

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 Regulatory Reform, Commercial and
Antitrust Law**

on the date of

June 28, 2013

on the subject of

The Regulatory Flexibility Improvements Act of 2013

Dear Chairman Bachus 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 Regulatory Reform, Commercial and Antitrust Law's hearing entitled the "Regulatory Flexibility Improvements Act of 2013."

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.

Two and a half years ago I had the opportunity to testify before this committee on the need for regulatory reform. As I stated at that time, overzealous regulation is a perennial cause of concern for small business owners. That fact has not changed. According to the June report of the NFIB Research Foundation's *Small Business Economic Trends*, 23 percent of small businesses say that red tape is the most important problem they face, second only to taxes.¹

To address the negative impact of regulations on small business, NFIB launched Small Businesses for Sensible Regulations in August 2011. Former Arkansas Senator Blanche Lincoln chairs the campaign, which is a national effort to protect small businesses and American jobs from the impacts of regulations.

When it comes to regulations, small businesses bear a disproportionate amount of the regulatory burden. According to a study by Nicole and Mark Crain for the U.S. Small Business Administration Office of Advocacy (Office of Advocacy), for 2008, small businesses spent 36 percent more per employee, per year on regulation than their larger counterparts.²

Unfortunately, this administration is increasing the regulatory burden on small business. Analyzing an April 19, 2013 draft report from the Office of Management

¹ NFIB Research Foundation, *Small Business Economic Trends*, at p. 18, June 2013. <http://www.nfib.com/research-foundation/surveys/small-business-economic-trends>

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

and Budget, the George Washington University's Regulatory Studies Center found that, "[b]y the administration's own estimates, the rules it issued in FY2012 alone imposed more costs on the economy than all the rules issued during the entire first terms of Presidents Bush and Clinton, combined."³

Job growth in America remains stagnant. Small businesses create two-thirds of the net new jobs in this country. Yet the June *Small Business Economic Trends* survey of small business owners showed a drop in small business' willingness to hire for the first time since November 2012.⁴ Reducing the regulatory burden would go a long way toward giving entrepreneurs the confidence they need to expand their workforce.

NFIB believes that Congress must take actions — like those proposed in the Regulatory Flexibility Improvements Act of 2013 — to level the regulatory playing field for small business.

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 and address potential problems that new rules will have for small businesses. During my eleven 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.

Small business owners are not roaming the halls of administrative agencies, reading the *Federal Register* or even *Inside EPA*. And, in those instances when they hear about a proposed rule that will impact their business, the regulatory deal is almost done as a practical matter. Comments can, and do, result in improvements to a proposed rule, but the real work of examining alternatives and developing the framework for any new mandate is accomplished long before a proposed rule is printed in the *Federal Register*.

SBREFA gives small business owners a valuable seat at the regulatory table at the most critical time of a rulemaking — the pre-rule stage. 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.

³ http://research.columbian.gwu.edu/regulatorystudies/sites/default/files/u41/20130422_OMB_Report.pdf

⁴ NFIB Research Foundation, *Small Business Economic Trends*, June 2013, at p. 1. <http://www.nfib.com/research-foundation/surveys/small-business-economic-trends>

SBREFA should apply to independent agencies

Furthermore, Congress should take steps to require independent agencies to follow SBREFA. For example, Congress did just that when it required the Consumer Financial Protection Bureau to conduct SBAR panels on 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.

Agencies should abide by the letter and spirit of SBREFA

While SBREFA itself is a good first step, in order for it to provide the regulatory relief that Congress intended agencies must make good-faith efforts to comply. An example concerns the Environmental Protection Agency's (EPA) Lead: Renovation, Repair and Painting (LRRP) rule. The LRRP rule prescribes certification, training, and work practices to address the threat of lead dust in homes built before 1978. When the rule went into effect in April 2010, homeowners with no children less than six years old or pregnant women could choose to skip these expensive requirements because EPA had determined that only young children faced substantial risk of poisoning from lead dust. This provision, known as the opt-out, was a cost-effective – and safety conscious – alternative supported by the SBAR panel convened for the rule.⁵ Yet just weeks later, EPA withdrew this provision because of a lawsuit from environmental groups. The move increased the cost of the rule from about \$800 million to \$1.3 billion – with the costs passed along from contractors to homeowners.

In another instance, the EPA's proposed Boiler MACT rule 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.⁶ This higher standard provided little, if any, additional benefit to the public over the health-based standard.

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.

⁵ Final Report of the Small Business Advocacy Review Panel on EPA's Planned Proposed Rule: Lead-Based Paint; Certification and Training; Renovation and Remodeling Requirements, March 3, 2000. <http://www2.epa.gov/lead/final-report-small-business-advocacy-review-panel-epas-planned-proposed-rule-lead-based-paint>

⁶ Comments of the Office of Advocacy to EPA on the proposed Boiler MACT Standards (August 23, 2010), available at <http://www.sba.gov/advocacy/816/12752>.

For example, in 2010 OSHA published a proposed rule that would have required a new column for musculoskeletal disorders (MSDs) on its Form 300 OSHA log for reporting workplace injuries. NFIB pressed the agency to conduct an SBAR panel for this rule that would have, in essence, required small business owners to “play doctor” when trying to determine whether or not an MSD was caused by an employee’s duties at work or from off-work activities. After the rule was proposed, OSHA agreed to hold informal teleconferences. Despite OSHA’s intent, this process did not follow SBREFA procedures.

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.

Expand 610 review

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.

Agencies should annually report penalty reductions

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. Over 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. As a result, small business will have its voice more substantively considered throughout the entire rulemaking process.

Agency focus on compliance

NFIB is concerned that many agencies have shifted from an emphasis on small business compliance assistance to an emphasis on enforcement. Over the last several years we generally have seen a reduction in resources agencies devote to helping small businesses comply with the rules on the books. 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.

Rulemaking through adjudication

More troubling are stories we are beginning to hear from members of agencies using adjudication, rather than formal rulemaking, to impose new requirements on small businesses.

For example, the Federal Trade Commission has been attempting to establish nationwide general data-security public policy through ad hoc enforcements. Over the last several years, the FTC has routinely punished businesses who are themselves hacking victims for allegedly failing to have “reasonable” data security measures in place. Because FTC has never formally promulgated any data security standards, a business has no way of knowing whether it’s compliant until after its system has been breached, it’s data stolen, it has undergone a costly FTC investigation, and an enforcement action has been filed against it.

The FTC asks the business to enter a so-called “settlement” agreement (or “consent order”). In many instances, these agreements give FTC authority to perform biannual audits of the business for the next 20 years and possible fines. Michael Daugherty, NFIB member and President and CEO of LabMD, a cancer diagnostics center in Atlanta, Georgia, is currently under FTC investigation after having their data hacked.⁷ In addition, the NFIB Small Business Legal Center recently filed an amicus brief in another FTC data security case against Wyndham World Wide Hotels. NFIB believes Congress should conduct oversight of agency use of adjudication to impose new regulatory requirements on business.

Waivers of fines and penalties for non-harmful paperwork errors

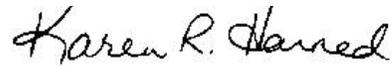
Finally, Congress should pass legislation waiving fines and penalties for small businesses the first time they commit a non-harmful error on regulatory paperwork. Because of a lack of specialized staff, mistakes in paperwork will happen. If no harm is committed as a result of the error, the agencies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

⁷ Dave Williams, Atlanta Business Chronicle, September 7-13, 2012, at 3A; See also, Frechette, Peter S., “FTC v. LabMD: FTC Jurisdiction Over Information Privacy Is ‘Plausible,’ But How Far Can It Go?”, American University Law Review, vol. 62, No. 5, 2013, <http://ssrn.com/abstract=2262801>.

With Main Street still struggling to regain its footing, 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