started your business?

☒ Very ☒ Somewhat ☒ Not very ☒ Not at all



When in your business did you start really worrying about compliance with regulations?

When I started it	36%
About six months in	14%
About two years in	15%
About five years in	7%
About 10 years in	12%
I am not worried about regulatory compliance	14%

More than half of small businesses say they really started worrying about regulations within the first year, underscoring that regulatory worries represent a major hurdle likely keeping many would-be entrepreneurs from starting their own business. These worries coupled with significant regulatory costs associated with a business' first year—\$83,019—and it's no wonder why we've seen lagging start-up rates in recent years.

\$83,019.23

AVERAGE REGULATORY START-UP COSTS



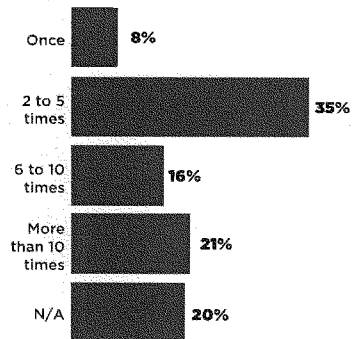
KEEPING ABREAST OF NEW REGULATIONS

The majority of small firms rely on business associations, such as NSBA and the Internet or other news sources for news on regulations that may impact their firm.

Where do you find out about regulations that may impact your firm? (check all that apply)

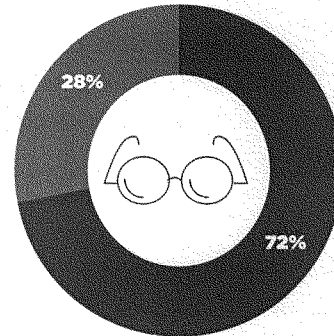
Internet / other media or news source	53%
Business associations (like NSBA or a Chamber of Commerce)	52%
External contractors (attorney/accountant/payroll firm)	43%
From other small-business owners	41%
Industry groups (like National Restaurant Association)	40%
The U.S. Small Business Administration (SBA) and/or its Office of Advocacy	32%
Staff (legal counsel/human resources)	21%
The Federal Register	20%
Congressional resources	7%
Other	4%

If yes, how often have you read through proposed regulations in the last FIVE years?



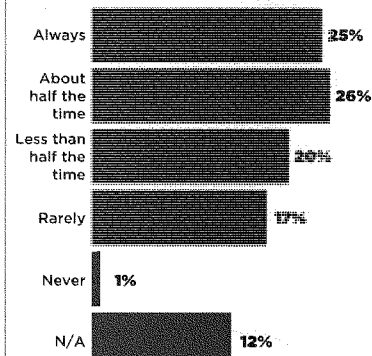
Have you ever read through proposed regulations?

■ Yes ■ No



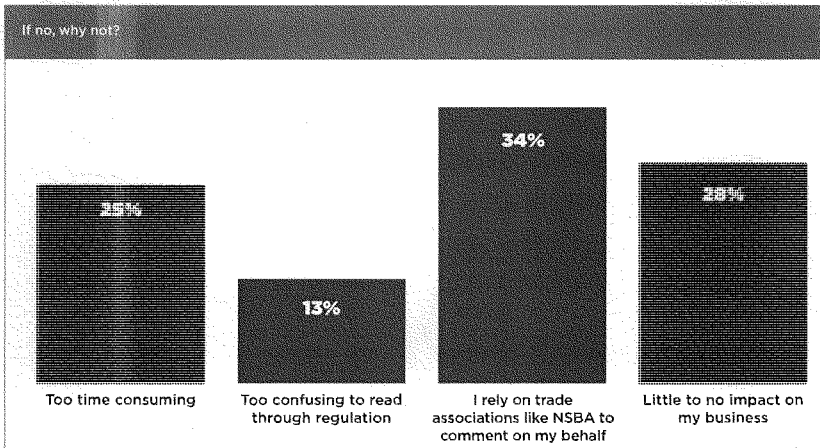
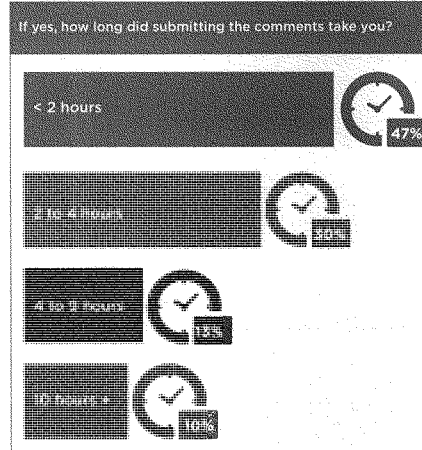
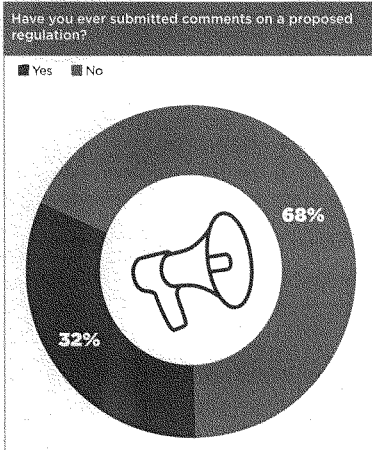
Nearly three-in-four small firms say they have read through proposed regulations, yet 63 percent say that they only have to comply with those regulations they read half the time or less, which represents HUGE time waste for many small firms.

How often do you typically have to comply with the proposed regulations you read?



COMMENTING ON REGULATIONS

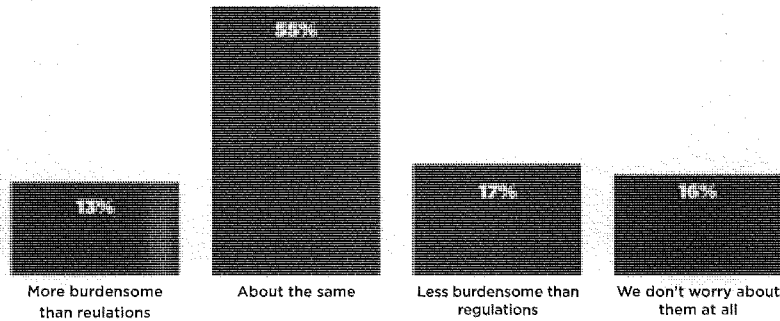
Despite the majority of small firms saying they read proposed regulations, just 32 percent have filed comments, likely due to the fact that it takes the majority of small firms two hours or more to do so. Furthermore, 38 percent say they don't submit comments because it is too time consuming or too confusing.



GUIDANCE DOCUMENTS, INTERPRETATIONS & MORE

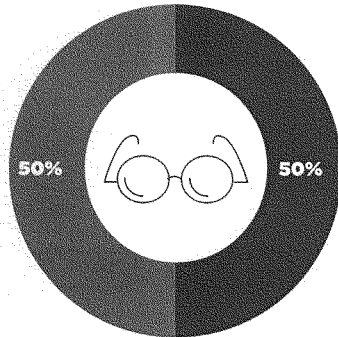
The policy focus often is on regulations. However guidance documents, interpretations and other memos related to regulatory changes are just as burdensome or more so than regulations for 68 percent of small businesses. Furthermore, the majority of small firms report having read through a guidance document and a memo of interpretation—yet another drain on their time and resources.

Compared to regulations, how significant of a burden are guidance memos and new interpretations for existing regulations for your business?



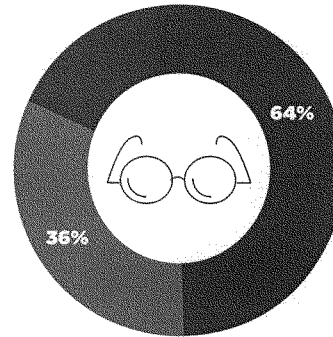
Have you ever read through memos of interpretation?

■ Yes ■ No



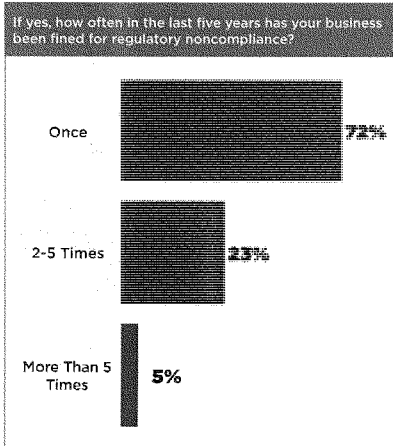
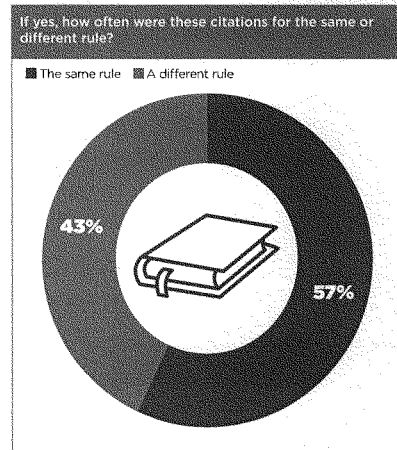
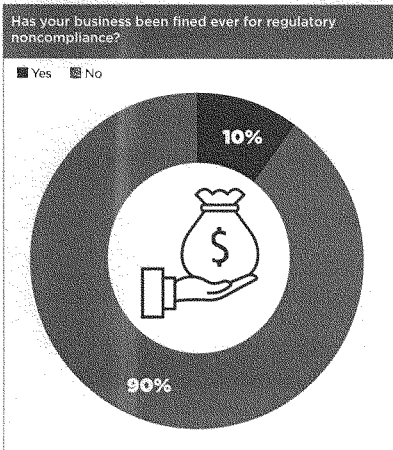
Have you ever read through guidance documents?

■ Yes ■ No



REGULATORY FINES

While the overwhelming majority of small firms have NOT been fined for regulatory noncompliance, those that have faced significant fines—the average cost of citations over five years was \$30,651.



IMPACTS OF REGULATION

Not surprising given the high level of confusion over the Affordable Care Act, health insurance was the number one employee benefit negatively impacted by high regulatory costs.

Please indicate which of the following employee benefits have been negatively impacted as a result of high compliance costs due to federal, state and local regulatory requirements. (check all that apply)

Health insurance	62%
Wage/salary increases	51%
Bonuses	36%
401K and other defined contribution retirement plans	33%
Competitive wages	32%
Paid time off	23%
Paid sick leave	22%
Pension plans and other defined benefit retirement plans	16%
Other	10%

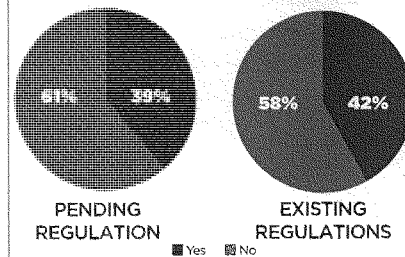
Seventy percent of small firms say that new regulations have a very or somewhat significant impact on their plans to grow or expand their business. More than half have held off on hiring a new employee due to regulatory burdens.

How significant an impact does regulatory uncertainty related to each of the following have on your plans to grow or expand your business?

	Very significant	Somewhat significant	Not very significant	Not at all
New regulations	39%	30%	18%	13%
The expectation of new regulations	37%	32%	17%	15%
Existing regulations	29%	35%	23%	14%

The impact of regulatory burden cannot be overstated: more than one-third have held off on business investment due to uncertainty on a PENDING regulation and 42 percent have held off due to uncertainty on the meaning or interpretation of an EXISTING regulation.

Have you delayed or halted any business investment besides new hires (expansions, product development, etc.) because of uncertainty on:

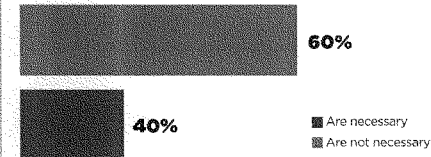


Please select how regulatory burdens and their associated costs impact your business overall. (check all that apply)

Held off on implementing growth strategies	53%
Held off on hiring a new employee	52%
Held off on salary increases for employees	50%
Delayed purchase of new equipment	43%
Increased prices	39%
Reduced benefits to employees	39%
Reduced the number of employees	29%
Unable to get financing	21%
Closed stores or branches	5%

REGULATORY POLICY

Would you say the majority of regulations covering your industry...



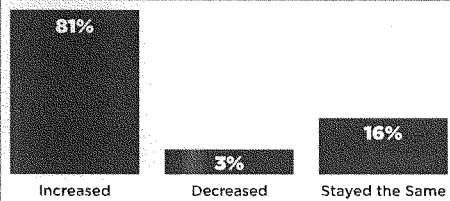
Certainly, NSBA and its members can see the need for some regulations, however 60 percent of small businesses surveyed said they believe the majority of regulations covering their industry are **NOT** necessary.

The U.S. Small Business Administration Office of Advocacy was ranked the number one most effective federal entity when it comes to protecting small businesses against unfair regulatory burdens.

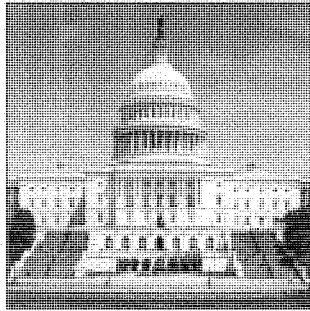
How effective do you think each of the following currently are in protecting small businesses against unfair regulatory burdens? (Please do not indicate how effective they have the potential to be, just how effective they ARE today.)

	Very	Somewhat	Not at all	Not sure what this is
SBA Office of Advocacy	8%	32%	28%	33%
SBA Ombudsman	7%	25%	29%	39%
Small Business Regulatory Enforcement Fairness Act (SBREFA)	6%	24%	20%	49%
The Administration's Office of Information and Regulatory Affairs (OIRA)	4%	14%	27%	55%
Regulatory Flexibility Act	4%	16%	23%	58%

How do you think federal regulations have changed over the past five years?

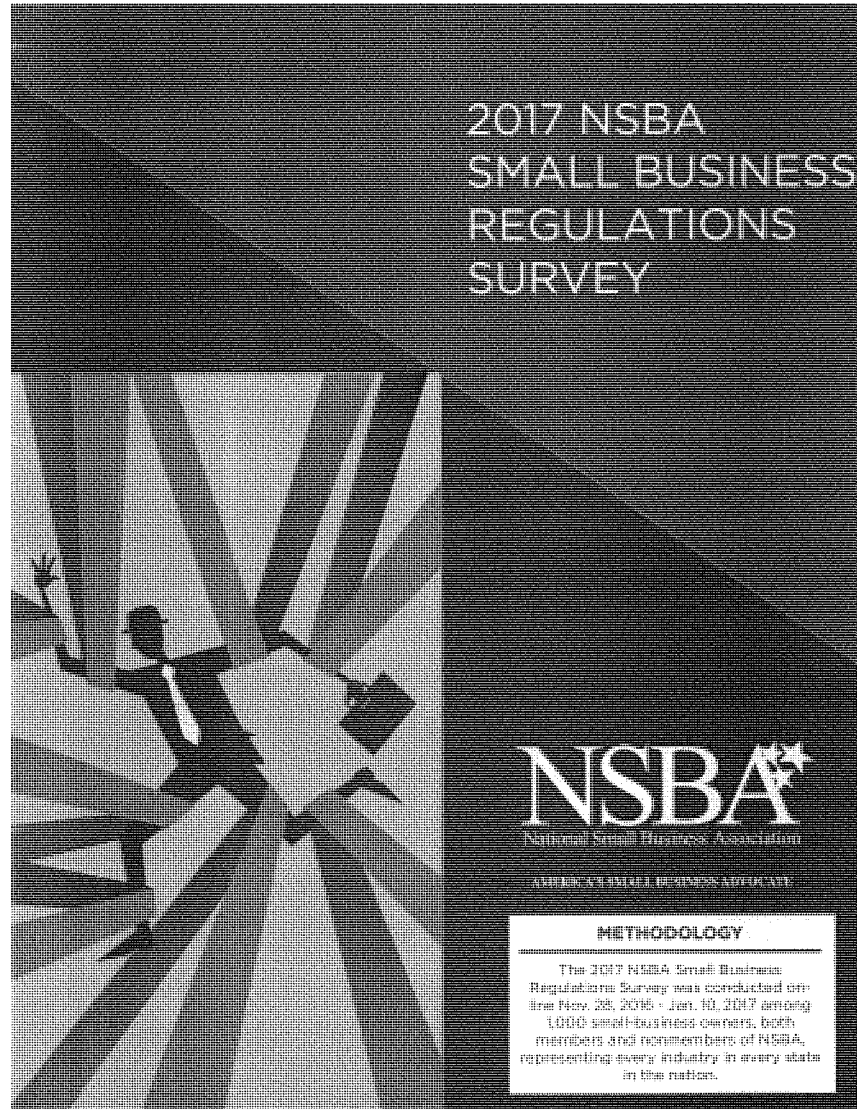


REGULATORY RELIEF IS POSSIBLE



To achieve meaningful relief and a rational regulatory regime, NSBA urges the adoption of a national regulatory budget, which would impose strict, enforceable constraints on the ability of federal agencies to impose regulatory costs on the public. Additionally, NSBA urges lawmakers to support policies that:

- Require that agencies consider indirect costs and detailed alternatives to minimize any significant adverse impact
- Require Regulatory Flexibility Analyses as a prerequisite to a final rule being issued
- Require increased economic analyses and the Office of Information and Regulatory Affairs (OIRA) to enhance its oversight efforts
- Require that agencies use plain writing when revising or drafting new regulations
- Allow for increased enforcement flexibility and the ability to grant common-sense exemptions for first-time offenders
- Streamline paperwork, consolidate forms and harmonize data and due dates
- Require a cost-benefit analysis on proposed regulations and paperwork
- Improve information collection by: 1) strengthening the Paperwork Reduction Act's requirement that agencies' chief information officers review and certify information collection requests; 2) requiring OIRA to develop stricter approval criteria; and 3) limiting the number of information requests an agency can issue per year



Post-Hearing Questions for the Record
Submitted to Mr. Rosario Palmieri
From Chairman James Lankford

*“Improving Small Business Input on Federal Regulations:
Ideas for Congress and a New Administration”*
Thursday January 19, 2017

United States Senate, Subcommittee on Regulatory Affairs and Federal Management
Committee on Homeland Security and Governmental Affairs

On the rigor of CFPB’s Regulatory Flexibility Analysis

Question: On October 7, 2016, the SBA Office of Advocacy sent the CFPB a letter during the comment period of the payday loans rule. The SBA Office of Advocacy raised concerns that the true economic impact of the Payday Loans rule “may be greater than what is indicated” in the agency’s regulatory flexibility analysis. What feedback have you received from your members about the rigor of CFPB’s regulatory flexibility analysis?

Answer:

The example you provide and how the SBA’s Office of Advocacy responded clearly shows the important role that offices like Advocacy and the Office of Information and Regulatory Affairs (OIRA) play in ensuring agencies are employing principles of sound rulemaking. Moreover, these offices ensure that all agencies are complying with the statutory requirements placed upon them by Congress and that executive branch agencies are complying with the executive orders and guidance that are designed to improve the quality of the regulations issued.

Whether its notice-and-comment, regulatory analysis or holding SBREFA panels, manufacturers are concerned that agencies simply “check the box” when it comes to complying with the Regulatory Flexibility Act (RFA), the Administrative Procedure Act (APA) and other process requirements. Congress must support SBA’s Office of Advocacy and OIRA and give these offices the resources they need to ensure that agencies are not just complying with process requirements, but are also conducting thorough regulatory analysis, holding meaningful and timely small business panels, holding more than one panel when necessary, conducting additional stakeholder outreach and incorporating feedback into agency decisionmaking.

Unfortunately, agencies are able to avoid many important RFA requirements by simply asserting that a rule will not impact small businesses significantly. A recent analysis in the *Administrative Law Review* shows that agencies avoided the requirement of the RFA for more than 92 percent of rules issued between the fall regulatory agendas of 1996 and 2012.¹ In January 2017, Small Business Administration’s Office of Advocacy, which monitors compliance with the RFA and

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

assists agencies in meeting the law's requirements, issued its annual report indicating that it helped save small businesses \$1.4 billion in regulatory costs. Moreover, Advocacy has saved businesses cumulatively \$130 billion in regulatory costs since it began tracking regulatory cost savings in 1998. Imagine the positive impact on regulations if agencies were not able to avoid the RFA's requirements so easily. In addition, despite the success of the small business panel process, it only applies to three agencies.

On CFPB's use of SBREFA Panels

Question: The CFPB is one of three agencies required to hold SBREFA panels for rules that have a significant economic impact on a substantial number of small entities. However, as an independent agency, CFPB is not subject to OMB review. Does CFPB's status as an independent agency have an impact on the rigor of their SBREFA panels? Have you heard from your members that CFPB listens to their concerns?

Answer:

As you mention, independent regulatory agencies are not subject to OMB review. The rules issued by these agencies impose significant costs on manufacturers. These agencies are not required to comply with the same regulatory principles as executive branch agencies and often fail to conduct any analysis to determine expected benefits and costs. In 2009, President Obama created the bipartisan Council on Jobs and Competitiveness. The Council recommended in both its interim and final reports to encourage Congress to require independent regulatory agencies to conduct cost-benefit analyses of their significant rules and subject their analysis to third-party review through OIRA or some other office. Congress should confirm the President's authority over these agencies. If there is consensus that this process makes executive branch rules better, why would we not want to similarly improve the rules issued by independent regulatory agencies? Consistency across the government in regulatory procedures and analysis would only improve certainty and transparency of the process. The case for the inclusion of independent regulatory agencies in a centralized review of regulations is clear, and Congress should act to make it certain.

Despite the documented benefit of the RFA's requirements, agencies still exploit the loopholes in the law. Significant rules issued by the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA) are subject review by OIRA. Despite its critical function, even as the size and scope of the government has increased, OIRA has shrunk. In 1980, the office had 90 full-time equivalent employees; in 2015, there were only 47.² If we are to ensure that agencies are conducting thorough and sound analysis and incorporating the concerns of manufacturers and other regulated entities into regulatory decisions, then Congress must expand OIRA's and other institutions' abilities to provide objective analysis, to conduct thoughtful regulatory review and to work with regulating agencies so that regulations will meet health, safety and environmental objectives more effectively at a much lower cost to businesses.

² Dudley, Susan and Melinda Warren (2016), "Regulators' Budget from Eisenhower to Obama: An Analysis of the U.S. Budget for Fiscal Years 1960 through 2017," <https://regulatorystudies.columbian.gwu.edu/regulators%E2%80%99-budget-eisenhower-obama>.

On the Usefulness of SBREFA Panels

Question: On paper, SBREFA Panels are a great way to receive input from small businesses. In reality, the agencies that are required to hold them have found ways around them or to minimize their impact. For example, when OSHA was drafting the Silica rule, they held a panel in 2003 but did not finalize the rule until 2016 – 13 years later. How could SBREFA Panels be improved so that agencies are consistently receiving real input from small businesses?

Answer:

The fact that OSHA empaneled small business representatives more than a decade before it issued a final regulation is simply one example of how agencies fail to comply with the spirit of the law. To ensure that agencies are consistently receiving input from small businesses and to ensure compliance by agencies with all of the RFA's requirements Congress should provide the Chief Counsel for Advocacy the authority to issue rules governing compliance with the RFA.³ By granting the Office of Advocacy the rulemaking authority to define key terms, Congress can ensure consistent application across agencies of the RFA's statutory requirements. It will also provide for mechanisms to better assess the effectiveness of the RFA and SBREFA.

On the Indirect Impact of Regulations

Question: Under the RFA, agencies, including independent agencies, must prepare a regulatory flexibility analysis for rules deemed to have a "significant economic impact on a substantial number of small entities." However, the RFA does not define "significant economic impact" or "substantial number of small entities." The DC Court of Appeals has consistently held that "economic impact" means only direct costs, not indirect. Do agencies provide enough information for small businesses to understand the potential cumulative costs of regulations? What steps should Congress take to ensure that all potential consequences of proposed regulations are public?

Answer:

To ensure that agencies are applying these sound regulatory principles to small entities, Congress should, as mentioned above, provide the Chief Counsel for Advocacy the authority to issue rules for ensuring compliance with the RFA. This is imperative if we are to stop agencies from exploiting loopholes in the law to avoid the RFA's requirements. Moreover, Congress should require independent regulatory agencies to conduct cost-benefit analyses of their significant rules and subject their analysis to third-party review through OIRA or some other office. This will help ensure that all agencies are complying with the RFA as Congress intended.

Federal regulators establish rules without considering the cumulative effects of existing regulations, hampering the ability of our regulatory system to effectively meet desired regulatory outcomes. The effectiveness (or ineffectiveness) of existing regulations is not analyzed, and the

³ See Section 5 of the Small Business Regulatory Flexibility Improvements Act of 2017 (S. 584, H.R. 33).

continued onslaught of new regulations simply adds to the ever-growing burden imposed by our inefficient and complex regulatory system.

Congress should require agencies to consider the cumulative costs of regulatory requirements, a principle that is articulated in President Obama's Executive Orders 13563 and 13610 and OMB guidance for agencies. Despite the efforts of past administrations, regulatory burdens continue to increase. Manufacturers are hopeful that directives by President Trump, including Executive Orders 13771 and 13777 and the Presidential Memorandum on Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing, will actually lead to a reduction in unnecessary regulatory burdens.

Regulators often make their regulatory determinations (e.g., how and who to regulate) before issuing a notice of proposed rulemaking and before they receive valuable feedback from those entities that are directly impacted by the agency's action. They work behind closed doors and fail to provide information to the public. Agencies should begin their public outreach well before they determine how and who to regulate. This simple change in how we regulate would enable regulators to better understand the impact—including the cumulative effects—of their actions. At a minimum, Congress should pass the Early Participation in Regulations Act (S. 579) and require an agency to publish an advance notice of proposed rulemaking when it considers a major rule. This would improve the regulatory process for small and large businesses alike.

Agency adherence to sound regulatory principles is vital if we are to implement fundamental change to our regulatory system that improves the effectiveness of rules in protecting health, safety and the environment while minimizing the unnecessary burdens imposed on regulated entities.

**Post-Hearing Questions for the Record
Submitted to Rosario Palmieri, National Association of Manufacturers**

**From Ranking Member Heidi Heitkamp
United States Senate, Subcommittee on Regulatory Affairs and Federal Management
Committee on Homeland Security and Governmental Affairs**

**Improving Small Business Input on Federal Regulations:
Ideas for Congress and a New Administration
January 19, 2017**

1. I hear from small businesses in my state about the need for Federal agencies to do a better job connecting with and understanding their challenges.
 - What steps need to be taken to improve the way agencies talk to small businesses to truly understand the challenges they face?

Answer:

Principles of sound rulemaking dictate that agencies engage regulated entities, regardless of size, as they develop regulatory proposals. The Administrative Procedure Act requires federal agencies to publish in the Federal Register a general notice of proposed rulemaking for substantive rules and provide the public an opportunity to participate in the rulemaking (5 U.S.C. 553). Unfortunately, regulators often make their regulatory determinations (e.g., how and who to regulate) before issuing a notice of proposed rulemaking and before receiving valuable feedback from those entities that are directly impacted by the agency's action. Congress should pass the Early Participation in Regulations Act (S. 579) and require an agency to publish an advance notice of proposed rulemaking when it considers a major rule. Such a requirement would force agencies to seek public input before they make regulatory decisions that would impose significant burdens on manufacturers and other businesses. This would improve the regulatory process for small and large businesses alike.

When Congress amended the Regulatory Flexibility Act (RFA) in 1996, it required the Environmental Protection Agency and the Occupational Safety and Health Administration to empanel a group of small business representatives to help those agencies better consider a rule's impact before it is proposed. In recognizing the importance of this panel process, Congress expanded this requirement to include the Consumer Financial Protection Bureau when it passed the Dodd-Frank Wall Street Reform and Consumer Protection Act. However, agencies exploit loopholes in the law to avoid the RFA's requirements. The law does not explicitly define a "significant economic impact on a substantial number of small entities," so agencies have great discretion in deciding when the RFA would apply to a proposed or final rule. Furthermore, only a small number of regulations require small business-oriented analysis because "indirect effects" cannot be considered. Congress should reform and strengthen the requirements that agencies improve public participation throughout the rulemaking process. Congress should close those loopholes.

- What types of compliance assistance do you believe are most effective?

Answer:

The NAM advocates for a collaborative approach by regulating agencies. Agencies should focus on outcomes-based solutions that yield a safety culture, productivity and economic growth. An adversarial relationship with employers does not foster the level of cooperation and collaboration necessary to lead to the highest standards of excellence in safe and competitive workplaces.

Treating allegations as facts and publicly shaming employers who may be working to remedy a problem do not build relationships of trust between the regulator and the regulated. Recent data from the Bureau of Labor Statistics have shown injury rates in the private sector have been declining substantially. Rather than celebrate these improvements and reward a safety culture, regulatory agencies punish companies for innovative safety programs. Manufacturers instead welcome the opportunity to publicly highlight stories of true success with new workforce initiatives, tout innovative ideas that engage employees, solve emerging problems and share best practices. Manufacturers believe that collaborating on the best way to remedy issues would be a better approach than focusing on only negative actions. Manufacturers believe in strong enforcement of rules and regulations. Agencies should embrace opportunities to collaborate and spotlight best practices and innovative ideas in the manufacturing sector to promote safety and compliance.

2. Good use of the SBREFA panels can help lead to better regulatory outcomes. However, all of these activities require agency resources, both time and personnel.

- How should the federal government address the resource challenges that agencies will face with significantly expanded small entity analysis?

Answer:

Requirements that agencies conduct substantive outreach to regulated entities before determining when and how to regulate should be priorities within an agency. Regulatory proposals that are poorly designed, are inefficient and do not effectively meet regulatory objectives already impose significant resource challenges for agencies and the regulated public. By engaging in thoughtful discussions with small entities and other stakeholders, agencies could use limited resources more effectively and better meet regulatory objectives.

3. One of my concerns is that introducing new or additional opportunities for judicial review will create havoc in the regulatory environment, and reduce certainty for businesses through regulatory delay.
 - How do we balance this challenge and does NAM believe that more court challenges and greater uncertainty is good for your members?

Answer:

Though the APA dictates the process for promulgating rules, the law provides agencies vast discretion. Notice-and-comment is not required for interpretative rules and agency guidance, and this provides regulators considerable authority about how and when to regulate. The complexity of rulemaking and its reliance on highly technical scientific information has only increased since the passage of the APA. The process by which the government relies on complex, scientific information as the basis for rules should be improved and subject to judicial review. Our administrative process has not kept up with those changes, and agency accountability is lacking without meaningful judicial review. When judicial review provisions were added to the Regulatory Flexibility Act in 1996, it resulted in greater agency compliance and very little litigation.

4. Too often, we focus on the mistakes that agencies make in the regulatory space. We should also look at the success stories and learn from those experiences.
 - Are there any specific Federal regulations that you believe an agency fully incorporated the views and concerns of your members? What lessons are to be learned from that experience?

Answer:

When Congress passed the Food Safety Modernization Act of 2011 (FSMA), it mandated that the Food and Drug Administration (FDA) finalize a regulation that addresses the sanitary transportation of food. FDA stated in its proposed rule that the “goal of the proposed rule is to ensure that transportation practices do not create food safety risks.”¹ As FDA worked on both the proposed and final rules, the agency proactively worked with industry stakeholders and the greater public to ensure that it was issuing a final rule that met the stated goal but did not impose significant new burdens. The agency recognized throughout the process that the transportation of food in the U.S. is conducted safely and efficiently, and it strove to establish requirements for the sanitary transportation of food that are in accordance with industry best practices. In addition to public meetings and webinars, FDA officials were very proactive in meeting with various stakeholder representatives. It was apparent that these officials wanted to get it right.

The FDA officials who drafted this regulation went above and beyond the requirements that were placed upon them. Their engagement with stakeholders was vital as they sought to minimize the unnecessary burdens that rule would impose. This was reflected in the changes that were made to

¹ 79 Fed. Reg. 7006

the proposed rule. Other agencies should proceed with regulations in a similar manner. Importantly, regulators should work closely with stakeholders before they make their regulatory determinations. Over the years, Congress and the executive branch have established laws and guidelines designed to encourage public outreach and a thoughtful consideration of the feedback received. Unfortunately, meaningful public engagement by agencies is the exception and not the rule. Unless there are mechanisms in place to ensure that agencies actually incorporate stakeholder feedback, agencies will lack the motivation to incorporate this important regulatory principle into their operations.

5. Research by the SBA and others has repeatedly demonstrated the inherent difficulty of accurately assessing the direct and indirect costs of regulations on small businesses across sectors and industries. While NEPA is cited as a model, there is currently no single formula or methodology that makes such comparisons meaningful for purposes of assessing the effectiveness of the RFA and SBREFA.

- How do you propose this overcoming this challenge? Who should be the ultimate arbiter of such determinations?

Answer:

The Small Business Administration's Office of Advocacy is required by law to monitor agency compliance with the RFA. Congress should provide the Chief Counsel for Advocacy the authority to issue rules governing compliance with the RFA.² By granting the Office of Advocacy the rulemaking authority to define key terms, Congress can ensure consistent application across agencies of the RFA's statutory requirements. It will also provide for mechanisms to better assess the effectiveness of the RFA and SBREFA.

6. In my view, one of the most interesting subjects discussed at the hearing is the impact of State regulations on small businesses across geographic boundaries, and the need for greater harmonization.
- Can you embellish upon your excellent suggestions on incentivizing such coordination among states?

Answer:

In order to understand the complexities associated with regulations across geographic boundaries, federal regulators must conduct—before making regulatory determinations—outreach to state and local entities to educate themselves on the regulatory requirements at the various levels of government. Without this knowledge, agencies run the risk of imposing significant regulatory costs on the public because of poorly designed, inefficient and unnecessary duplicative and conflicting rules. Conducting this type of outreach before regulatory determinations are made should not be a novel approach to rulemaking at the federal level.

² See Section 5 of the Small Business Regulatory Flexibility Improvements Act of 2017 (S. 584, H.R. 33).

I mentioned in my testimony that one source of information for federal officials could be state economic development entities, but there are many other sources of information on which federal regulators should apply. Agencies can utilize small business panels, such as those required by SBREFA to assist them in coordinating with state and local officials. Agencies should issue advance notices and requests for information to better inform them on state and local regulations as they determine whether there is a need for federal action. Importantly, the SBA's Office of Advocacy and other offices within the federal government can ensure agencies are working with state and local officials. These are not new principles. Executive Order 12866 makes clear the importance of agency coordination with state and local officials. President Obama's Executive Order 13563 affirms this principle, stating that "regulations shall be based, to the extent feasible and consistent with law, on the open exchange of information and perspectives among State, local, and tribal officials, experts in relevant disciplines, affected stakeholders in the private sector, and the public as a whole."

- Does NAM believe State and local regulations impose more, less, or an equal number of burdens on small businesses than Federal regulations? Has NAM attempted to assess those impacts, and if so, what did you find?

Answer:

The NAM has not attempted to assess the impact of burdens imposed by state and local regulations.

Post-Hearing Questions for the Record
Submitted to Mr. Rosario Palmieri
From Senator Jon Tester

*“Improving Small Business Input on Federal Regulations:
Ideas for Congress and a New Administration”
Thursday January 19, 2017*

United States Senate, Subcommittee on Regulatory Affairs and Federal Management
Committee on Homeland Security and Governmental Affairs

The following questions are intended for Rosario Palmieri, Vice President for Labor, Legal, and Regulatory Policy; National Association of Manufacturers

Question:

One of the things that I consistently hear from small businesses in Montana is the need for access to capital. I believe that our community banks and credit unions are the lifeblood of capital in rural America. In the last several years we've placed too many regulatory burdens on them that were meant for Wall Street. I'm not saying we should be loosening the reigns on everybody, but I do believe there is work to be done for our community banks and credit unions.

1) I'd like your thoughts on any burdens you see with regards to access to capital, especially in rural areas.

Answer:

Regardless of the agency or regulation, regulators should employ the principles of sound rulemaking to ensure they are minimizing unnecessary burdens, especially on small businesses. The Regulatory Flexibility Act (RFA) requires agencies to thoughtfully consider the impact of their rules on small entities. The law requires agencies to consider less costly regulatory alternatives for small firms and, in some cases, communicate directly with small business representatives when drafting a proposed rule. Congress intended the law to ensure that agencies minimize the burdens on those who are most vulnerable to a rule's negative impacts. To ensure that regulations are appropriate and tailored best meet policy objectives, agencies must conduct meaningful public outreach, conduct thorough regulatory analysis and define ways to determine the future effectiveness of their rules. Agencies must also faithfully comply with the RFA to minimize the burdens imposed on small entities.

Question:

- 2) Do you have any suggestions with regards to making it easier to access capital in rural areas through easing regulatory burdens on small lending institutions?*

Answer:

Each agency interprets the RFA's important terms in widely divergent ways and thus is able to avoid the RFA's requirements as Congress intended. As a result, only a small number of regulations now include RFA analysis because agencies can determine when a regulatory flexibility analysis is necessary and appropriate. Congress must pass the Small Business Regulatory Flexibility Improvements Act of 2017 (S. 584, H.R. 33) to close loopholes that agencies use to avoid its requirements. It would provide the Small Business Administration's Office of Advocacy authority to establish standards for when RFA analysis is to be conducted. The bill would expand small business outreach requirements before rules are proposed and direct agencies to consider the indirect impact of their regulations on small businesses. The Act would ensure that regulations are designed in a way that meets policy objectives without placing unnecessary burdens on small businesses. Through careful analysis and an understanding of both intended and unintended impacts on stakeholders, agencies can improve their rules for small entities, leading to improved regulations.

Question:

A few years ago, Congress responded to foodborne illnesses issues by passing the Food Safety Modernization Act. The Act transformed the methods FDA uses to keep our food supply safe and our families healthy. Knowing that changing food safety regulations could be especially burdensome to the smallest food producers, I added an amendment that exempted small businesses that sell a majority of their food directly to consumers within a 275-mile radius. In this case, local and state food safety and health agencies are perfectly capable of overseeing these small businesses without the federal government interfering. The Food Safety Modernization Act, which went into effect late last year, is a good example of important policy that didn't need to be one size fits all.

- 3) I believe this is a good example of how Congress can work with industry to make sure small businesses are not overregulated. I believe we need to see more of this type of legislating whenever a bill comes to the floor. Could you please talk about your efforts to work with Congress on small business exemptions as authorizing bills move through Congress?*

Answer:

In August 2011, Congress passed H.R. 2715 (Pub. Law 112-28), which amended the Consumer Product Safety Improvement Act (CPSIA) to correct provisions that imposed significant burdens on small businesses. In addition to product-specific exclusions from some of the CPSIA's requirements, H.R. 2715 mandated the U.S. Consumer Product Safety Commission (CPSC) to

identify ways to reduce third party testing burdens and issue regulations by August 2012 if the agency determines that such regulations will reduce testing costs while assuring compliance. The focus of this provision was alleviating the unnecessary burdens—those that do not advance consumer protection—on small businesses.

Despite this congressional mandate, the CPSC has failed to move forward with regulations that would decrease the costs associated with third party testing. Stakeholders have provided the Commission proposals for reducing burdens and CPSC staff has made recommendations to the Commission; yet the Commission shows no desire to move forward. Other than clarifying that untreated wood would not contain certain harmful chemicals such as lead and phthalates, the Commission has not advanced any real burden reduction initiatives.

Industry spends millions of dollars every year testing materials they know will never contain the banned chemicals and heavy metals. This does not advance safety, and in fact, may hinder companies from expanding their businesses or product lines. This is especially detrimental to small businesses that are not able to absorb the extra testing costs.

To encourage the Commission to move forward with burden reduction, Congress, through the FY 2015 omnibus spending measure (H.R. 83), provided the CPSC \$1 million to be used exclusively for third party testing burden reduction and the bill's joint explanatory statement articulated that Congress desires the Commission to move forward. It is unclear as to whether the Commission plans to move forward.

**Post-Hearing Questions for the Record
Submitted to Gerald (Jerry) Hietpas, Action Safety Supply Co.**

**From Chairman James Lankford
United States Senate, Subcommittee on Regulatory Affairs and Federal Management
Committee on Homeland Security and Governmental Affairs**

**Improving Small Business Input on Federal Regulations:
Ideas for Congress and a New Administration
January 19, 2017**

**United States Senate, Subcommittee on Regulatory Affairs and Federal Management
Committee on Homeland Security and Governmental Affairs**

On the Small Business Regulatory Burden

Question: When the federal government issues one-size-fits-all rules, they place a disproportionately large burden on small businesses which lack the economies of scale to handle the costs of changing their operations for each new regulation. In 2012, Manufacturers spent an average of \$19,564 per employee to comply with state and federal regulations – double the amount per employee spent by total U.S. businesses. Every dollar spent on regulatory compliance is a missed opportunity for growth and investment. How does a company of Action Safety Supply's size balance complying with regulations while ensuring the success of your business?

On the Indirect Impact of Regulations

Question: Under the Regulatory Flexibility Act, agencies must prepare a regulatory flexibility analysis for rules deemed to have a "significant economic impact on a substantial number of small entities." However, the RFA does not define "significant economic impact" or "substantial number of small entities." The DC Court of Appeals has consistently held that "economic impact" means only direct costs, not indirect effects. As a business owner, do you make a distinction between direct costs and indirect costs when you review new regulations and consider their effects when planning for your business?

Witness Responses to questions submitted for the record were not received by time of printing.

**Post-Hearing Questions for the Record
Submitted to Gerald (Jerry) Hietpas, Action Safety Supply Co.**

**From Ranking Member Heidi Heitkamp
United States Senate, Subcommittee on Regulatory Affairs and Federal Management
Committee on Homeland Security and Governmental Affairs**

**Improving Small Business Input on Federal Regulations:
Ideas for Congress and a New Administration
January 19, 2017**

1. Every small business faces a different specific situation.
 - What steps do we need to take when instructing Federal agencies to craft regulatory analysis requirements that ensure consideration of the different operating environments that small businesses occupy?
2. One thing I hear from small businesses in my state is the need for federal agencies to do a better job connecting with and understanding their challenges.
 - What steps do you think need to be taken to improve the way agencies talk to small businesses so that they truly understand the challenges you face?
3. Another topic I hear a lot about, both here in Washington and in North Dakota, is the idea that small businesses could use more assistance in figuring out how to comply with agency regulations. This topic is generally described as compliance assistance.
 - What types of compliance assistance do you believe would be most effective?
4. Are SBA's existing NAICS size standards useful and fair? Do they promote or impede small business innovation and growth?
5. At the hearing, there was some discussion about State and local regulations sometimes imposing even greater burdens on small businesses than Federal regulations.
 - Can you elaborate on your experiences in having to comply with different regulations across State boundaries?
 - Do you have any ideas or suggestions on how Congress should think about those challenges?

Witness Responses to questions submitted for the record were not received by time of printing.

**Post-Hearing Questions for the Record
Submitted to LaJuanna Russell, Business Management Associates, Inc.**

**From Ranking Member Heidi Heitkamp
United States Senate, Subcommittee on Regulatory Affairs and Federal Management
Committee on Homeland Security and Governmental Affairs**

**Improving Small Business Input on Federal Regulations:
Ideas for Congress and a New Administration
January 19, 2017**

1. Every small business faces a different specific situation.
 - What steps do we need to take when instructing Federal agencies to craft regulatory analysis requirements that ensure consideration of the different operating environments that small businesses occupy?
 - L Russell response: I would suggest that the regulatory analysis is structured for specific small business types – or those focusing within a specified space – vs being a broad stroke. For instance, the issues and concerns faced by retailers are much different than those faced by federal contractors. To take this a step further, the issues faced by product suppliers within the federal contracting space are much different than those of a service provider.
2. One thing I hear from small businesses in my state is the need for federal agencies to do a better job connecting with and understanding their challenges.
 - What steps need to be taken to improve the way agencies talk to truly understand the challenges they face?
 - L Russell response: It doesn't appear to us that federal agencies truly conduct an open level of outreach. What is currently considered "outreach" consists of an event where a specific agency brings in a group of small businesses to provide information on 'How to Do Business with X Agency'. This is not a two-way conversation. I have done training videos for federal procurement where we discuss the information exchange between agencies and small businesses. We understand the FAR requirements regarding restrictive contracting and how certain conversations can be construed to fall within that category. However, it is extremely clear when a solicitation is released that the agency is targeting one company to pursue and win the opportunity. That is again a one-sided conversation as other qualified bidders will simply not respond.
3. Another topic I hear a lot about, both here in Washington and in North Dakota, is the idea that small businesses could use more assistance in figuring out how to comply with agency regulations. This topic is generally described as compliance assistance.
 - What types of compliance assistance do you believe would be most effective?
 - L Russell response: It depends specifically on the compliance issue. A tax compliance issue is different from a Department of Labor compliance issue. Most often, the

compliance factor is released without the small business owner even knowing that the factor exists. We learn about it during an audit when it then becomes punitive. It is difficult to determine, for every type of small business, what type of compliance assistance is needed up front. I believe what would be most helpful would be some level of a grace period or grace occurrence so that we are not penalized for the first offense of an issue of which we were truly unaware.

4. Good regulatory analysis is important. Good outreach from agencies to small businesses is important. Good use of the SBREFA panels can help lead to better regulatory outcomes. However, all of these actions require agency resources, both time and personnel.
 - How should the federal government address the resource challenges that agencies will face with significantly more small entity analysis?
 - L Russell response: That's a very difficult question to answer with the current environment. Currently, agencies are undergoing RIFs, hiring freezes, contracting freezes...makes it near impossible to plan for mission.
5. Are SBA's existing NAICS size standards useful and fair? Do they promote or impede small business innovation and growth?

L Russell response: The NAICS codes size standards should be re-evaluated and raised. Once a small business is outside of its small business standard – sometimes as low as \$7 Mil up to \$20 Mil or so – that business is now competing with the \$100 Mil or even \$1 Bil firms who have significantly more resources and are willing to reduce price and accept risks that small/mid-sized firms cannot. Having many opportunities set aside for small business helps, but once a business crosses the threshold, every element within that firm must change overnight which is not plausible.
6. You testified that that State and local regulations sometimes impose even greater burdens on small businesses than Federal regulations.
 - Can you embellish upon this subject, including how to assess such impacts?
 - L Russell: I find this is a significant issue when it comes to employee pay laws, location tax laws and rules. For instance, we have employees in the State of PA where PA requires that a certain locality tax be taken. Our payroll company is large and understands tax laws and liability, but missed this locality tax – the only one for all 15 states where we have employees. Now we have a situation where not only the employee, but corporately, there is an unexpected tax liability.

**Post-Hearing Questions for the Record
Submitted to Ms. Karen Harned
From Chairman James Lankford**

***“Improving Small Business Input on Federal Regulations:
Ideas for Congress and a New Administration”
Thursday January 19, 2017***

**United States Senate, Subcommittee on Regulatory Affairs and Federal Management
Committee on Homeland Security and Governmental Affairs**

On the rigor of CFPB's Regulatory Flexibility Analysis

Question: On October 7, 2016, the SBA Office of Advocacy sent the CFPB a letter during the comment period of the payday loans rule. The SBA Office of Advocacy raised concerns that the true economic impact of the Payday Loans rule “may be greater than what is indicated” in the agency’s regulatory flexibility analysis. What feedback have you received from your members about the rigor of CFPB’s regulatory flexibility analysis?

Answer: To the best of my knowledge NFIB has not heard from any members on the CFPB rule regarding Payday Loans.

On CFPB's use of SBREFA Panels

Question: The CFPB is one of three agencies required to hold SBREFA panels for rules that have a significant economic impact on a substantial number of small entities. However, as an independent agency, CFP is not subject to OMB review. Does CFPB’s status as an independent agency have an impact on the rigor of their SBREFA panels? Have you heard from your members that CFPB listens to their concerns?

Answer: To the best of my knowledge NFIB has not heard from any members regarding CFPB and the SBREFA panel process at that agency.

On the Usefulness of SBREFA Panels

Question: On paper, SBREFA Panels are a great way to receive input from small businesses. In reality, the agencies that are required to hold them have found ways around them or to minimize their impact. For example, when OSHA was drafting the Silica rule, they held a panel in 2003 but did not finalize the rule until 2016 – 13 years later. How could SBREFA Panels be improved so that agencies are consistently receiving real input from small businesses?

Answer:

In the case of a situation like the Silica rule, Congress could reform the RFA to require agencies subject to SBAR panels to convene a new panel when it is re-proposing a rule that is more than three years from its initial proposal. To solve the broader issue, Congress could enact a similar requirement for all proposed rules covered by the panel process. Absent legislative action,

Congress could use its oversight authority to call agencies out when they fail to act on information from a panel in a timely manner.

On the Indirect Impact of Regulations

Question: Under the RFA, agencies, including independent agencies, must prepare a regulatory flexibility analysis for rules deemed to have a “significant economic impact on a substantial number of small entities.” However, the RFA does not define “significant economic impact” or “substantial number of small entities.” The DC Court of Appeals has consistently held that “economic impact” means only direct costs, not indirect. Do agencies provide enough information for small businesses to understand the potential cumulative costs of regulations? What steps should Congress take to ensure that all potential consequences of proposed regulations are public?

Answer:

No. We believe that including costs on small businesses indirectly regulated by the proposed rule would be an effective step to resolve this issue. Congress should clarify the definition of costs under the RFA to include indirect costs.

**Post-Hearing Questions for the Record
Submitted to Karen Harned
National Federation of Independent Business Small Business Legal Center**

**From Ranking Member Heidi Heitkamp
United States Senate, Subcommittee on Regulatory Affairs and Federal Management
Committee on Homeland Security and Governmental Affairs**

**Improving Small Business Input on Federal Regulations:
Ideas for Congress and a New Administration
January 19, 2017**

1. Good use of the SBREFA panels can help lead to better regulatory outcomes. However, expanding their use to all agencies requires agency resources, both time and personnel.
 - How should the federal government address the resource challenges that agencies will face with significantly expanded small entity analysis?

Answer:

Federal agencies need not face significant resource challenges by expanding small entity analysis. Such analysis does not need to be overly complicated. Small business outreach can be performed by telephone, e-mail or other cost and time-efficient ways.

2. One of my concerns is that introducing new or additional opportunities for judicial review will create havoc in the regulatory environment, and reduce certainty for businesses through regulatory delay. During your testimony, you stated support for eliminating Chevron deference.
 - Do you have any concerns that a likely increase in lawsuits will simply paralyze the regulatory process thereby possibly harm your members?

Answer:

We do not believe that the elimination of Chevron deference will necessarily result in additional litigation. Eliminating Chevron deference does not mean that the entity challenging a new rule will always win. The courts still will review regulations to determine whether or not the agency is acting within its statutory authority. Generally, if an agency stays within the statutory framework it is given by Congress, a legal challenge would likely fail and, therefore, not be worth the money or time for the regulated community to bring in the first instance.

3. Too often, we focus on the mistakes that agencies make in the regulatory space. We should also look at the success stories and learn from those experiences.

- Are there any specific Federal regulations that you believe an agency fully incorporated the views and concerns of your members? What lessons are to be learned from that experience?

Answer:

Unfortunately we are unable to provide an example of specific a specific Federal regulation where an agency fully incorporated the views and concerns of NFIB members. However, the Annual Report for the Chief Counsel of Advocacy on Implementation of the Regulatory Flexibility Act provides good examples of how the RFA benefits small business.
<https://www.sba.gov/advocacy/regulatory-flexibility-act-annual-reports>

3. Research by the SBA and others has repeatedly demonstrated the inherent difficulty of accurately assessing the direct and indirect costs of regulations on small businesses across sectors and industries. There is currently no single formula or methodology that makes such comparisons meaningful for purposes of assessing the effectiveness of the RFA and SBREFA.
 - How do you propose this overcoming this challenge? Who should be the ultimate arbiter of such determinations?

Answer:

NFIB supports legislation that would expand the definition of “economic impact” to include, “to the extent practicable and where possible, any indirect economic effect on small entities which is reasonably foreseeable and results from such rule.”

- Are SBA’s existing NAICS size standards useful and fair? Do they promote or impede small business innovation and growth?

Answer:

NFIB has not taken a position on NAICS size standards.

4. In my view, one of the most interesting subjects discussed at the hearing is the impact of State regulations on small businesses across geographic boundaries, and the need for greater harmonization.
 - Does NFIB believe State and local regulations impose more, less, or an equal number of burdens on small businesses than Federal regulations? Has NFIB attempted to assess those impacts and if so, what did you find?

Answer:

The NFIB Research Foundation released its poll on small business on regulations just last month (February 2017). Among other things, the majority of small business respondents said that the

federal government presents the most serious regulatory problems for their business. Wade, Holly, NFB National Small Business Poll, *Regulations*, Vol. 13, Iss. 3 (Feb. 2017) at 7. <http://www.411sbfacts.com/files/Regulations%202017.pdf>

5. In your testimony you mention expanding SBREFA and SBAR panels to independent agencies. However, doing so might conflict with other foundational statutes designed to ensure the autonomy of independent agencies.

- Do you have any ideas on how Congress might reconcile these competing needs?

Answer:

NFIB does not see a conflict with expanding SBREFA and SBAR panels to independent agencies and protecting the autonomy of independent agencies, particularly because SBA's Office of Advocacy, which helps enforce the RFA, is an independent office that does not speak for the administration.

**Post-Hearing Questions for the Record
Submitted to Ms. Karen Harned
From Senator Jon Tester**

***“Improving Small Business Input on Federal Regulations:
Ideas for Congress and a New Administration”
Thursday January 19, 2017***

**United States Senate, Subcommittee on Regulatory Affairs and Federal Management
Committee on Homeland Security and Governmental Affairs**

The following question is intended for Karen Harned, Executive Director; National Federation of Independent Businesses

One of the things that I consistently hear from small businesses in Montana is the need for access to capital. I believe that our community banks and credit unions are the lifeblood of capital in rural America. In the last several years we've placed too many regulatory burdens on them that were meant for Wall Street. I'm not saying we should be loosening the reigns on everybody, but I do believe there is work to be done for our community banks and credit unions.

- 1) *I'd like your thoughts on any burdens you see with regards to access to capital, especially in rural areas.*
- 2) *Do you have any suggestions with regards to making it easier to access capital in rural areas through easing regulatory burdens on small lending institutions?*

Answer: NFIB's monthly Small Business Economic Trends has consistently shown that access to capital is not an issue for NFIB members. <http://www.nfib.com/surveys/small-business-economic-trends/>

However, NFIB is concerned about the reduction in community banks, which we understand has happened at an accelerated pace since the enactment of Dodd-Frank.

A few years ago, Congress responded to foodborne illnesses issues by passing the Food Safety Modernization Act. The Act transformed the methods FDA uses to keep our food supply safe and our families healthy. Knowing that changing food safety regulations could be especially burdensome to the smallest food producers, I added an amendment that exempted small businesses that sell a majority of their food directly to consumers within a 275-mile radius. In this case, local and state food safety and health agencies are perfectly capable of overseeing these small businesses without the federal government interfering. The Food Safety Modernization

Act, which went into effect late last year, is a good example of important policy that didn't need to be one size fits all.

- 3) *I believe this is a good example of how Congress can work with industry to make sure small businesses are not overregulated. I believe we need to see more of this type of legislating whenever a bill comes to the floor. Could you please talk about your efforts to work with Congress on small business exemptions as authorizing bills move through Congress?*

Answer: NFIB appreciates your work fighting against one-size-fits-all regulatory policies. NFIB also advocates against such policies which do not provide small businesses with needed flexibility.