

TESTIMONY BEFORE THE UNITED STATES CONGRESS  
ON BEHALF OF THE  
**NATIONAL FEDERATION OF INDEPENDENT BUSINESS**

**NFIB**  
The Voice of Small Business.®

**United States Senate Committee on Homeland Security and  
Government Affairs**

on the date of

July 20, 2011

on the subject of

A Review of Legislative Proposals, Part II

Dear Chairman Lieberman and Ranking Member Collins:

On behalf of the National Federation of Independent Business (NFIB), I appreciate the opportunity to submit for the record this testimony for the U.S. Senate Committee on Homeland Security and Government Affairs hearing entitled "A Review of Legislative Proposals, Part II."

My name is Karen Harned and I serve as the executive director of the NFIB Small Business Legal Center. NFIB is the nation's leading small business advocacy association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents about 350,000 independent business owners who are located throughout the United States.

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

NFIB and the small business owners it represents commend this Committee for examining legislative solutions to help grow the economy by reducing overly burdensome regulation. NFIB believes it is vitally important to the nation's economy to achieve regulatory reform now, especially when there is momentum to do so in the 112<sup>th</sup> Congress. Various proposals have been introduced or discussed that would improve current law. We hope the Committee takes the needed steps to act in a bipartisan way and pass these important provisions.

The burden of regulation on small business has been among small business' top ten concerns for years. The NFIB Research Foundation's Problems and Priorities, which has been conducted every four years since 1982 and is designed to establish the relevant importance of small business concerns, has found "unreasonable government regulations" to be a top ten problem for small businesses for the last two decades.<sup>1</sup>

Overzealous regulation is particularly burdensome in times like these when the nation's economy remains sluggish. Unfortunately, the regulatory burden on small business has only grown. A recent study by Nicole and Mark Crain for the U.S. Small Business Administration Office of Advocacy found that the total cost of regulation on the American economy is \$1.75 trillion per year.<sup>2</sup>

If that number is not staggering enough, the study reaffirmed that small businesses bear a disproportionate amount of the regulatory burden. The study found that for 2008,

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<sup>1</sup> Phillips, Bruce D. and Wade, Holly, "Small Business Problems & Priorities", June 2008, at Table 5.

<sup>2</sup> Crain, Nicole V. and Crain, W. Mark, *The Impact of Regulatory Costs on Small Firms*, 2010.  
<http://www.sba.gov/advo/research/rs371tot.pdf>

small businesses spent \$10,585 per employee on regulation, which amounts to 36 percent more per employee than their larger counterparts.

Job growth in America remains at recession levels. Small businesses create two-thirds of the net new jobs in this country, yet those with less than 20 employees have shed more jobs than they have created every quarter but one since the second quarter of 2007, according to the Bureau of Labor Statistics.<sup>3</sup> Moreover, for the first six months of 2011, 17 percent of small businesses responding to the NFIB Research Foundation's *Small Business Economic Trends* cite regulation as their single most important problem.<sup>4</sup> Thus, reducing the regulatory burden would go a long way toward giving entrepreneurs the confidence they need to expand their workforce in a meaningful way.

NFIB believes that Congress must take actions like those proposed in the legislative proposals, which are the subject of this hearing to level the playing field. NFIB believes that the following ideas would help improve regulatory conditions for small businesses.

### **Expansion and oversight of SBREFA**

The Small Business Regulatory Enforcement and Fairness Act (SBREFA) — when followed correctly — can be a valuable tool for agencies to identify flexible and less burdensome regulatory alternatives. NFIB supports reforms, like in S. 1030, the “Freedom from Restrictive Excessive Executive Demands and Onerous Mandates Act of 2011,” introduced by Senator Olympia Snowe, which would expand SBREFA’s reach into other agencies and laws affecting small businesses. 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 small businesses, and how the agency can develop simple and concise guidance materials.

Furthermore, Congress should take steps to require independent agencies to follow SBREFA requirements. Last year, Congress took an important initial step to do this by requiring the new Consumer Financial Protection Bureau to conduct SBAR panels on the rules that will affect small businesses. Now more than ever, the rules promulgated by independent agencies have a considerable impact on small businesses. Congress should hold these independent agencies accountable for their effect on the small business economy.

In reality, small business owners are not walking the halls of federal agencies lobbying about the impact of a proposed regulation on their businesses. Despite great strides in regulatory reform, too often small business owners find out about a regulation *after* it has taken effect. Expanding SBAR panels and SBREFA requirements to other agencies would help regulators learn the potential impact of regulations on small business before they are promulgated. In addition, it would help alert small business owners to new regulatory proposals in the first instance.

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<sup>3</sup> <http://www.bls.gov/bdm/>

<sup>4</sup> NFIB Research Foundation, *Small Business Economic Trends*, July 2011.

While SBREFA itself is a good first step, in order for it to provide the regulatory relief intended by Congress, the agencies must make good-faith efforts to comply. As an example, the Environmental Protection Agency's (EPA) proposed Boiler MACT rule from last year failed to heed the recommendation of its SBAR panel to adopt a health-based standard and instead proposed a much higher standard that is virtually impossible to attain at any reasonable cost. This higher standard provided little, if any, additional benefit to the public over the health-based standard. Moreover, EPA is now revising its rule because the standard it proposed is too expensive and not practically attainable. If the agency had followed the SBAR recommendations in the first instance, it would not have to jump through these additional hoops.

Committees with oversight authority should hold agencies accountable to the spirit of the law, and the Office of Advocacy should uphold its obligation to ensure that agencies consider the impacts of their rules on small businesses. There are instances where EPA declined to conduct an SBAR panel despite developing significant rules, or a rule that would greatly benefit from small business input.

Congress should require agencies to perform regulatory flexibility analyses. Agencies should also be required to list all of the less-burdensome alternatives that they considered, and in the final rule, provide an evidence-based explanation for why they chose a more-burdensome alternative versus a less-burdensome option — or why no other means were available to address a rule's significant impact. In addition, agencies should address how their rule may act as a barrier to entry for a new business.

SBREFA contains a process known as Section 610 review, which requires agencies to periodically review existing rules and determine if they should be modified or rescinded. NFIB supports this requirement, but believes it could be improved — since all too often it is disregarded by agencies. NFIB supports legislation that would ensure agency compliance with 610 reviews.

Finally, when SBREFA was enacted it required all agencies to perform a one-time report on how they had reduced penalties for violations from small businesses. NFIB believes that Congress should explore making such reports an annual requirement. Many of the original reports occurred at least a decade ago. Congress should investigate ways to make agencies provide updated information and require that information on an annual or biannual basis.

### **Indirect costs in economic impact analyses**

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. As an example, environmental regulations have particularly high costs. 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. Following are recent examples of the indirect cost of regulation on small business:

- NFIB would like to thank Senator Collins for ensuring more small business owners had a chance to learn about and be certified under EPA's lead renovation and repair rule. Although the rule took effect in April of last year, Senator Collins was successful in pushing the effective date back to October 2010. That rule, however, continues to negatively impact small business. NFIB member Jack Buschur, of Buschur Electric in Minster, Ohio, recently testified that because of the time and financial costs of EPA's lead renovation and repair rule he will no longer bid on residential renovation projects.<sup>5</sup> Because he will no longer bid on these projects, Mr. Buschur will not be hiring new workers at his company of 18 employees, down from 30 employees in 2009.<sup>6</sup>
- NFIB member Hugh Joyce, James River Air Conditioning, Inc., Richmond, Virginia, projected in testimony that new greenhouse gas regulations will add 2 percent to 10 percent in consulting costs to his projects.<sup>7</sup> This is particularly telling because Mr. Joyce is committed to doing business in an environmentally-friendly manner. He is a member of the U.S. Green Building Council and conducts LEED certified green housing projects.

Reforms like those in S. 602, the "Clearing Unnecessary Regulatory Burdens Act" or "CURB Act," and S. 1030 would be a great start in ensuring that agencies make public a reasonable estimate of a rule's indirect impact. This requirement exists if agencies follow the Regulatory Impact Analysis (RIA) mandate contained in Executive Order 12866 signed during the Clinton Administration. Congress should hold agencies accountable and clarify the agencies' responsibility for providing a balanced statement of costs and benefits in public regulatory proposals.

### **Strengthen the role of the Office of Advocacy**

The Office of Advocacy plays an important role within the government to ensure that federal agencies consider the impact of regulations on small businesses. This role was further strengthened by executive order 13272. This order required agencies to notify the Office of Advocacy of any draft rules that may have a significant impact on small businesses, and "[g]ive every appropriate consideration to any comments provided by Advocacy regarding a draft rule."

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<sup>5</sup> Testimony of Jack Buschur, before the House Committee on Oversight and Government Reform, "Regulatory Impediments to Job Creation," February 10, 2011.

<sup>6</sup> Id.

<sup>7</sup> Testimony of Hugh Joyce, before the House Energy and Commerce Subcommittee on Energy and Power, "EPA's Greenhouse Gas Regulations and Their Effect on American Jobs," March 1, 2011.

Despite this executive order, agencies frequently fail to give proper consideration to the comments of the Office of Advocacy. In addition, there is no mechanism for resolving disputes regarding the economic cost of a rule between the agency and the Office of Advocacy.

NFIB believes that the Office of Advocacy needs to be strengthened. The Chief Counsel for Advocacy should have the ability to issue rules governing how agencies should comply with regulatory flexibility requirements. This will help ensure that agencies fully consider the views of the Office of Advocacy.

### **Increase judicially reviewable agency requirements within SBREFA**

As this committee well knows, SBREFA provided important reforms to the Regulatory Flexibility Act (RFA), including providing that agency decisions are judicially 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 employment growth. Under the current system, an agency could make a determination of no significant impact on a substantial number of small entities on its initial regulatory flexibility analysis that may be years before the rule is finalized.

In addition, we have had the experience of filing a lawsuit when a rule is finalized, won the case, yet received a resolution that was of no benefit to small business. About a decade ago, the U.S. Army Corps of Engineers (USACE) issued a rule on what it considers a wetland pertaining to its Nationwide Permits (NWP) program. The USACE performed no regulatory flexibility analysis and instead pushed through the rule using a “streamlined process.” 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 be fixed, the court only required that the USACE not use its streamlined process in the future. Small business owners affected by the NWP rule realized no relief.

NFIB supports S. 1030, which allows small business advocates judicial review during the proposed rule stage of rulemaking.

### **Codify Executive Order 13563**

NFIB supports legislation, like S. 358, the “Regulatory Responsibility for our Economy Act of 2011,” which 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.

## **Waiver for First-Time Paperwork Violations**

Additionally, Congress should pass legislation, which would waive fines and penalties for small businesses the first time they commit a non-harmful error on regulatory paperwork. Because of a lack of 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. We appreciate that Senator Collins and Senator Vitter have introduced legislation to add a first time waiver protection in law, and we look forward to working with them toward finding an effective solution.

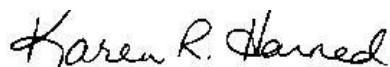
## **Agency focus on compliance**

NFIB is concerned that many agencies are shifting from an emphasis on small business compliance assistance to an emphasis on enforcement. Unfortunately, the evidence in this area is plentiful. Both of the five-year strategic plans released last year by EPA and the Department of Labor strongly emphasized increased enforcement. In OSHA's FY 2011 budget request, it proposed shifting 35 staff members from compliance assistance to enforcement activities. Most recently, OSHA has proposed significant changes in its On-site Consultation Program that would reduce incentives for small businesses to participate and identify potential workplace hazards. Small businesses rely on compliance assistance from agencies because they lack the resources to employ specialized staff devoted to regulatory compliance. 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.

With high rates of unemployment continuing, Congress needs to take steps to address the growing regulatory burden on small businesses. NFIB is hopeful that the 112<sup>th</sup> Congress can pass regulatory reforms that would improve current law and level the regulatory "playing field" for small business.

NFIB looks forward to working with you on this and other issues important to small business.

Sincerely,



Karen R. Harned, Esq.  
Executive Director  
NFIB Small Business Legal Center

# CORE VALUES

We believe deeply that:

Small business is essential to America.

Free enterprise is essential to the start-up and expansion of small business.

Small business is threatened by government intervention.

An informed, educated, concerned, and involved public  
is the ultimate safeguard for small business.

Members determine the public policy positions of the organization.

Our employees and members, collectively and individually, determine the success of  
the NFIB's endeavors, and each person has a valued contribution to make.

Honesty, integrity, and respect for human and spiritual values are important  
in all aspects of life, and are essential to a sustaining work environment.

## NFIB

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