

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

NFIB
The Voice of Small Business.®

**House of Representatives Committee on the Judiciary
Subcommittee on Courts, Commercial and Administrative Law**

on the date of

February 10, 2011

on the subject of

The Regulatory Flexibility Improvements Act of 2011
Unleashing Small Businesses to Create Jobs

National Federation of Independent Business
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Dear Chairman Coble and Ranking Member Cohen:

On behalf of the National Federation of Independent Business (NFIB), I appreciate the opportunity to submit for the record this testimony for the Subcommittee on Courts, Commercial and Administrative Law hearing entitled “the Regulatory Flexibility Improvements Act of 2011 — Unleashing Small Businesses to Create Jobs.”

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.

Overzealous regulation is a perennial cause of concern for small business owners, and 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 (Office of Advocacy) found that the total cost of regulation on the American economy is \$1.75 trillion per year.¹

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, small businesses spent 36 percent more per employee on regulation than their larger counterparts.

Job growth in America remains stagnant. Small businesses create two-thirds of the net new jobs in this country, yet the NFIB Research Foundation’s most recent edition of *Small Business Economic Trends* revealed in the next three months 12 percent of respondents plan to increase employment while 8 percent plan a reduction in workforce.² Reducing the regulatory burden would go a long way toward giving entrepreneurs the confidence they need to expand their workforce in a meaningful way.

Last month, President Obama issued an executive order directing agencies to follow certain processes “to improve regulation and regulatory review.” I share the view of

¹ Crain, Nicole V. and Crain, W. Mark, *The Impact of Regulatory Costs on Small Firms*, 2010.

<http://www.sba.gov/advo/research/rs371tot.pdf>

² NFIB Research Foundation, *Small Business Economic Trends*, February 2011.

<http://www.nfib.com/Portals/0/PDF/sbet/sbet201102.pdf>

Susan Dudley, a former administrator of the Office of Information and Regulatory Affairs (OIRA). Dudley wrote: “Whether the President’s actions signal a real recognition that regulations can place unreasonable burdens on economic growth remains to be seen. Over the first two years of his term, the federal government issued 132 economically significant regulations (defined as having impacts of \$100 million or more per year). That averages out to 66 major regulations per year, which is dramatically higher than the averages issued by [the previous two administrations].”³

NFIB believes that it has been a long time coming for small business owners to hear the administration emphasize the harmful effects of overregulation on small business and job creation, and we will be watching closely to see if last month’s directive leads to real regulatory reform.

In the meantime, NFIB believes that Congress must take actions — like those proposed in the bill being considered — to level the playing field, and the following ideas will 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 believes Congress should 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.

While SBREFA itself is a good first step, in order for it to provide the regulatory relief that Congress intended 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.

³ Dudley, Susan E. *President Obama’s Executive Order: Improving Regulation and Regulatory Review*, January 2011. http://www.regulatorystudies.gwu.edu/images/commentary/20110118_reg_eo.pdf

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 plenty of instances where both EPA and the Occupational Safety and Health Administration (OSHA) have 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 it considered, and in the final rule, provide an evidence-based explanation for why it chose a more-burdensome alternative versus a less-burdensome option — or why no other means were available to address a rule’s significant impact. Agencies should also address how their rule may act as a barrier to entry for a new business.

Within SBREFA is a requirement 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 this requirement is disregarded by agencies. The proposed legislation would require agencies to amend or rescind rules where the 610 review shows that the agency could achieve its regulatory goal at a lower cost to the economy.

Finally, when SBREFA was enacted it required all agencies to perform a one-time report on how it 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. Agencies should be required to 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.”

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.

Because of the regulatory flexibility process improvements inherent within this proposed bill, NFIB is hopeful that review of agency actions will be strengthened. Small business will have its voice more substantively considered throughout the entire rulemaking process.

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.

For example, the Department of Treasury late last year notified small businesses that beginning on January 1, 2011, they could no longer make tax payments through Federal Tax Deposit Coupons. Instead small businesses are required to make these payments electronically or face a 10 percent penalty. For many businesses this was a major change in the way they make their payments and lack the means to make such payments electronically. Providing only a few weeks notice gave some businesses little chance to make the necessary changes. As proof, we have already heard from NFIB members this year that are confused about the change and scrambling to figure out how they will submit their payments.

Additionally, Congress should pass legislation waiving 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.

With high rates of unemployment continuing, Congress needs to take steps to address the growing regulatory burden on small businesses. The proposed reforms in the Regulatory Flexibility Improvements Act are a good first step.

Thank you for holding this important hearing on reducing the regulatory burden on small businesses. I look forward to working with you on this and other issues important to small business.

Sincerely,

A handwritten signature in black ink that reads "Karen R. Harned". The signature is written in a cursive, slightly slanted style.

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.

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