



Testimony of

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

**Before the
United States House of Representatives
Judiciary Committee
Subcommittee on Regulatory Reform, Commercial and Antitrust Law**

**Hearing on
“Regulatory Flexibility Improvements Act of 2013”**

June 28, 2013

On behalf of the more than 140,000 members of the National Association of Home Builders (NAHB), I appreciate the opportunity to submit this testimony. My name is Carl Harris. I am a builder from Wichita, Kansas, and co-founder of Carl Harris Co., Inc. We employ approximately twenty individuals and have been engaged in a variety of residential and light-commercial construction applications since our founding in 1985. I also serve as a national area chairman for the National Association of Home Builders and am the 2013 President of the Kansas Building Industry Association.

As a small businessman operating in a heavily regulated industry, I understand how difficult (and often costly) it can be to comply with the myriad of government regulations that apply to my day-to-day work. In fact, in my industry, the sum total of regulations imposed by government at all levels account for 25 percent of the final price of a new single-family home.¹ This is particularly noteworthy in an industry where margins are so thin and consumers' sensitivity to price fluctuation is so acute.

As a frequent industry representative in the statutorily-mandated small business feedback portion of the regulatory rulemaking process, I am well aware of the role small businesses play in informing regulators of the potential burdens borne by small business with new regulations. I am also aware of the strengths and weaknesses inherent to the process.

While the original Congressional intent and subsequent additions/enhancements to the Regulatory Flexibility Act (RFA) are to be lauded, the reality is that far too often agencies either view compliance with the Act as little more than a procedural "check-the-box" exercise or they artfully avoid compliance by other means.

I am pleased that the subcommittee is focusing today on the impacts of regulation on small businesses and ways to improve the RFA. NAHB supports *The Regulatory Flexibility Improvements Act of 2013* and I believe that many, if not most, of the issues set forth in this testimony could have been avoided if the changes offered in *The Regulatory Flexibility Improvements Act of 2013* had been law. In particular, I applaud the bill's proposed provisions to expand coverage to all rules within the APA's definition, extend review panels requirements, include indirect effects of regulations on small entities, and require better and more comprehensive flexibility analyses. One way in which we believe the legislation could be made stronger is by extending the judicial review provisions found in the RFA to include section 609(b) for reasons discussed below.

¹ <http://www.nahb.org/generic.aspx?genericContentID=161065&channelID=311>

The Regulatory Flexibility Act

The Regulatory Flexibility Act² requires federal agencies to consider the effect of their actions on small entities, including small businesses, small non-profit enterprises, and small local governments. When an agency issues a rulemaking proposal, the RFA requires the agency to "prepare and make available for public comment an initial regulatory flexibility analysis. Such analysis shall describe the impact of the proposed rule on small entities."³

The RFA states that an initial regulatory flexibility analysis (IRFA) shall address the reasons that an agency is considering the action; the objectives and legal basis of the rule; the type and number of small entities to which the rule will apply; the projected reporting, recordkeeping, and other compliance requirements of the proposed rule; and all federal rules that may duplicate, overlap, or conflict with the proposed rule. The agency must also provide a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes which minimize any significant economic impact of the proposed rule on small entities.⁴

Section 605 of the RFA allows an agency, in lieu of preparing an IRFA, to certify that a rule is not expected to have a significant economic impact on a substantial number of small entities. If the head of the agency makes such a certification, the agency must publish the certification in the Federal Register along with a statement providing the factual basis for the certification.⁵ The agency must then prepare a final regulatory flexibility analysis (FRFA) for publication with the final rule.⁶ The FRFA must include a succinct statement of the need for, and the objectives of, the rule, a description of and the estimate of the number of small entities to which the rule will apply, a description of the projected reporting, recordkeeping, and other compliance requirements of the rule, and a description the steps the agency has taken to minimize the significant economic impacts on small entities consistent with the stated objectives and the factual, policy, and legal reasons why the selected option was chosen and the alternatives rejected.⁷

In addition, under the 1996 amendments to the RFA, known as the Small Businesses Regulatory Enforcement Fairness Act (SBREFA)⁸, when the Occupational Safety and Health Administration (OSHA) or Environmental Protection Agency (EPA) is required to prepare an IRFA⁹, they must

² 5 U.S.C. 601-612

³ 5 U.S.C. 603(a).

⁴ 5 U.S.C. 603(c).

⁵ 5 U.S.C. 605.

⁶ 5 U.S.C 604.

⁷ 5 U.S.C. 604(a).

⁸ 5 U.S.C. 609.

⁹ Section 1100G of Dodd-Frank amended § 609(b) to add CFPB to the list of agencies.

first notify the Chief Counsel for Advocacy of the Small Business Administration (“Advocacy”) and provide Advocacy with information on the potential impacts of the proposed regulation on small entities and the type of small entities that may be affected. Advocacy must then identify individual representatives of affected small entities for the purpose of obtaining advice and recommendations about the potential impacts of the proposed rule, and the agency must convene a review panel made up of the agency, Advocacy, and the Office of Management and Budget to review the materials the agency has prepared (including any draft proposed rule), collect advice and recommendations of the small entity representatives (SERs), and issue a report on the comments from the SERs and the findings of the panel. Following this process, the agency shall modify the proposed rule, the IRFA, or the decision on whether an IRFA is required.¹⁰ While there are exceptions to the requirement to conduct a SBREFA panel, these are limited to situations where the agency certifies that the rule will have a minimal impact.¹¹

Addressing the Disproportionate Impacts on Small Entities

Enhanced flexibility analysis requirements included in *The Regulatory Flexibility Improvements Act of 2013*, including a requirement that agencies detail the disproportionate economic impacts on small entities expected from a new rule, would help agencies produce better, more workable rules for small businesses. I witnessed this need first-hand when I participated as a SER on a feedback panel for OSHA’s proposed Safety Standard for Cranes and Derricks in Construction.

In 2008, OSHA proposed the Cranes and Derricks Rule, which was intended to protect workers from the hazards associated with hoisting equipment in construction. For the development of this rule, OSHA relied on the negotiated rulemaking process, wherein the rule is developed by a committee comprised of individuals who represent the interests of those who will be significantly affected by the rule.

Unfortunately it wasn’t until after the negotiated rulemaking process was completed that OSHA convened a Small Business Advocacy Review Panel to evaluate the potential impact of the rule on small entities. Several SERs, myself included, raised concerns at the time that the Cranes and Derricks proposal did not differentiate between crane applications on residential construction sites and large commercial construction sites. As a result, any rule issued with this fundamental oversight would disproportionately impact small entities.

¹⁰ 5 U.S.C. 609(b) (1) through (6).

¹¹ 5 U.S.C. 609(c).

I use cranes almost every day for our residential and light commercial work. We use cranes to set large trusses, steel framing for greater clear heights and greater open spaces, and precast concrete pieces including floors over basements and safe rooms.

I personally put forward an effective, feasible alternative that would save lives and reduce injuries in a more cost-effective way by developing regulations for crane operator certification which are appropriate to the equipment that is being used and the risks presented by that equipment. This included principles of what should be required for crane operators: employer training for the specific equipment in use, employer assessment of the conditions of the job site, and the equipment and certification by the employer that the training has been completed.

Again, it is unfortunate that small businesses were not brought in until after the rule had already been developed through the negotiated rulemaking process. As it was, the process seemed little more than a procedural hurdle with little interest from OSHA to make changes based on the feedback received. A more thorough analysis of the proposed requirements here may have revealed the disproportionate burden small residential home builders would face with this rule.

Acknowledging the True Costs to Small Entities

Too often agencies will avoid an honest and rigorous analysis of the impacts of a proposed rule on small entities by simply certifying, in accordance with section 605 of the RFA, that the rule will not have a significant economic impact on a substantial number of small entities. This releases the agency from section 603 and 604 regulatory flexibility analysis requirements contained in the RFA and is often claimed in spite of compelling evidence that a proposed rule will in fact significantly impact small businesses. More stringent requirements for initial and final regulatory flexibility analyses, coupled with greater transparency surrounding the certification process are necessary to ensure that the true cost of regulations on small entities are acknowledged. We believe provisions in *The Regulatory Flexibility Improvements Act of 2013* address this need.

In 2010, OSHA proposed revising its Occupational Injury and Illness Recordkeeping regulation to include additional reporting requirements on work-related musculoskeletal disorders (MSDs).

While OSHA certified, in accordance with the Regulatory Flexibility Act (RFA), that the proposed recordkeeping rule would “not have a significant impact on a substantial number of small entities,” industry groups urged OSHA to solicit further input on the impact of the proposed rule on small businesses by convening a Small Business Advocacy Review Panel, as mandated by the RFA. However, in lieu of a proper small business panel, OSHA convened a series of

teleconferences in 2011 (which I participated in) to reach out to the small business community for input on the proposal.

During the teleconferences, I raised the concern that the proposed rule would result in additional costs to small employers which OSHA had not yet considered. Recording MSDs entails far more than simply placing a check mark in the MSD column. It requires a thorough investigation to correctly classify MSDs. Most employers in the home building industry are generally not qualified to assess such work-related illnesses. Only qualified medical personnel can analyze MSD injuries—I certainly do not have this medical expertise and very few home builders have medical degrees. Therefore, evaluating each MSD case would be very time consuming for employers, particularly small ones. This evaluation would likely take several hours to several days—not minutes as OSHA suggests—to consult with qualified medical personnel, review medical records and reports, and determine whether the MSD is new, work-related, or otherwise recordable. This would result in significantly increased costs to small businesses.

OSHA failed to account for the true impact this proposed rule would have on small entities and their employees. They have since temporarily withdrawn the proposed Recordkeeping rule citing the need for “greater input from small businesses on the impact of the proposal.”¹² I welcome the prospect of partnering with OSHA on the proposed rule in the hopes of developing a better, more workable rule for small entities that takes into account the true costs associated with compliance. I believe provisions included in Section 4 of *The Regulatory Flexibility Improvements Act of 2013* would ensure that agencies consider the full impact of regulations on small businesses.

Ensuring Compliance with Small Entity Feedback Requirements

While section 611 of the RFA provides for judicial review of some of the act’s provisions, it does not permit judicial review of section 609(b), which contains the panel requirement.¹³ NAHB believes that *The Regulatory Flexibility Improvements Act of 2013* should be amended to include judicial review of the panel requirement to ensure agencies adhere to the law. If the RFA allowed judicial review of section 609(b), agencies would feel more pressure to comply by convening a meaningful panel of SERs that can thoughtfully and substantively advise the agency, as Congress intended. Knowing that its decision whether to convene a panel could

¹² http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=19158

¹³ Section 611(a)(1)states: “For any rule subject to this chapter, a small entity that is adversely affected or aggrieved by final agency action is entitled to judicial review of agency compliance with the requirements of sections 601, 604, 605(b), 608(b), and 610 in accordance with chapter 7. Agency compliance with sections 607 and 609(a) shall be judicially reviewable in connection with judicial review of section 604.”

result in a judicial remand of a regulation presents a strong incentive to agencies to conduct a panel at the early stages in rule development. Without a judicial backstop or other enforcement mechanism, there is no way to compel the agency to implement a clear congressional directive.

When agencies evade their responsibility to convene review panels, they remove small business input entirely from the equation. This was the case when EPA failed to convene a review panel in 2008 as the agency sought to amend its Lead Renovation, Repair, and Painting (RRP) Rule.

The RRP Rule requires for-hire contractors that conduct renovation activities in residences built before 1978 to obtain certification from EPA; use “lead-safe work practices” designed to contain and minimize dust created during the renovation activity; and maintain records on these activities. Shortly after finalizing the RRP Rule in 2008, as a result of a settlement agreement EPA reached with public interest advocates, EPA proposed and went final with their decision to amend the regulation to remove the opt-out provision. The opt-out provision allowed homeowners to authorize their contractor to use traditional work practices under certain circumstances, resulting in significant cost savings.

Removing the opt-out provision more than doubled the number of homes subject to the RRP Rule to 78 million and EPA estimated the cost of this action to be \$500 million annually.¹⁴ However, the costs are far greater because of EPA’s flawed economic analysis, which significantly underestimated the true compliance costs. The agency initially estimated that compliance costs would add \$35 to a typical remodeling job; yet for a typical window replacement project the cost ranges from \$90 to \$160 per window opening, easily adding more than \$1,000 to each project. Moreover, an EPA Inspector General’s (IG) report, published on July 25, 2012, found that the EPA failed to use accurate or even reliable information on the likely costs of changes to the RRP Rule on small entities. More specifically, the report called on EPA to review both the original RRP Rule and the removal of the opt-out provision using RFA Section 610 authorities:

“We have identified only a few aspects of EPA’s complex benefits-costs analysis that are limited. However, we believe these aspects limit the reliability of EPA’s estimates of the rule’s costs and benefits to society. The Administration’s 2011 Executive Order [E.O. 13563] and Section 610 of the Regulatory Flexibility Act provide EPA an opportunity to review the Lead Rule to determine whether it

¹⁴ 75 Fed. Reg. 24802, 24812 (May 6, 2010). The agency estimated that the removal of the opt-out provision would result in \$500 million in costs in the first year, but projected this amount would decrease to \$200 million each year once the agency certified a test kit that satisfied the RRP Rule’s criteria for accurately measuring the presence of lead in paint at regulated levels. However, no such test kit has been identified and therefore these cost savings have not been realized.

should be modified, streamlined, expanded, or repealed in light of the known limitations in the rule's underlying cost and benefit estimates."

EPA acknowledged during the initial rulemaking that the opt-out provision substantially impacted a significant number of small entities and complied with the RFA's regulatory flexibility analysis reporting requirements. However, when EPA later proposed to eliminate the opt-out provision, they refused to convene a new panel. Instead, EPA relied on a panel convened more than a decade earlier for the original RRP Rule. EPA stated "that reconvening the Panel would be procedurally duplicative and is unnecessary given that the issues here were within the scope of those considered by the Panel."¹⁵

In the 17 years since the RFA was amended by SBREFA to include the panel requirement, EPA has convened approximately 43 panels. According to a recent report issued by the Congressional Research Service (CRS), EPA issued nearly the same number of significant regulations during the first Obama Administration.¹⁶ It defies belief that so few EPA regulations have met the threshold under SBREFA and these numbers illustrate how reluctant agencies are to comply with the law.

Many of the deficiencies found in EPA's RRP Rule could have been addressed if EPA complied with both the letter and spirit of the RFA. Ultimately, because they didn't convene a panel, EPA was unable to produce a workable rule and has unnecessarily burdened small entities. I believe including judicial review of section 609(b) of the RFA in *The Regulatory Flexibility Improvements Act of 2013* would address this issue.

Acknowledging Significant Indirect Impacts

Indirect impacts on small entities can be just as costly and damaging as those deemed to be direct. Agencies must consider the burden of indirect effects if they are to appropriately tailor regulations to the size of businesses as Congress intended.

Under the Endangered Species Act (ESA), the U.S. Fish and Wildlife Service and National Oceanic and Atmospheric Administration (collectively referred to as "the Service") can prohibit the issuance of any federal permit if the Service determines the proposed activity may result in

¹⁵ *Id.* at 24815.

¹⁶ The Congressional Research Service examined 45 regulations it characterized as satisfying OMB's "significance" threshold of \$100 million annual effect on the U.S. economy in a report addressing the rate of issuing regulations during the first Obama Administration. *Regulations: Too Much, Too Little, or On Track?*, <http://www.fas.org/sgp/crs/misc/R41561.pdf> (last visited Mar. 5, 2013).

the “adverse modification” of critical habitat.¹⁷ Congress, recognizing the potential economic impact of critical habitat designations, requires the Service to perform an economic analysis whenever the Service proposes to designate critical habitat. Congress also gave the Service the authority to exclude any area from a final critical habitat designation, provided the Service determines the economic costs resulting from critical habitat designation outweighs the biological benefits to the species.¹⁸

While the Service is required to comply with the RFA, they frequently will adopt the stance that small entities are not significantly or directly impacted by a proposed critical habitat designation, and certify as such. The designation of critical habitat directly impacts land developers, builders, states, and local governments by restricting their ability to undertake otherwise lawful land use activities. The designation of critical habitat by the Service is unlike other ESA regulatory restrictions in that the Service can designate private property as critical habitat regardless of whether a federally protected species will ever occupy the property in question. For NAHB members, the designation of critical habitat by the Service has a significant economic impact on their land development projects and their businesses. As explained further below, the designation of critical habitat triggers a complex federal permitting process known as the ESA Section 7 consultation process that can result in the Service prohibiting otherwise lawful land use activities if the Service determines proposed activities may result in adverse modification of critical habitat.

The ESA's Section 7 consultation process often significantly impacts small businesses and is fraught with permitting delays, increased costs and land use exactions. While the Service's regulations say the ESA Section 7 formal consultation process should take no longer than four and half months (135 days) to complete, the Service routinely fails to complete the consultation process within its own prescribed permitting deadlines.¹⁹ For example, the U.S. General Accounting Office (GAO) conducted an audit of ESA Section 7 consultations permits performed in the Pacific Northwest in 2003 following the Service's decision in the late 1990's to list as “endangered” over 20 subpopulations of salmon species. GAO's audit found the Service routinely exceeded the Section 7 permitting timeframes for formal consultation by many months and, in some cases, years.²⁰ Homeowners living near Seattle, Washington waited over two years for the Service and the Army Corps of Engineers (Corps) to complete ESA Section 7 formal consultations for CWA Section 404 wetland permits (needed to install private boat docks

¹⁷ 16 U.S.C. §1636(2)

¹⁸ 16 U.S.C. § 1533(b)(2)

¹⁹ 50 CFR §402.14 (2012)

²⁰ GAO Report (2003) *Endangered Species: Despite Consultation Improvement Efforts in the Pacific Northwest, Concerns Persist about the Process*, GAO-03-949T, Executive Summary.

on Lake Washington).²¹ In the case of these homeowners, GAO estimated economic impacts from Section 7 permitting delays for federal wetlands permits to be approximately \$10,000 per homeowner.²² While understandably outrageous, these types of permitting delays are common for NAHB members whose projects occur in areas designated by critical habitat and require a Section 404 permit.

Despite these examples of significant economic impacts on small entities, the Service routinely claims that the RFA does not apply when designating critical habitat.

Congress needs to act to require agencies to consider indirect effects of proposed regulations on small entities. Section 2 in *The Regulatory Flexibility Improvements Act of 2013* appropriately addresses this urgent need.

Conclusion

Congress, in crafting the RFA, clearly intended for federal agencies to carefully consider the proportional impacts of federal regulations on small businesses.

It is the purpose of this Act to establish as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulations. To achieve this principal, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.²³

Unfortunately, all too often federal agencies view RFA compliance as either a technicality of the federal rulemaking process or, worse yet, as unnecessary. In an effort to ensure that regulations are crafted in accordance with the Congressional intent of the RFA, I urge the subcommittee to work to pass the *Regulatory Flexibility Improvements Act of 2013*.

Thank you again for the opportunity to testify today.

²¹ GAO Report (2003) *Endangered Species: Despite Consultation Improvement Efforts in the Pacific Northwest, Concerns Persist about the Process*, GAO-03-949T, page 12

²² GAO Report (2003) *Endangered Species: Despite Consultation Improvement Efforts in the Pacific Northwest, Concerns Persist about the Process*, GAO-03-949T, page 12

²³ Regulatory Flexibility Act of 1980 (P.L. 96-354)