REGULATORY FLEXIBILITY IMPROVEMENTS ACT OF 2013

HEARING

BEFORE THE

SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

FIRST SESSION

ON

H.R. 2542

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JUNE 28, 2013

REGULATORY FLEXIBILITY IMPROVEMENTS ACT OF 2013

FRIDAY, JUNE 28, 2013

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON REGULATORY REFORM,
COMMERCIAL AND ANTITRUST LAW
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 9:10 a.m., in room 2141, Rayburn House Office Building, the Honorable Spencer Bachus (Chairman of the Subcommittee) presiding.

Present: Representatives Bachus, Holding, Collins, Smith, Cohen, DelBene, and Jeffries.

Staff Present: (Majority) Daniel Flores, Chief Counsel; Jennifer Lackey, Legislative Director, Office of Rep. Collins; Justin Gibbs, Office of Rep. Smith of Missouri; Ashley Lewis, Clerk; Matthew Alexander, Intern; (Minority) James Park, Minority Counsel; Veronica Eligan, Professional Staff Member.

Mr. BACHUS. The Subcommittee on Regulatory Reform, Commercial and Antitrust Law hearing will come to order.

Without objection, the Chair is authorized to declare recesses of the Committee at any time.

We welcome all our witnesses today. Now we will have opening statements, and I will recognize myself for such time as I may consider.

Most economic experts will agree that small businesses and small business trade drive and shape our economy and our ability to provide employment for American workers. In my view, the health of small businesses is one of the most important issues confronting our country. Small businesses are the source for almost half of our workforce, and while I am concerned about many economic factors, it is also my view that government regulations have a disproportionate impact on small businesses.

While all businesses have to comply with State and local regulations, Federal regulations can impose an even greater burden because most small businesses simply do not have the resources or the time to monitor and participate in the Federal regulatory process or dispute new rules.

According to the Small Business Administration, businesses with fewer than 20 employees spend on average 30 percent more per employee than large firms to comply with Federal regulations. The

SBA also reports that these small employers represent 99.7 percent of all businesses and have created well over 60 percent of all new jobs for over the past 15 years.

Although our economy may be showing signs of improvement, we are still suffering from job loss, lack of job creation and long-term employment or underemployment. It only makes sense that we look to small businesses and work to create an environment that will help them prosper.

We all know the importance of small businesses in our district, so certainly this should be an area for bipartisan cooperation. It is my belief that the Regulatory Flexibility Improvements Act of 2013 offers one such opportunity, and I am pleased to be able to introduce legislation with my colleagues, Congressman John Barrow; Congressman Jim Matheson; the chairman of the Small Business Committee, Chairman Sam Graves; and Former Judiciary Committee Chairman Lamar Smith.

It is my belief that improving the Regulatory Flexibility Act and the Small Business Regulatory Enforcement and Fairness Act will have a lasting impact on small businesses and help support long-term small business growth. We have a responsibility as legislators to ensure that regulations are appropriately tailored and that our regulatory process is effective.

We have an excellent panel today that will offer diverse range of viewpoints on this legislation, and I want all of you to know that your input will serve a very important role as this legislation comes up for further consideration.

I now recognize Mr. Cohen from Tennessee and Ranking Member of the Subcommittee for his opening statement.

[The bill, H.R. 2542, follows]:

I

113TH CONGRESS
1ST SESSION

H. R. 2542

To amend chapter 6 of title 5, United States Code (commonly known as the Regulatory Flexibility Act), to ensure complete analysis of potential impacts on small entities of rules, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JUNE 27, 2013

Mr. BACHUS (for himself, Mr. GRAVES of Missouri, Mr. BARROW of Georgia, Mr. MATHESON, Mr. SMITH of Texas, Mr. COBLE, and Mr. ROKITA) introduced the following bill; which was referred to the Committee on the Judiciary, and in addition to the Committee on Small Business, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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A BILL

To amend chapter 6 of title 5, United States Code (commonly known as the Regulatory Flexibility Act), to ensure complete analysis of potential impacts on small entities of rules, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Regulatory Flexibility Improvements Act of 2013".

(b) TABLE OF CONTENTS.—The table of contents of this Act is as follows:

SEC. 2. CLARIFICATION AND EXPANSION OF RULES COVERED BY THE REGULATORY FLEXIBILITY ACT.

(a) IN GENERAL.—Paragraph (2) of section 601 of title 5, United States Code, is amended to read as follows:

"(2) RULE.—The term 'rule' has the meaning given such term in section 551(4) of this title, except that such term does not include a rule of particular (and not general) applicability relating to rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services, or allowances therefor or to valuations, costs or accounting, or practices relating to such rates, wages, structures, prices, appliances, services, or allowances.".

(b) INCLUSION OF RULES WITH INDIRECT EFFECTS.—Section 601 of title 5, United States Code, is amended by adding at the end the following new paragraph:

"(9) ECONOMIC IMPACT.—The term 'economic impact' means, with respect to a proposed or final rule—

"(A) any direct economic effect on small entities of such rule; and

"(B) any indirect economic effect on small entities which is reasonably foreseeable and results from such rule (without regard to whether small entities will be directly regulated by the rule).".

(c) INCLUSION OF RULES WITH BENEFICIAL EFFECTS.—

(1) INITIAL REGULATORY FLEXIBILITY ANALYSIS.—Subsection (c) of section 603 of title 5, United States Code, is amended by striking the first sentence and inserting "Each initial regulatory flexibility analysis shall also contain a detailed description of alternatives to the proposed rule which minimize any adverse significant economic impact or maximize any beneficial significant economic impact on small entities.".

(2) FINAL REGULATORY FLEXIBILITY ANALYSIS.—The first paragraph (6) of section 604(a) of title 5, United States Code, is amended by striking "minimize the significant economic impact" and inserting "minimize the adverse significant economic impact or maximize the beneficial significant economic impact".

(d) INCLUSION OF RULES AFFECTING TRIBAL ORGANIZATIONS.—Paragraph (5) of section 601 of title 5, United States Code, is amended by inserting "and tribal organizations (as defined in section 4(l) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(l)))," after "special districts,".

(e) INCLUSION OF LAND MANAGEMENT PLANS AND FORMAL RULEMAKING.—

(1) INITIAL REGULATORY FLEXIBILITY ANALYSIS.—Subsection (a) of section 603 of title 5, United States Code, is amended in the first sentence—

(A) by striking "or" after "proposed rule,"; and

(B) by inserting "or publishes a revision or amendment to a land management plan," after "United States,".

(2) FINAL REGULATORY FLEXIBILITY ANALYSIS.—Subsection (a) of section 604 of title 5, United States Code, is amended in the first sentence—

(A) by striking "or" after "proposed rulemaking,"; and

(B) by inserting "or adopts a revision or amendment to a land management plan," after "section 603(a),".

(3) LAND MANAGEMENT PLAN DEFINED.—Section 601 of title 5, United States Code, is amended by adding at the end the following new paragraph:

"(10) LAND MANAGEMENT PLAN.—

"(A) IN GENERAL.—The term 'land management plan' means—

"(i) any plan developed by the Secretary of Agriculture under section 6 of the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. 1604); and

"(ii) any plan developed by the Secretary of the Interior under section 202 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1712).

"(B) REVISION.—The term 'revision' means any change to a land management plan which—

"(i) in the case of a plan described in subparagraph (A)(i), is made under section 6(f)(5) of the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. 1604(f)(5)); or

"(ii) in the case of a plan described in subparagraph (A)(ii), is made under section 1610.5–6 of title 43, Code of Federal Regulations (or any successor regulation).

"(C) AMENDMENT.—The term 'amendment' means any change to a land management plan which—

"(i) in the case of a plan described in subparagraph (A)(i), is made under section 6(f)(4) of the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. 1604(f)(4)) and with respect to which the Secretary of Agriculture prepares a statement described in section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)); or "(ii) in the case of a plan described in subparagraph (A)(ii), is made under section 1610.5–5 of title 43, Code of Federal Regulations (or any successor regulation) and with respect to which the Secretary of the Interior prepares a statement described in section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)).".

(f) INCLUSION OF CERTAIN INTERPRETIVE RULES INVOLVING THE INTERNAL REVENUE LAWS.—

(1) IN GENERAL.—Subsection (a) of section 603 of title 5, United States Code, is amended by striking the period at the end and inserting "or a recordkeeping requirement, and without regard to whether such requirement is imposed by statute or regulation.".

(2) COLLECTION OF INFORMATION.—Paragraph (7) of section 601 of title 5, United States Code, is amended to read as follows:

"(7) COLLECTION OF INFORMATION.—The term 'collection of information' has the meaning given such term in section 3502(3) of title 44.".

(3) RECORDKEEPING REQUIREMENT.—Paragraph (8) of section 601 of title 5, United States Code, is amended to read as follows:

"(8) RECORDKEEPING REQUIREMENT.—The term 'recordkeeping requirement' has the meaning given such term in section 3502(13) of title 44.".

(g) DEFINITION OF SMALL ORGANIZATION.—Paragraph (4) of section 601 of title 5, United States Code, is amended to read as follows:

"(4) SMALL ORGANIZATION.—

"(A) IN GENERAL.—The term 'small organization' means any not-for-profit enterprise which, as of the issuance of the notice of proposed rulemaking—

"(i) in the case of an enterprise which is described by a classification code of the North American Industrial Classification System, does not exceed the size standard established by the Administrator of the Small Business Administration pursuant to section 3 of the Small Business Act (15 U.S.C. 632) for small business concerns described by such classification code; and

"(ii) in the case of any other enterprise, has a net worth that does not exceed

$7,000,000 and has not more than 500 employees.

"(B) LOCAL LABOR ORGANIZATIONS.—In the case of any local labor organization, subparagraph (A) shall be applied without regard to any national or international organization of which such local labor organization is a part.

"(C) AGENCY DEFINITIONS.—Subparagraphs (A) and (B) shall not apply to the extent that an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions for such term which are appropriate to the activities of the agency and publishes such definitions in the Federal Register.".

SEC. 3. EXPANSION OF REPORT OF REGULATORY AGENDA.

Section 602 of title 5, United States Code, is amended—

(1) in subsection (a)—

(A) in paragraph (2), by striking ", and" at the end and inserting ";";

(B) by redesignating paragraph (3) as paragraph (4); and

(C) by inserting after paragraph (2) the following:

"(3) a brief description of the sector of the North American Industrial Classification System that is primarily affected by any rule which the agency expects to propose or promulgate which is likely to have a significant economic impact on a substantial number of small entities; and"; and

(2) in subsection (c), to read as follows:

"(c) Each agency shall prominently display a plain language summary of the information contained in the regulatory flexibility agenda published under subsection (a) on its website within 3 days of its publication in the Federal Register. The Office of Advocacy of the Small Business Administration shall compile and prominently display a plain language summary of the regulatory agendas referenced in subsection (a) for each agency on its website within 3 days of their publication in the Federal Register.".

SEC. 4. REQUIREMENTS PROVIDING FOR MORE DETAILED ANALYSES.

(a) INITIAL REGULATORY FLEXIBILITY ANALYSIS.—Subsection (b) of section 603 of title 5, United States Code, is amended to read as follows:

"(b) Each initial regulatory flexibility analysis required under this section shall contain a detailed statement—

"(1) describing the reasons why action by the agency is being considered;

"(2) describing the objectives of, and legal basis for, the proposed rule;

"(3) estimating the number and type of small entities to which the proposed rule will apply;

"(4) describing the projected reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report and record;

"(5) describing all relevant Federal rules which may duplicate, overlap, or conflict with the proposed rule, or the reasons why such a description could not be provided;

"(6) estimating the additional cumulative economic impact of the proposed rule on small entities beyond that already imposed on the class of small entities by the agency or why such an estimate is not available; and

"(7) describing any disproportionate economic impact on small entities or a specific class of small entities.".

(b) FINAL REGULATORY FLEXIBILITY ANALYSIS.—

(1) IN GENERAL.—Section 604(a) of title 5, United States Code, is amended—

(A) in paragraph (4), by striking "an explanation" and inserting "a detailed explanation";

(B) in each of paragraphs (4), (5), and the first paragraph (6), by inserting "detailed" before "description"; and

(C) by adding at the end the following:

"(7) describing any disproportionate economic impact on small entities or a specific class of small entities.".

(2) INCLUSION OF RESPONSE TO COMMENTS ON CERTIFICATION OF PROPOSED RULE.—Paragraph (2) of section 604(a) of title 5, United States Code, is amended by inserting "(or certification of the proposed rule under section 605(b))" after "initial regulatory flexibility analysis".

(3) PUBLICATION OF ANALYSIS ON WEBSITE.—Subsection (b) of section 604 of title 5, United States Code, is amended to read as follows:

"(b) The agency shall make copies of the final regulatory flexibility analysis available to the public, including placement of the entire analysis on the agency's website, and shall publish in the Federal Register the final regulatory flexibility analysis, or a summary thereof which includes the telephone number, mailing address, and link to the website where the complete analysis may be obtained.".

(c) CROSS-REFERENCES TO OTHER ANALYSES.—Subsection (a) of section 605 of title 5, United States Code, is amended to read as follows:

"(a) A Federal agency shall be treated as satisfying any requirement regarding the content of an agenda or regulatory flexibility analysis under section 602, 603, or 604, if such agency provides in such agenda or analysis a cross-reference to the specific portion of another agenda or analysis which is required by any other law and which satisfies such requirement.".

(d) CERTIFICATIONS.—Subsection (b) of section 605 of title 5, United States Code, is amended—

(1) by inserting "detailed" before "statement" the first place it appears; and

(2) by inserting "and legal" after "factual".

(e) QUANTIFICATION REQUIREMENTS.—Section 607 of title 5, United States Code, is amended to read as follows:

"§ 607. Quantification requirements

"In complying with sections 603 and 604, an agency shall provide—

"(1) a quantifiable or numerical description of the effects of the proposed or final rule and alternatives to the proposed or final rule; or

"(2) a more general descriptive statement and a detailed statement explaining why quantification is not practicable or reliable.".

SEC. 5. REPEAL OF WAIVER AND DELAY AUTHORITY; ADDITIONAL POWERS OF THE CHIEF COUNSEL FOR ADVOCACY.

(a) IN GENERAL.—Section 608 is amended to read as follows:

"§ 608. Additional powers of Chief Counsel for Advocacy

"(a)(1) Not later than 270 days after the date of the enactment of the Regulatory Flexibility Improvements Act of 2013, the Chief Counsel for Advocacy of the Small Business Administration shall, after opportunity for notice and comment under section 553, issue rules governing agency compliance with this chapter. The Chief Counsel may modify or amend such rules after notice and comment under section 553. This chapter (other than this subsection) shall not apply with respect to the issuance, modification, and amendment of rules under this paragraph.

"(2) An agency shall not issue rules which supplement the rules issued under subsection (a) unless such agency has first consulted with the Chief Counsel for Advocacy to ensure that such supplemental rules comply with this chapter and the rules issued under paragraph (1).

"(b) Notwithstanding any other law, the Chief Counsel for Advocacy of the Small Business Administration may intervene in any agency adjudication (unless such agency is authorized to impose a fine or penalty under such adjudication), and may inform the agency of the impact that any decision on the record may have on small entities. The Chief Counsel shall not initiate an appeal with respect to any adjudication in which the Chief Counsel intervenes under this subsection.

"(c) The Chief Counsel for Advocacy may file comments in response to any agency notice requesting comment, regardless of whether the agency is required to file a general notice of proposed rulemaking under section 553.".

(b) CONFORMING AMENDMENTS.—

(1) Section 611(a)(1) of such title is amended by striking "608(b),".

(2) Section 611(a)(2) of such title is amended by striking "608(b),".

(3) Section 611(a)(3) of such title is amended—

(A) by striking subparagraph (B); and

(B) by striking "(3)(A) A small entity" and inserting the following:

"(3) A small entity".

SEC. 6. PROCEDURES FOR GATHERING COMMENTS.

Section 609 of title 5, United States Code, is amended by striking subsection (b) and all that follows through the end of the section and inserting the following:

"(b)(1) Prior to publication of any proposed rule described in subsection (e), an agency making such rule shall notify the Chief Counsel for Advocacy of the Small Business Administration and provide the Chief Counsel with—

"(A) all materials prepared or utilized by the agency in making the proposed rule, including the draft of the proposed rule; and

"(B) information on the potential adverse and beneficial economic impacts of the proposed rule on small entities and the type of small entities that might be affected.

"(2) An agency shall not be required under paragraph (1) to provide the exact language of any draft if the rule—

"(A) relates to the internal revenue laws of the United States; or

"(B) is proposed by an independent regulatory agency (as defined in section 3502(5) of title 44).

"(c) Not later than 15 days after the receipt of such materials and information under subsection (b), the Chief Counsel for Advocacy of the Small Business Administration shall—

"(1) identify small entities or representatives of small entities or a combination of both for the purpose of obtaining advice, input, and recommendations from those persons about the potential economic impacts of the proposed rule and the compliance of the agency with section 603; and

"(2) convene a review panel consisting of an employee from the Office of Advocacy of the Small Business Administration, an employee from the agency making the rule, and in the case of an agency other than an independent regulatory agency (as defined in section 3502(5) of title 44), an employee from the Office of Information and Regulatory Affairs of the Office of Management and Budget to review the materials and information provided to the Chief Counsel under subsection (b).

"(d)(1) Not later than 60 days after the review panel described in subsection (c)(2) is convened, the Chief Counsel for Advocacy of the Small Business Administration shall, after consultation with the members of such panel, submit a report to the agency and, in the case of an agency other than an independent regulatory agency (as defined in section 3502(5) of title 44), the Office of Information and Regulatory Affairs of the Office of Management and Budget.

"(2) Such report shall include an assessment of the economic impact of the proposed rule on small entities, including an assessment of the proposed rule's impact on the cost that small entities pay for energy, and a discussion of any alternatives that will minimize adverse significant economic impacts or maximize beneficial significant economic impacts on small entities.

"(3) Such report shall become part of the rulemaking record. In the publication of the proposed rule, the agency shall explain what actions, if any, the agency took in response to such report.

"(e) A proposed rule is described by this subsection if the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget, the head of the agency (or the delegatee of the head of the agency), or an independent regulatory agency determines that the proposed rule is likely to result in—

"(1) an annual effect on the economy of $100,000,000 or more;

"(2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local governments, tribal organizations, or geographic regions;

"(3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets; or

"(4) a significant economic impact on a substantial number of small entities.

"(f) Upon application by the agency, the Chief Counsel for Advocacy of the Small Business Administration may waive the requirements of subsections (b) through (e) if the Chief Counsel determines that compliance with the requirements of such subsections are impracticable, unnecessary, or contrary to the public interest.".

SEC. 7. PERIODIC REVIEW OF RULES.

Section 610 of title 5, United States Code, is amended to read as follows:

"§ 610. Periodic review of rules

"(a) Not later than 180 days after the enactment of the Regulatory Flexibility Improvements Act of 2013, each agency shall publish in the Federal Register and place on its website a plan for the periodic review of rules issued by the agency which the head of the agency determines have a significant economic impact on a substantial number of small entities. Such determination shall be made without regard to whether the agency performed an analysis under section 604. 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 adverse significant economic impacts or maximize any beneficial significant economic impacts on a substantial number of small entities. Such plan may be amended by the agency at any time by publishing the revision in the Federal Register and subsequently placing the amended plan on the agency's website.

"(b) The plan shall provide for the review of all such agency rules existing on the date of the enactment of the Regulatory Flexibility Improvements Act of 2013 within 10 years of the date of publication of the plan in the Federal Register and for review of rules adopted after the date of enactment of the Regulatory Flexibility Improvements Act of 2013 within 10 years after the publication of the final rule in the Federal Register. If the head of the agency determines that completion of the review of existing rules is not feasible by the established date, the head of the agency shall so certify in a statement published in the Federal Register and may extend the review for not longer than 2 years after publication of notice of extension in the Federal Register. Such certification and notice shall be sent to the Chief Counsel for Advocacy of the Small Business Administration and the Congress.

"(c) The plan shall include a section that details how an agency will conduct outreach to and meaningfully include small businesses for the purposes of carrying out this section. The agency shall include in this section a plan for how the agency will contact small businesses and gather their input on existing agency rules.

"(d) Each agency shall annually submit a report regarding the results of its review pursuant to such plan to the Congress, the Chief Counsel for Advocacy of the Small Business Administration, and, in the case of agencies other than independent regulatory agencies (as defined in section 3502(5) of title 44) to the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget. Such report shall include the identification of any rule with respect to which the head of the agency made a determination described in paragraph (5) or (6) of subsection (e) and a detailed explanation of the reasons for such determination.

"(e) In reviewing a rule pursuant to subsections (a) through (d), the agency shall amend or rescind the rule to minimize any adverse significant economic impact on a substantial number of small entities or disproportionate economic impact on a specific class of small entities, or maximize any beneficial significant economic impact of the rule on a substantial number of small entities to the greatest extent possible, consistent with the stated objectives of applicable statutes. In amending or rescinding the rule, the agency shall consider the following factors:

"(1) The continued need for the rule.

"(2) The nature of complaints received by the agency from small entities concerning the rule.

"(3) Comments by the Regulatory Enforcement Ombudsman and the Chief Counsel for Advocacy of the Small Business Administration.

"(4) The complexity of the rule.

"(5) The extent to which the rule overlaps, duplicates, or conflicts with other Federal rules and, unless the head of the agency determines it to be infeasible, State, territorial, and local rules.

"(6) The contribution of the rule to the cumulative economic impact of all Federal rules on the class of small entities affected by the rule, unless the head of the agency determines that such calculations cannot be made and reports that determination in the annual report required under subsection (d).

"(7) The length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule.

"(f) The agency shall publish in the Federal Register and on its website a list of rules to be reviewed pursuant to such plan. Such publication shall include a brief description of the rule, the reason why the agency determined that it has a significant economic impact on a substantial number of small entities (without regard to whether it had prepared a final regulatory flexibility analysis for the rule), and request comments from the public, the Chief Counsel for Advocacy of the Small Business Administration, and the Regulatory Enforcement Ombudsman concerning the enforcement of the rule.".

SEC. 8. JUDICIAL REVIEW OF COMPLIANCE WITH THE REQUIREMENTS OF THE REGULATORY FLEXIBILITY ACT AVAILABLE AFTER PUBLICATION OF THE FINAL RULE.

(a) IN GENERAL.—Paragraph (1) of section 611(a) of title 5, United States Code, is amended by striking "final agency action" and inserting "such rule".

(b) JURISDICTION.—Paragraph (2) of such section is amended by inserting "(or which would have such jurisdiction if publication of the final rule constituted final agency action)" after "provision of law,".

(c) TIME FOR BRINGING ACTION.—Paragraph (3) of such section is amended—

(1) by striking "final agency action" and inserting "publication of the final rule"; and

(2) by inserting ", in the case of a rule for which the date of final agency action is the same date as the publication of the final rule," after "except that".

(d) INTERVENTION BY CHIEF COUNSEL FOR ADVOCACY.—Subsection (b) of section 612 of title 5, United States Code, is amended by inserting before the first period "or agency compliance with section 601, 603, 604, 605(b), 609, or 610".

SEC. 9. JURISDICTION OF COURT OF APPEALS OVER RULES IMPLEMENTING THE REGULATORY FLEXIBILITY ACT.

(a) IN GENERAL.—Section 2342 of title 28, United States Code, is amended—

(1) in paragraph (6), by striking "and" at the end;

(2) in paragraph (7), by striking the period at the end and inserting "; and"; and

(3) by inserting after paragraph (7) the following new paragraph:

"(8) all final rules under section 608(a) of title 5.".

(b) CONFORMING AMENDMENTS.—Paragraph (3) of section 2341 of title 28, United States Code, is amended—

(1) in subparagraph (D), by striking "and" at the end;

(2) in subparagraph (E), by striking the period at the end and inserting "; and"; and

(3) by adding at the end the following new subparagraph:

"(F) the Office of Advocacy of the Small Business Administration, when the final rule is under section 608(a) of title 5.".

(c) AUTHORIZATION TO INTERVENE AND COMMENT ON AGENCY COMPLIANCE WITH ADMINISTRATIVE PROCE-

DURE.—Subsection (b) of section 612 of title 5, United States Code, is amended by inserting "chapter 5, and chapter 7," after "this chapter,".

SEC. 10. ESTABLISHMENT AND APPROVAL OF SMALL BUSINESS CONCERN SIZE STANDARDS BY CHIEF COUNSEL FOR ADVOCACY.

(a) IN GENERAL.—Subparagraph (A) of section 3(a)(2) of the Small Business Act (15 U.S.C. 632(a)(2)(A)) is amended to read as follows:

"(A) IN GENERAL.—In addition to the criteria specified in paragraph (1)—

"(i) the Administrator may specify detailed definitions or standards by which a business concern may be determined to be a small business concern for purposes of this Act or the Small Business Investment Act of 1958; and

"(ii) the Chief Counsel for Advocacy may specify such definitions or standards for purposes of any other Act.".

(b) APPROVAL BY CHIEF COUNSEL.—Clause (iii) of section 3(a)(2)(C) of the Small Business Act (15 U.S.C. 632(a)(2)(C)(iii)) is amended to read as follows:

"(iii) except in the case of a size standard prescribed by the Administrator, is approved by the Chief Counsel for Advocacy.".

(c) INDUSTRY VARIATION.—Paragraph (3) of section 3(a) of the Small Business Act (15 U.S.C. 632(a)(3)) is amended—

(1) by inserting "or Chief Counsel for Advocacy, as appropriate" before "shall ensure"; and

(2) by inserting "or Chief Counsel for Advocacy" before the period at the end.

(d) JUDICIAL REVIEW OF SIZE STANDARDS APPROVED BY CHIEF COUNSEL.—Section 3(a) of the Small Business Act (15 U.S.C. 632(a)) is amended by adding at the end the following new paragraph:

"(6) JUDICIAL REVIEW OF STANDARDS APPROVED BY CHIEF COUNSEL.—In the case of an action for judicial review of a rule which includes a definition or standard approved by the Chief Counsel for Advocacy under this subsection, the party seeking such review shall be entitled to join the Chief Counsel as a party in such action.".

SEC. 11. CLERICAL AMENDMENTS.

(a) Section 601 of title 5, United States Code, is amended—

(1) in paragraph (1)—

(A) by striking the semicolon at the end and inserting a period; and

(B) by striking "(1) the term" and inserting the following:

"(1) AGENCY.—The term";

(2) in paragraph (3)—

(A) by striking the semicolon at the end and inserting a period; and

(B) by striking "(3) the term" and inserting the following:

"(3) SMALL BUSINESS.—The term";

(3) in paragraph (5)—

(A) by striking the semicolon at the end and inserting a period; and

(B) by striking "(5) the term" and inserting the following:

"(5) SMALL GOVERNMENTAL JURISDICTION.—The term"; and

(4) in paragraph (6)—

(A) by striking "; and" and inserting a period; and

(B) by striking "(6) the term" and inserting the following:

"(6) SMALL ENTITY.—The term".

(b) The heading of section 605 of title 5, United States Code, is amended to read as follows:

"§ 605. Incorporations by reference and certifications".

(c) The table of sections for chapter 6 of title 5, United States Code, is amended—

(1) by striking the item relating to section 605 and inserting the following new item:

"605. Incorporations by reference and certifications.";

(2) by striking the item relating to section 607 and inserting the following new item:

"607. Quantification requirements.";

and

(3) by striking the item relating to section 608 and inserting the following:

"608. Additional powers of Chief Counsel for Advocacy.".

(d) Chapter 6 of title 5, United States Code, is amended as follows:

(1) In section 603, by striking subsection (d).

(2) In section 604(a) by striking the second paragraph (6).

SEC. 12. AGENCY PREPARATION OF GUIDES.

Section 212(a)(5) the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 601 note) is amended to read as follows:

"(5) AGENCY PREPARATION OF GUIDES.—The agency shall, in its sole discretion, taking into account the subject matter of the rule and the language of relevant statutes, ensure that the guide is written using sufficiently plain language likely to be understood by affected small entities. Agencies may prepare separate guides covering groups or classes of similarly affected small entities and may cooperate with associations of small entities to distribute such guides. In developing guides, agencies shall solicit input from affected small entities or associations of affected small entities. An agency may prepare guides and apply this section with respect to a rule or a group of related rules.".

○

Mr. COHEN. Thank you, Mr. Bachus, and I want you to know, in your absence, we went ahead and passed quite a few new regulations. The Regulatory Flexibility Improvements Act proposes some needlessly drastic measures that threaten to undermine public health and safety and waste public resources.

I am open to ideas on tweaking the regulatory process in modest ways to make regulatory compliance easier for small businesses and perhaps even finding better ways for small businesses to provide input to specific rules. As drafted, though, this bill simply goes too far.

Wait a minute. I am having a flashback. I said the same thing 2 years ago on this bill that was real similar to this in the same Subcommittee. It is indeed Groundhog's Day, and I am playing the part of Bill Murray. That is the role I have been cast in by being made the Ranking Member here.

It is not necessarily Mr. Bachus' fault. He is doing what he thinks is right, but the fact is we are repeating and rehashing the same stuff over and over here. And the fact is regulations do have a function and an important function in our society, and regulations protect the American public from a vast array of harms.

The reason we have regulations is because we have got to clean up our air, our water, protect children from dangerous toys, make sure our food is not going to cause us disease or even death, that we don't have financial markets go haywire and crazy and almost wreck the economy and have unsafe workplaces.

Not all this will be stopped with regulations, but most regulations are for the purpose of protecting society, and that is what they do. And for those who say all we need are libertarian laissez-faire, no-regulation society, well, we will have a whole bunch of deaths in the marketplace and deaths from consumer products. The Bureau of Labor Statistics report in 2011 census of fatal occupational injuries said there were 4,693 workplace deaths in 2011.

According to researchers in the National Institute for Occupational Safety and Health, American Cancer Society and Emory University School of Public Health, 50,000 to 70,000 deaths from occupation-related diseases occurred in the United States.

And while we are talking about regulatory cost, we should consider the cost of insufficient regulation. According to a joint study by Liberty Mutual Insurance Company and health economists at UC Davis, the estimated cost of workplace-related injuries is $250 billion, only 25 percent of which is covered by Workers' Comp.

As I said, I know Chairman Bachus and other proponents of this bill sincerely share also my appreciation for the importance of regulation in protecting us from a myriad of harms, some of which I have mentioned. But I will emphasize the importance of regulation to point out that this bill, if enacted, could jeopardize these protections in the future. This bill was only used for regulatory review panels by requiring they apply the rules proposed by all agencies and by applying to them all major rules, not just those that are the subject to the Regulatory Flexibility Act.

Currently, such review panels are required for rules that are subject to the Regulatory Flexibility Act and are proposed by the Environmental Protection Agency, OSHA, or the Consumer Financial Protection Bureau. These review panels, which consist of the chief counsel for advocacy of small business administration, a representative of the issuing agency and a representative from the Office of OIRA, review the covered rules and can send them back to the issuing agency. Clearly, the process is intended to slow down rulemaking. By dramatically expanding the use, this bill will effectively stop most rules from going into effect.

The bill also burdens agencies with numerous additional analytical requirements, including the requirement that agencies assess the indirect economic effects of a proposed rule. The requirement to assess indirect effects has almost no limitation other than that such indirect effect should be reasonably foreseeable, sounds like Palsgraf, which is not much of a limitation. Under this fairly open-ended requirement, agencies would be at a loss to determine how much is enough when it comes to the regulatory analysis obligations.

For example, what is the reasonably foreseeable and direct economic effect of a regulation requiring heightened security measures at airports? Would the issuing agency have to take into account the potential loss of business for the hotdog stand that is located far past the security checkpoint or better, the barbecue rib place, more appropriate for my jurisdiction.

These are just two of the many concerns of the RFIA. We will hear more in detail from Mr. Narang of Public Citizen about the remaining concerns with the bill. There are things we could do to help small entities, including measures to assist small business with regulatory compliance. We ought to be able to support such measures in a bipartisan basis.

I understand Mr. Narang may have a proposal to that effect. I hope his fellow witnesses and the other Members of the Subcommittee will give it true consideration for legislation that we can pass in a bipartisan fashion in anticipation of the Fourth of July. God bless America. I yield back the balance of my time.

Mr. BACHUS. Thank you. I thank the Ranking Member. One thing I may tell the panel and—not the panel here, but I think most of you probably know this, but I am not sure our Members do. The Regulatory Flexibility Act was 1980. In 1996, President Clinton said it wasn't being enforced and that it should be extended to small businesses, which he did, and that was kind of Groundhog Day, because a lot of what he said in 1996 is what is in this act because it just didn't happen.

And you mentioned the EPA environmental standards. They are actually required by the law to do a lot of what we are asking them to do here, but they just simply hadn't done it, and I know Public Citizen has in their written testimony, which I read, said how this would slow things up. But I think the argument may be with the 1996 act. But the EPA, it said they were going to voluntarily comply with this and it just hadn't done it except I think on 56 occasions, 40-something occasions. Many times they just ignored the law, so I am not sure your argument may be with what President Clinton——

Mr. COHEN. No. May I have a moment?

Mr. BACHUS. Oh, absolutely.

Mr. COHEN. Yeah. I appreciate your bringing up who I consider was a tremendous President and a dear friend, but 1996 wasn't necessarily his best year. That is also the year, you know, it was election year, and he signed the Defense of Marriage Act, and there were some of the things he did that year he didn't really believe. He has admitted that.

Mr. BACHUS. Well, you know, it is the law.

Mr. COHEN. Well, so was that.

Mr. BACHUS. Until yesterday, right?

Mr. COHEN. Right.

Mr. BACHUS. Day before yesterday. All right.

Thank you. "It wasn't a good year;" that is a great argument.

We have got an esteemed panel today. Ms. Karen Harned serves as executive director of the NFIB, National Federation of Independent Business, Small Business Legal Center. As executive director, she comments regularly on small business cases before Federal and State courts as well as the U.S. Supreme Court. Prior to joining the Legal Center, Ms. Harned was an attorney at the Washington, D.C., law firm specializing in food and drug law where she represented several small and large businesses and their respective trade associations before Congress and Federal agencies. She also served as the Assistant Press Secretary of the U.S. Senator Don Nickles of Oklahoma, which was a fine senator, fine person. Ms. Harned received her BA from the University of Oklahoma in 1989 and her JD from the George Washington University National Law Center in 1995. We welcome you.

Mr. Carl Harris is co-founder of Carl Harris Company, a construction company founded in Wichita, Kansas in 1985. Mr. Harris' business engages in numerous residential and light commercial construction applications. He serves as national area chairman for the National Association of Homebuilders, a trade association that helps promote policies that make housing a national priority. NAHB strives to improve housing affordability, availability, and choice. Mr. Harris serves as the 2013 president of the Kansas Building Industry Association and affiliate of NAHB. KBIA, and that is Kansas Building Industry Association, serves as an advocate for Kansas Housing Industry and has more than 2,000 members. It has been a rough few years for the house—home building industry.

Mr. HARRIS. It has, Mr. Bachus.

Mr. BACHUS. And hopefully, we are seeing some recovery, but I know many of your colleagues have actually gone out of business. I remember my father was a general contractor during the Carter administration and many of his colleagues didn't survive those high interest rates. But anyway.

Mr. Amit Narang; is that right?

Mr. NARANG. Correct.

Mr. BACHUS. Okay. Is a regulatory policy advocate for Public Citizen, a nonprofit organization lobbying for citizen interest in the government. Founded in 1971, Public Citizen works on numerous issues, including the economic crisis, healthcare reform and climate change. Mr. Narang is the article's editor of the Administrative Law Review, a widely circulated legal journal focused on regulatory law and policy. He has been quoted in the New York Times and the Bureau of National Affairs, and I guess that is BNA, is what most of us call that. Mr. Narang received his bachelor's degree from the University of Pennsylvania and his JD from American University, Washington College of Law. We welcome you to our panel.

Mr. Rosario Palmieri? Okay. Good. Is vice president of Infrastructure, Legal and Regulatory Policy for the National Association of Manufacturers. In that capacity, he works with manufacturers to develop and articulate the Association's position on regulatory civil justice, antitrust, transportation, and infrastructure issues. Mr. Rosario—actually, it is Mr. Palmieri. It says "Rosario" on there. I should probably read these things.

Also leads NAM's efforts——

Mr. COHEN. Take out all the excitement.

Mr. BACHUS [continuing]. In product safety and chairs the now CPSC coalition made up of manufacturers and retailers. Previously he served as NAM's director of Energy and Resources Policy.

Boy, that was a challenge, wasn't it.

Prior to joining the Association, Mr. Palmieri worked in the U.S. House of Representatives as the deputy staff director out of the Regulatory Affairs Subcommittee and the Committee on Government Reform. He also served on the House Committee on Small Business. He received his BA in political science from American university. We have two American University graduates, right? Did you all know each other?

Mr. PALMIERI. No, sir.

Mr. NARANG. Until today.

Mr. BACHUS. It is time you all got acquainted, right?

Alright. We will now proceed with the—let's see. Actually, we need to have the opening—the panelists have their opening statements.

Mr. BACHUS. So, Ms. Harned, we will start with you. And you are recognized for 5 or more minutes. If you need 6 or 7 minutes, that is fine, too, right? We don't—we would rather—we would rather you not rush and get it out.

TESTIMONY OF KAREN R. HARNED, ESQ., EXECUTIVE DIRECTOR, NATIONAL FEDERATION OF INDEPENDENT BUSINESS

Ms. HARNED. Thank you so much.

Good morning, Mr. Chairman Bachus and Ranking Member Cohen.

NFIB, the Nation's largest small business advocacy organization, appreciates the opportunity to testify on the burdensome effects of regulation on small business and how H.R. 2542, the "Regulatory Flexibility Improvement Act of 2013," would address many of those concerns.

Two and a half years ago, I had the opportunity to testify before the Committee on a need for regulatory reform. As I stated at that time, overzealous regulation is a perennial concern for small business owners, but that fact has not changed. According to the June 2013 report of the NFIB Research Foundation's "Small Business Economic Trends," 23 percent of small businesses say that government red tape is the most important problem they face, second only to taxes.

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 shares that campaign, which is a national effort to protect small businesses and American jobs from the impacts of regulation.

NFIB believes that Congress must take action to level the regulatory playing field for small business. Congress should expand the Small Business Regulatory Enforcement and Fairness Act and its small business advocacy review panels to all agencies, including independent agencies. In so doing, all agencies would be 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 the office of advocacy should ensure that agencies are following the spirit of SBREFA. There are instances where agencies have declined to adopt the recommendation of a SBAR panel or conduct a SBAR panel for either a significant rule or a rule that would greatly benefit from small business input. Congress should ensure that agencies perform regulatory flexibility analyses and require them to list all of the less burdensome alternatives that were considered.

Each agency should provide an evidence-based explanation for why it is more—why it shows a more burdensome versus a less burdensome option and explain how their rule may act as a barrier to entry for a new business. Section 610 reviews should be strengthened. Agencies should be required 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.

NFIB also believes that Congress should explore requiring agencies to provide updated information on how each agency mitigates penalties and fines on small businesses as required by SBREFA and require that such a report be conducted on an annual basis. Regulatory agencies will often proclaim the indirect benefits for regulatory proposals, but they 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.

Agencies should be held accountable when they fail to give proper consideration to the comments of the office of advocacy, and a formal mechanism should be put in place for resolving disputes regarding the economic cost of a rule between the agency and advocacy. Because of the improvements that are inherent in H.R. 2542, NFIB is hopeful that, if enacted, that review of agency actions will be strengthened and the small business voice will be more substantively considered throughout the regulatory process or the rulemaking process.

NFIB is concerned that agencies are shifting from an emphasis on small business compliance to an emphasis on enforcement. Congress can help by stressing to agencies that they devote adequate resources to help small businesses comply with the complicated and vast regulatory burdens that they face. Congress also should pass legislation waiving fines and penalties for small businesses the first time they commit a nonharmful error on regulatory paperwork.

Mistakes in paperwork are going to happen, but if no harm is committed as a result of the error, agencies should waive penalties for first-time offenses and help owners understand the mistakes that they have made.

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 this legislation are a good first step. Thank you for the opportunity.

Mr. BACHUS. Thank you. I appreciate that opening statement.

[The prepared statement of Ms. Harned follows:]

Prepared Statement of Karen R. Harned, Esq., Executive Director, National Federation of Independent Business (NFIB)

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,

Karen R. Harned

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

Mr. BACHUS. Mr. Harris.

TESTIMONY OF CARL HARRIS, VICE PRESIDENT AND GENERAL MANAGER, CARL HARRIS CO., INC., ON BEHALF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS

Mr. HARRIS. Chairman Bachus, Ranking Member Cohen and distinguished Members of the Subcommittee, my name is Carl Harris. I am cofounder of the Carl Harris Company, a construction firm based in Wichita, Kansas with about 20 employees. I am also a member of the National Association of Homebuilders and president of the Kansas Building Industry Association. Thank you for the opportunity to be here today to talk about ways to reform and improve the Regulatory Flexibility Act.

I applaud this Subcommittee for considering H.R. 2542, the "Regulatory Flexibility Improvement Act of 2013," and I believe this legislation will go a long way in addressing the issues I have observed in the rulemaking process. As a small businessman operating in a heavily regulated industry, I understand how difficult it can be for a small builder to operate a successful thriving business that provides the highest levels of health, safety and welfare for its employees.

The sheer volume of regulations isn't the only problem. Often regulations are crafted without respect to the size of the regulated entities or don't appropriately take into account the true cost of compliance. Congress appropriately acknowledged this dilemma when, in 1980, it passed the Regulatory Flexibility Act, the RFA, and subsequently amended that to include the Small Business Regulatory Enforcement Fairness Act, SBREFA. With the RFA, Congress intended for regulations to be crafted to the scale of businesses while achieving the goals of the rule. This was an admirable aim. However, in practice, it does not appear to be working as intended.

I have had the fortune of representing the residential construction industry on a number of small business review panels over the years. I have seen firsthand how agencies treat the RFA process as little more than a procedural check-the-box exercise, or worse still, artfully avoid complying with certain parts of it altogether.

For example, in 2008, OSHA proposed the Cranes and Derricks Rule, which was intended to protect workers from hazards associated with hoisting equipment in construction. I participated as a small entity representative on a review panel that followed. Several SERs, myself included, raised concerns about the feasibility of various aspects of the rule that were clearly designed for large commercial construction applications. I personally put forward an effective commonsense alternative that would save lives while keeping low the cost of compliance for small entities. Unfortunately, it seems that my feedback fell on deaf ears.

I believe the requirements in section 4 of H.R. 2542 for agencies to state the disproportionate impact a rule may have on small entities would lend additional focus to agency action in accordance with Congress' original intent. At times, it seems that agencies are not performing a rigorous analysis of the impacts of proposed rules on small entities. The result is often regulations that don't acknowledge the true cost to small businesses.

This is the case, in 2010, when OSHA proposed revising its occupational injury and illness recordkeeping requirements. OSHA maintained that the additional recording requirements did not amount to a significant burden on small business. They certified it, and to that effect, and in doing so, avoided analysis requirements contained in the RFA.

On teleconferences, I raised the point that OSHA hadn't considered the true additional cost that small employers must face. I believe that more stringent regulatory flexibility analysis requirements contained in H.R. 2542 would have addressed this issue.

Finally, the Small Entity Review Panel requirements in the RFA offer a valuable opportunity for small businesses to provide much needed input to ensure rules are appropriately scaled to the size of the businesses that they will impact.

Unfortunately, there exists many ways for agencies to avoid this critical step in the rulemaking process. In 2008, the Environmental Protection Agency neglected to convene a review panel when the agency sought to amend its lead renovation and repair—repair and painting rule. This failure to convene a review panel resulted in an amended rule that grossly underestimated the impact on small businesses.

I support the extended review panel requirements included in section 6 of H.R. 2542. I also suggest, for further consideration and future consideration, that Congress look toward a stronger enforcement mechanism for agency compliance with section 609(b) of the RFA, the review panel requirements.

If the RFA allowed judicial review of section 609(b), agencies would feel more pressure to comply with convening a meaningful panel of SERs that could thoughtfully advise the agency as Congress intended.

I appreciate this Subcommittee's effort to improve the RFA, and I urge passage of the Regulatory Flexibility Improvements Act of 2013. Thank you for the opportunity to testify today.

Mr. BACHUS. Thank you very much, Mr. Harris.

[The prepared statement of Mr. Harris follows:]

Testimony of

Carl Harris

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 Act[2] 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 IRFA[9], they must

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[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

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[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

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[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)

Mr. BACHUS. Mr. Narang.

TESTIMONY OF AMIT NARANG, REGULATORY POLICY ADVOCATE, PUBLIC CITIZEN

Mr. NARANG. Thank you. Chairman Bachus, Ranking Member Cohen and Members of this Committee. Thank you for the opportunity to testify today on H.R. 2542, the "Regulatory Flexibility Improvements Act of 2013." I am Amit Narang, regulatory policy advocate at Public Citizen's Congress Watch. Public Citizen is a national public interest organization with more 300,000 members and supporters.

For more than 40 years, we have successfully advocated for stronger health, safety, consumer protection and other rules, as well for a robust regulatory system that curtails corporate wrongdoing and advanced the public interest.

I am here today to express significant concerns about the Regulatory Flexibility Improvements Act of 2013. My concerns can be broken down into two parts. First, like so many other regulatory reform proposals, the RFIA adds more procedures, more analyses and more requirements to a regulatory process that badly needs less of each, without funding any of this additional work for agencies.

Second, the RFIA forces agencies to find small business impacts where there are none, giving big business a free pass by slowing or blocking rules that in reality only affect large corporations.

Turning to the first part. Important questions at the outset are, one, what does the current regulatory process look like; and two, is it a good idea to add more to it?

As Public Citizen's visual depiction of the regulatory process shows, the current process is a model of inefficiency with a dizzying array of duplicative and redundant requirements that amounts to a virtual maze for agencies to navigate.

This has led to a state of paralysis by analysis at Federal agencies. These agencies must contend with a broken regulatory process that is too slow, too calcified and too inflexible to respond to emerging health and safety threats. For example, OSHA has finalized just one significant worker safety standard since the beginning of 2010. As another example, it has been 2 and a half years since the Food Safety Modernization Act passed on a bipartisan basis and still no food safety rules have been finalized. In practical terms, it is as if the food safety law doesn't exist. The list goes on.

The RFIA makes this situation worse in many respects, but let me just focus on two in the short time I have.

First, the RFIA establishes a vague, indirect effects test. If agencies find their rules result in indirect effects on small businesses that are "reasonably foreseeable," they must treat those rules in the same exact way as rules that have a direct effect on small businesses. Since this ill-defined test gives agencies no guidance as to what constitutes, or more importantly, does not constitute an indirect effect, agencies will feel strong pressure to send their rules through the much longer process reserved for rules that actually do impact small businesses.

Second, the RFIA makes all agencies conduct SBREFA Small Business Advisory panels on all of their major rules, even if the rule will have no effect on real small businesses. This new mandate, without any commensurate funding, represents a massive expansion over the current system and is in no way targeted at rules that have small business impacts. These panels are time and resource intensive, and yet the RFIA simply asks agencies to ignore small business impacts and go through the SBREFA review panel process every time they issue a major rule. That would have meant 83 SBREFA panels for rules issued last year alone at a time when agencies are cutting back and furloughing staff.

Since small businesses don't benefit from delay or blocking of rules that do not apply to them anyway, who does benefit? The obvious answer is big businesses, who are let off the hook when it comes to commonsense new health and safety standards. An example here is helpful.

Late last year, Public Citizen issues a report looking into whether the Volcker Rule would affect small banks, and if so, how. The yet to be finalized Volcker Rules is a critical Dodd-Frank financial reform that would prohibit federally insured banks from engaging in the kind of risky proprietary trading which led to the financial collapse. Our report showed that of 7,181 banks in the U.S., 7,175 would be unaffected by the Volcker Rule. In other words, the Volcker Rule would only apply to the six largest banks in the U.S. that engage in proprietary trading.

Even though the Volcker Rule is only directed at the big banks, the RFIA would have forced financial agencies to treat the rule as if it does affect small businesses. Do we want our financial agencies to be spending taxpayer money studying the Volcker Rule's supposed indirect effects on small businesses? The RFIA would have required financial agencies to put the Volcker Rule through small business advisory panels. Who would those panels have included to represent small businesses for a rule that only applies to big banks?

If Congress wants to clarify how agencies should identify rules that may apply to small businesses, then it should do so in a clear, direct, and unambiguous manner. Instead, the RFIA creates more uncertainty for agencies when it comes to small business impacts.

Over the years, Congress has repeatedly tried to address small business regulatory relief by adding more procedures, analyses, and requirements. If this hearing is any indication, it hasn't worked. It is time for a new approach.

We all agree that we need to help real small businesses. One consensus approach would be to enhance small business regulatory compliance assistance. This provides direct compliance assistance targeted only to legitimate small businesses while preserving critical health and safe protections for the public's benefit.

Congress has taken first steps in this direction, but more can and should be done. I look forward to working with Members of Congress on this consensus path forward. Thank you.

Mr. BACHUS. I appreciate that, Mr. Narang, and I do hope we will all work together on this.

[The prepared statement of Mr. Narang follows:]

Written Testimony of

Amit Narang
Regulatory Policy Advocate, Public Citizen

before the

The Subcommittee on Regulatory Reform, Commercial and Antitrust Law
U.S. House of Representatives

on

"The Regulatory Flexibility Improvements Act of 2013"

June 28, 2013

Mr. Chairman and Members of the Committee,

Thank you for the opportunity to testify today on the Regulatory Flexibility Improvements Act of 2013. I am Amit Narang, Regulatory Policy Advocate at Public Citizen's Congress Watch. Public Citizen is a national public interest organization with more than 300,000 members and supporters. For more than 40 years, we have successfully advocated for stronger health, safety, consumer protection and other rules, as well as for a robust regulatory system that curtails corporate wrongdoing and advances the public interest.

Public Citizen co-chairs the Coalition for Sensible Safeguards (CSS). CSS is an alliance of more than 75 consumer, small business, labor, scientific, research, good government, faith, community, health and environmental organizations joined in the belief that our country's system of regulatory safeguards provides a stable framework that secures our quality of life and paves the way for a sound economy that benefits us all. Time constraints prevented the Coalition from reviewing my testimony in advance, and today I speak only on behalf of Public Citizen.

The Regulatory Flexibility Improvements Act (RFIA) seeks to help a segment of our economy that all would agree is essential to keeping our economy thriving. Unfortunately, this legislation will do little to help genuine small businesses, and will come at an enormous cost in terms of undermining our federal agencies' ability to provide crucial public health and safety protections, civil rights, workers' rights, consumer safety standards, and environmental standards.

As discussed more fully below, the RFIA takes a "sledgehammer" to the regulatory process where only a "scalpel" at most is needed. The legislation makes drastic and unnecessary reforms to the Regulatory Flexibility Act (RFA) which, in turn, will place great pressure on federal agencies to consider almost all of their rules as significantly impacting small business, even in cases where the rule is only setting public health and safety standards for large companies. As a result, agencies will be bogged down in senseless busywork in a search for impacts on small businesses that simply do not exist. Since the RFIA does not provide any funding for the significant added mandates it imposes on federal agencies, the end result will be, at a minimum, further delayed public protections, with many crucial new safeguards never seeing the light of day. Congress should instead explore ways to provide direct assistance to real small businesses while preserving our country's system of existing safeguards and our government's ability to respond to emerging threats. A promising consensus path forward is highlighted at the end of this testimony.

I. Regulations Do Not Kill Jobs, They Save Lives

First, there is little empirical evidence supporting the claim that there is a trade-off between economic growth and strong, effective regulatory standards. Experts from across the political spectrum have acknowledged that arguments linking regulations to job losses are nothing more than mere fiction. For example, Bruce Bartlett, a prominent conservative economist who worked in both the Reagan and George H.W. Bush administrations, referred to the argument that cutting regulations will lead to significant economic growth as "just nonsense" and "made up."[1]

Mr. Bartlett's claims are backed up by a recent World Bank study that surveyed economic conditions across the world and ranked countries according to the "ease of doing business" in those countries. The study ranked the U.S. number four overall and number one among the 25 largest economies.[2] In the words of the World Bank, "A high ranking on the ease of doing business index means the regulatory environment is more conducive to the starting and operation of a local firm." The World Bank recognized that the regulatory environment includes many rules that enhance and protect business activity, and the U.S. ranks especially high in protecting investors, enforcing contracts, and getting credit.

In fact, the available evidence shows that there is simply no clear link between regulations and job losses. Rather, recent data from the Bureau of Labor Statistics demonstrate that insufficient demand for products and services is what's driving layoffs and job losses. As the figure below depicts, employers cite business demand roughly 100 times more often government regulations as the reason for mass layoffs:

Reason for layoff: 2008-2011[3]

	2008	2009	2010	2011
Business Demand	516,919	824,834	384,564	366,629
Governmental regulations/intervention	5,505	4,854	2,971	2,736

To the extent that there is a link between regulations and job losses, it points in the opposite direction with a lack of regulation being tbe culprit for the financial collapse of 2008 and the ensuing Great Recession. As the Financial Crisis Inquiry Commission noted, ""Widespread failures in financial regulation and supervision proved devastating to the stability of the nation's financial markets."[4] A recent GAO report quantified the tragic costs of the financial crisis, finding that lost economic output could exceed $13 trillion and that American households collectively lost $9.1

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[1] Charles Babington, Bruce Bartlett, Ex-Reagan Economist: Idea That Deregulation Leads to Jobs 'Just Made Up,' Huffington Post, October 30, 2011, http://www.huffingtonpost.com/2011/10/31/gop-candidates-plans-on-economy-housing_n_1066949.html?view=print&comm_ref=false.

[2] World Bank, Doing Business: Measuring Business Regulations available at: http://www.doingbusiness.org/rankings

[3] U.S. Department of Labor, Bureau of Labor Statistics. (2012, November). *Extended Mass Layoffs in 2011. Table 5. Reason for layoff: extended mass layoff events, separations, and initial claimants for unemployment insurance, private nonfarm sector, 2009-2011.* Available from: <http://www.bls.gov/mls/mlsreport1039.pdf>; U.S. Department of Labor, Bureau of Labor Statistics. (2011, November). *Extended Mass Layoffs in 2010. Table 6. Reason for layoff: extended mass layoff events, separations, and initial claimants for unemployment insurance, private nonfarm sector, 2008-2010.* Available from: <http://www.bls.gov/mls/mlsreport1038.pdf>.

[4] Financial Crisis Inquiry Commission. (2011). The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States. Washington, D.C.: Government Printing Office. p. 30.

trillion.[5] The lack of demand that has been driving the mass layoffs can be directly attributed to the economic slowdown following this financial crisis. It's no surprise then to see a prominent small business poll from earlier this year show overwhelming support for holding Wall Street accountable.[6] The RFIA, if enacted, would work to further stall, and potentially block, key parts of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) and thus lay the foundation for future economic and job losses.

Second, the benefits that federal regulations provide to our country consistently dwarf the costs of those regulations according to official government figures. Every year, the Office of Management and Budget (OMB) analyzes the costs and benefits of rules with a major economic impact in a report to Congress. The most recent OMB report found that:

> The estimated annual benefits of major Federal regulations reviewed by OMB from October 1, 2002, to September 30, 2012, for which agencies estimated and monetized both benefits and costs, are in the aggregate between $193 billion and $800 billion, while the estimated annual costs are in the aggregate between $57 billion and $84 billion. These ranges are reported in 2001 dollars and reflect uncertainty in the benefits and costs of each rule at the time that it was evaluated.[7]

This means that even by the most conservative OMB estimates, the benefits of major federal regulations over the last decade have exceeded their costs by a factor of more than two-to-one, and benefits may have exceeded costs by a factor of up to 14.

Yet, the raw numbers do not fully portray the critical role that regulations play in our lives every day. Regulations bave made our food supply safer; saved hundreds of thousands of lives by making our air and water supply safer; saved countless lives by taking unsafe products off the shelves and ensuring that product manufacturers adhere to strict safety standards; protected consumers from unfair and deceptive financial products; empowered disabled persons by allowing them means to access public facilities; made our workplaces safer environments for workers; and much more.

While many of us take these regulatory protections as granted, the true value of regulatory standards become tragically apparent following avoidable crises and catastrophes stemming from a lack of regulation. Deregulatory failures such as the aforementioned 2008 financial collapse and Great Recession, the 2010 British Petroleum oil spill disaster in the Gulf of Mexico, the Upper Big Branch mine explosion in West Virginia, the numerous tainted food recalls and food safety crises that still occur on a regular basis, the massive recalls of unsafe children's toys and defective

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[5] U.S. Government Accountability Office. (2013, Jan. 13). Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act. p. 12. available at: <http://www.gao.gov/products/GAO-13-180>.
[6] Small Business Majority, Opinion Poll: Small Businesses Support Strong Accountability for Financial Industry, (Jan. 29, 2013), http://www.smallbusinessmajority.org/small-business-research/financial-reform/small-business-opinion-on-financial-reform.php.
[7] Office of Management and Budget, Office of Information and Regulatory Affairs. (2013). Draft 2013 Report to Congress on the Benefits and Costs of Federal Regulations an Unfunded Mandates on State, Local, and Tribal Entities. p.3. available at:
http://www.whitehouse.gov/sites/default/files/omb/inforeg/2013_cb/draft_2013_cost_benefit_report.pdf

consumer products, and most recently the explosion at a West Texas fertilizer plant, all point to the need to strengthen, not weaken, our system of regulatory protections.

No wonder, then, that opponents of strong regulatory protections seek to obscure the clear and tangible benefits of regulation by focusing myopically on the costs of regulation, even to the point of exaggerating such cost estimates to an implausible degree. The most famous, or notorious, of these inflated regulatory cost estimates is the so-called "Crain and Crain" study,[8] commissioned by the Small Business Administration's (SBA) Office of Advocacy, which found the annual costs of significant regulations amount to 1.75 trillion dollars a year. Touted by many, this deeply flawed study has been universally discredited by experts and peer reviewers from across the political spectrum. Former OIRA administrator Cass Sunstein has previously stated that the study "should be considered nothing more than an urban legend"[9] while former OIRA Administrator under President George W. Bush, John Graham, has stated that a prior iteration of the study "might not pass OMB information quality guidelines."[10] The CRS report analyzing the study contained a striking admission by the study's authors that they did not intend for the study to be used for policy making purposes because it only included discussion of potential costs of regulation with no discussion of potential benefit.[11] None of this has stopped lawmakers from repeatedly citing the study as justification for their claims of "overregulation" and the public is regularly misled by new reports that inflate estimates of the costs of regulation with nary a mention of the benefits they bring.

Finally, it is true that the regulatory system is broken, but not because there is too much regulation. Rather the system is broken because the current regulatory process is too slow, too calcified, and too inflexible to respond to public health and safety threats as they emerge. As Public Citizen's striking visual depiction of the regulatory process shows,[12] the current process is a model of inefficiency, with a dizzying array of duplicative and redundant requirements interspersed throughout a byzantine network that is a virtual maze for agencies to navigate. This is the result of an accumulation of analyses and procedures that Congress and the Executive have imposed on agencies over the years leaving agencies in a state of "paralysis by analysis." Far from the popular conception of "regulators run amok," the reality is that agency delays are rampant, deadlines are routinely missed or pushed back, and ample evidence exists that the situation is getting worse.

Last July, Public Citizen conducted an analysis of public health and safety rulemakings that Congress required agencies to implement with strict deadlines.[13] Our analysis showed that most

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[8] Nicole V. Crain and W. Mark Crain, The Impact of Regulatory Costs on Small Firms (2010) available at http://www.sba.gov/advocacy/7540/49291

[9] Mark Drajem, *Rules Study Backed by Republicans 'Deeply Flawed,' Sunstein Says* (Bloomberg, June 3, 2011) *available at* http://www.bloomberg.com/news/2011-06-03/rules-study-backed-by-republicans-deeply-flawed-sunstein-says.html

[10] Hearing on H.R. 2432, Paperwork and Regulatory Improvements Act of 2003 Before the H. Comm. On Gov't Reform, 108th Cong. Tr. 21 (2003) (statement of John Graham).

[11] Curtis W. Copeland, *Analysis of an Estimate of the Total Cost of Federal Regulations* 2 (Cong. Research Serv., R41763, Apr. 6 2011).

[12] Public Citizen, *The Federal Rulemaking Process*, http://www.citizen.org/documents/Regulations-Flowchart.pdf.

[13] Negah Mouzoon, *Public Safeguards Past Due: Missed Deadlines Leave Public Unprotected*, Public Citizen, June 2012, http://www.citizen.org/documents/public-safeguards-past-due-report.pdf.

rules are issued long after their deadlines have passed, putting American consumers at risk. Of the 159 rules analyzed, 78 percent missed their deadline and more than half remained incomplete at the time. Federal agencies miss these deadlines for a variety of reasons, including having to conduct onerous analyses, inadequate resources or agency commitment, and fear of judicial review. A report just released by CSS also confirms these delays continue unabated.[14] The CSS report profiled eight rules critical to public health and safety that have been stuck at various stages of the rulemaking process for years. Many of these rules are required by Congress, with clear deadlines that agencies have been unable to meet because the regulatory process is so slow.

None of this should come as a surprise to this committee. In late 2011, an expert testified before this committee that it takes agencies on average four to eight years to finalize and enforce significant regulations.[15] This comports with a recent Government Accountability Office (GAO) report finding that it takes the Occupational Safety and Health Administration (OSHA) on average seven years to develop and finalize health and safety standards.[16] Clearly, no one can point to the federal agency rulemaking process as a paragon of government efficiency.

Perhaps the most vivid example of excessive and unreasonable regulatory delays is the ongoing process of putting basic financial reforms in place after the financial crisis of 2008 by implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act. According to the most recent report by the law firm DavisPolk, a total of 279 Dodd-Frank rulemaking requirement deadlines have passed.[17] Of these 279 passed deadlines, only 104, or approximately 37% have been met with finalized rules.[18] Overall, only 153 of the 398 total required rulemakings have been finalized, while 128 required rulemakings have yet to even be *proposed*.[19]

These delays and missed deadlines are the sign of a broken regulatory system that is crumbling under the cumulative weight of ever increasing analytical and procedural requirements. The RFIA would make the situation worse in several key respects.

II. RFIA: Small Business Bill In Name Only

The RFIA is another in a long string of so-called "regulatory reform" measures that are designed to slow down or prevent agencies from carrying out their congressionally required responsibilities to protect the health and safety of the American public. Although this legislation is supposedly intended to provide small businesses with regulatory relief, the legislation will actually give big

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[14] Coalition for Sensible Safeguards, *Down the Regulatory Rabbit Hole: How Corporate Influence, Judicial Review, and Lack of Transparency Delay Crucial Rules and Harm the Public* available at: http://sensiblesafeguards.org/assets/documents/down-the-regulatory-rabbit-hole.pdf

[15] Testimony of Sidney Shapiro, Hearing on H.R. 3010, The Regulatory Accountability Act of 2011, House Judiciary Committee, 112th Congress (Oct 25, 2011) available at http://judiciary.house.gov/hearings/pdf/Shapiro%2010252011.pdf

[16] *Workplace Safety and Health: Multiple Challenges Lengthen OSHA's Standard Setting: Hearing Before the S. Comm. on Health, Education, Labor, and Pensions*, 113th Cong. (2012) (statement of Revae Moran, Director, Education, Workforce, and Income Security).

[17] DavisPolk. (2013, June) Dodd-Frank Progress Report. Available at: <http://www.davispolk.com/Dodd-Frank-Rulemaking-Progress-Report>.

[18] *Id.*

[19] *Id.*

business interests an even more effective tool to avoid common-sense regulatory standards and safeguards.

A. RFIA renders "small business impacts" meaningless

The RFIA stipulates that rules which have an "indirect economic effect on small entities which is reasonably foreseeable" be required to go through the same analysis regarding small business impacts as those rules which have a direct impact on small businesses. In other words, the RFIA would force agencies to assess not just the particular impacts of a proposed on regulated small businesses but also the indirect and ancillary impacts on any small entities not covered, or intended to be covered, by the regulation. The RFIA does little to clarify what constitutes, and more importantly, what does *not* constitute an indirect economic effect, giving agencies only the vague and perfunctory guidance that it be "reasonably foreseeable." This ill-defined and indeterminate new mandate will exert strong pressure on agencies to engage in a guessing game of sorts as they attempt to identify all possible indirect effects of a rule, an enterprise akin to ordering a meteorologist to discern the effects on Washington, D.C. weather of a butterfly flapping its wings in Japan.

Making matters worse, the RFIA ensures that if agencies guess wrong on indirect effects, regulated entities will have the ability to drag the agency into court and overturn a rule because the agency wasn't able to satisfy this new and highly speculative mandate of determining all indirect effects. Thus, the RFIA opens the floodgates of litigation and transforms a statute that is supposed to target rules that apply to small businesses into one that forces agencies, by default, to assume that their rules will in some indirect and attenuated fashion apply to small businesses.

B. The RFIA creates a new regulatory "czar" in the SBA Office of Advocacy

The RFIA gives a small office within the SBA, the Office of Advocacy (SBA Advocacy), unprecedented powers to intervene in agency rulemakings and shape and influence the substance of rules before allowing the broader public to see and comment on the rules once they are published in the *Federal Register*. This is troubling given that recent reports have revealed Advocacy to be operating very differently in practice than its innocuous sounding mission to "advance the views and concerns of small businesses."[20]

Early this year, The Center for Effective Government (CEG) released a report suggesting that the SBA Office of Advocacy played an improper role by intervening and commenting on agency scientific risk assessments on the cancer risk of certain chemicals at the behest of trade industry lobbyists for large chemical companies, not small businesses.[21] Through Freedom of Information Act requests that disclosed e-mail correspondence, CEG found that lobbyists for the American Chemistry Council (ACC) contacted SBA Advocacy in November 2011 and requested that SBA Advocacy intervene on ACC's behalf to rebut the scientific evidence prepared by Department of

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[20] Small Business Association, http://www.sba.gov/advocacy/809/480811 (last visited June 26, 2013).
[21] *See* Randy Rabinowitz, Katie Greenhaw, & Katie Weatherford, *Small Businesses, Public Health, and Scientific Integrity: Whose Interests Does the Office of Advocacy at the Small Business Administration Serve?*, Center for Effective Government, January 2013.

Health and Human Services (HHS) showing formaldehyde to be a "known carcinogen."[22] SBA Advocacy complied with the request and asked lobbyists for the ACC to provide a "detailed industry" rebuttal to the HHS scientific finding.[23] Further, Advocacy made no effort on its end to verify the industry science that it was being asked to support.[24] Importantly, the CEG report shows that no small businesses requested that Advocacy intervene in this fashion on behalf of large chemical companies, nor did any small businesses file comments criticizing the scientific findings on formaldehyde by HHS.[25]

The CEG report also found that Advocacy again played a similar improper role regarding scientific risk assessments for a chemical called Hexavalent Chromium, listed as a "known human carcinogen" since 1980.[26] In response to EPA's interest in establishing new drinking water standards for chromium levels nationwide, the American Chemistry Council's Hexavalent Chromium Panel mobilized to push back and enlisted SBA Advocacy as a key ally.[27] In June 2011, ACC lobbyists asked SBA Advocacy to send a letter to EPA requesting that an industry scientific assessment of chromium, conducted by the ACC, be completed before EPA proceed on chromium standards.[28] Again, SBA Advocacy performed no independent verification of the scientific claims being made by the ACC, and were not contacted by any small businesses to engage in this matter.[29] Not surprisingly, when SBA Advocacy agreed to the request and sent a letter to EPA, the letter was remarkably similar to the ACC's comments to EPA and parroted exact language forwarded to SBA Advocacy by the ACC.[30]

These disturbing revelations give the strong impression that the SBA Office of Advocacy is a taxpayer funded voice for large business interests, rather than the small business interests that it was created to represent. When Advocacy takes positions on agency scientific findings and regulations, the public should have faith that those positions are soundly supported by SBA Advocacy's own analysis and reflect the interests of legitimate small businesses. SBA Advocacy should not be using their authority as a front for large companies and their trade associations under the guise of helping small businesses. Rather than giving new and unprecedented powers to SBA Advocacy, Congress should seek to bring basic accountability and transparency to SBA Advocacy to ensure it is fulfilling its mission on behalf of small business.

C. SBREFA panels for all agencies irrespective of small business impacts

The RFIA would entail a dramatic expansion of the Small Business Regulatory Flexibility Act (SBREFA) review panel process. Under current law, three agencies, the Environmental Protection Agency (EPA), the Occupational Safety and Health Administration (OSHA), and the Consumer Financial Protection Bureau (CFPB), are required to convene SBREFA review panels for every

[22] *Id.* at 18.
[23] *Id.*
[24] *Id.*
[25] *Id.* at 17.
[26] *Id.* at 23.
[27] *Id.* at 25.
[28] *Id.*
[29] *Id.*
[30] *Id.* at 26.

proposed rule that will have a "significant economic impact on a substantial number of small entities."[31] Under the RFIA, all agencies would be required to conduct SBREFA review panels if their regulation would result "in an annual effect on the economy of $100,000,000 or more," "major increase in costs or prices," "significant adverse effects" on a variety of economic factors, "or a significant economic impact on a substantial number of small entities." Note here that under the RFIA, SBREFA panels are required even when an agency has demonstrated that a regulation will result in no small business impacts whatsoever. This is a significant transformation of the SBREFA review panel process which currently is designed to provide input into rules that actually affect small businesses. As illustrated below, the new expanded scope of SBREFRA panels will result in these panels giving feedback on rules that have no application and place no requirements on small businesses. Once again, the RFIA stretches the boundaries of what is considered a regulation that impacts small businesses to such a degree that the distinction between what does and what does not impact small businesses is rendered meaningless.

Moreover, this expansion of the SBREFA review panel process will entail significant resources for both the SBA and federal agencies that is simply unaccounted for in this legislation. In 2012, federal agencies issued 83 "economically significant" rules,[32] meaning those with an impact of over $100,000,000. If the RFIA had been in effect, the SBA would have conducted 83 SBREFA review panels for the rules finalized last year alone. The enormity of this undertaking, in terms of staffing and resources, cannot be understated. Agencies frequently spend months diligently preparing for the panels. A recent GAO report detailing the glacially slow pace of rulemaking at OHSA identified the SBREFA panel process as one of the factors delaying OSHA, finding that it takes about 8 months of work for OSHA to prepare for the panel.[33] The increased workload for the SBA Office of Advocacy will also likely cause delays in their ability to conduct these review panels expeditiously and efficiently. The only way for Congress to impose this significant new mandate for an expanded SBREFA review panel process without creating lengthy delays is to provide commensurate funding. Unfortunately, the RFIA does not do this.

III. A Consensus Path Forward

As previously discussed, the RFIA's inclusion of indirect costs, empowerment of the SBA Office of Advocacy, and wide-ranging expansion of the SBREFA review panel process all lead to one inevitable result: regulations that have no impact on small businesses are nonetheless subject to extensive analyses and procedures currently reserved only for those rules that do actually affect small businesses. Ultimately, the RFIA will work to delay or completely block rules designed to curtail big business wrongdoing and irresponsibility that result in enormous costs to our society's health and safety, all the while invoking the goal of "small business regulatory relief." Congress

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[31] Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 857 (1996) (codified in scattered sections of 5 U.S.C., 15 U.S.C., and 28 U.S.C.).

[32] Maeve P. Carey, *Counting Regulations: An Overview of Rulemaking, Types of Federal Regulations, and Pages In the* Federal Register 11 (Cong. Research Serv., R43056, May 1, 2013).

[33] *Workplace Safety and Health: Multiple Challenges Lengthen OSHA's Standard Setting: Hearing Before the S. Comm. on Health, Education, Labor, and Pensions*, 113th Cong. (2012) (statement of Revae Moran, Director, Education, Workforce, and Income Security).

should not be passing legislation like the RFIA that lets Big Business off the hook by giving them a free pass in the name of small businesses.

Fortunately, there is a path forward that does not undercut our government's ability to establish clear rules of the road and strong regulatory standards while providing small businesses with targeted regulatory relief: small business regulatory compliance assistance. Right now, federal agencies are not required to provide meaningful compliance assistance to small businesses. Instead, they are only required to answer inquiries and provide compliance guides. It is clear that agencies can do more to help small businesses understand and meet their regulatory obligations.

Congress should consider legislation to amend the Small Business Regulatory Enforcement Fairness Act by requiring agencies to conduct more outreach, education and compliance assistance to small businesses on their regulatory obligations. Many agencies already have existing Small Business Ombudsman offices that were specifically created to help small businesses with compliance issues once regulations are issued.[34] Legislation is needed to ensure that those offices are conducting effective regulatory outreach and education to small businesses by, for example, establishing "best practices" guidelines for federal agencies, particularly those with Small Business Ombudsman offices, to follow when working to ease regulatory compliance for small businesses. The virtues of compliance assistance are clear: real small businesses receive direct and tangible assistance in complying with regulations and the enormous benefits that public health and safety regulations provide to our country are preserved.

There are clearly better ways to help small business without sacrificing vital public health and safety protections. Supporters of this legislation are mistaken if they believe the RFIA will improve or streamline the rulemaking process. Far from it, the RFIA will cater to large corporate special interests by depriving the American people of critical safeguards to ensure clean air and water, safe food, consumer products and workplaces, and a stable, prosperous economy, all under the guise of helping small business.

[34] A list of small business ombudsman offices can be found at http://www.sba.gov/category/navigation-structure/starting-managing-business/starting-business/business-law-regulations/contact-government-agency/fe

Mr. BACHUS. Mr. Palmieri.

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

Mr. PALMIERI. Thank you, Mr. Chairman, Members of the Subcommittee, thank you for the opportunity to testify today about reform of the Regulatory Flexibility Act.

The United States is the world's largest manufacturing economy. It produces more than $1.8 trillion of value each year and employs nearly 12 million Americans working directly in manufacturing. On behalf of the NAM and the millions of men and women working in manufacturing in the United States, I want you to know that we support your efforts to reform the RFA to unleash the small manufacturers in this country to do what they do best, makes things and create jobs.

Manufacturers have been deeply affected by the most recent recession. This sector lost 2.2 million jobs during the period, and the numbers show that American manufacturing is growing more slowly than in competitive countries. We have seen policies from Washington that will not help our economic recovery and can actually discourage job creation. To regain manufacturing momentum and to return to net job gains, we need improved economic conditions and improved government policies.

Many of the proposals being offered by the Subcommittee, including more detailed statements in the RFA process and requirements to describe redundant overlapping or conflicting regulations, will help us do just that. My written statement details our support for amendments to the periodic review requirements of the RFA. Those reforms address the challenges of the cumulative burden of regulations that are no longer serving our modern needs.

But I would also like to spend some time on some of the critiques of the reforms in your legislation, including one that Mr. Narang just mentioned, the analysis of indirect effects in the RFA. So courts have found that agencies must only consider the direct effects of the regulations on small entities under this law. That is one of the reasons we are taking a look at this, and that is, despite the fact that Senator John Culver, a Democrat from Iowa and one of the lead authors of the RFA in 1980, declared otherwise in the legislative history, and there was a lot of confusion about this at the very beginning.

The RFA was basically a good government, bipartisan law signed by President Carter and modeled after the National Environmental Policy Act, or NEPA. And under NEPA, the Council For Environmental Quality developed the implementing guidelines and regulation that all agencies must follow. They declared NEPA reviews to include both direct and indirect effects. Agencies have had to comply with these requirements for more than 30 years.

Additionally, President Clinton's executive order on regulatory review requires the consideration of all costs and benefits, not just direct costs and benefits but all, and the implementing regulation OMB Circular A-4, which explains to agencies how they must comply with those analytical requirements of the executive order, states that agencies must identify the undesirable side effects and ancillary benefits of the rule.

A review of indirect effects is already included in all the surrounding analysis of a regulation. It only makes sense to extend this review of indirect effects to the RFA as well. A simple example of why this is so important is EPA's forthcoming "National Ambient Air Quality Standards, or NAAQS, for Ozone," a study we published with MAPI, estimates the most stringent ozone standard under consideration could result in the loss of 7.3 million jobs by 2020 and add a trillion dollars in new regulatory costs per year between 2020 and 2030, and yet this rule will never undergo a regulatory flexibility analysis.

Why you might ask? Because EPA's NAAQS regulations don't have a direct impact on small entities. They regulate States, and the States in turn regulate small businesses and small communities, and since a State is not a small entity, it exempts the rule from coverage. This provision should not be controversial. No matter where you want to see the next ozone standard, you should want a fair accounting of its impact on small businesses, small nonprofits, small churches, and small local governments. Manufacturers hope this proposed legislation is just the beginning of a more thoughtful regulatory system built on common sense with an understanding of modern manufacturing.

Mr. Chairman, thank you for the opportunity to testify today, and I will be happy to respond to questions.

Mr. BACHUS. Thank you very much.

[The prepared statement of Mr. Palmieri follows:]

NATIONAL ASSOCIATION OF
Manufacturers

Testimony

of Rosario Palmieri
Vice President, Infrastructure, Legal and Regulatory Policy
National Association of Manufacturers

before the Subcommittee on Regulatory Reform, Commercial and Antitrust Law
of the Committee on the Judiciary
U.S. House of Representatives

on "H.R. __ the Regulatory Flexibility Improvements Act of 2013"

June 28, 2013

COMMENTS OF THE NATIONAL ASSOCIATION OF MANUFACTURERS
BEFORE THE

SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

JUNE 28, 2013

Chairman Bachus, Ranking Member Cohen and members of the Subcommittee on Regulatory Reform, Commercial and Antitrust Law, thank you for the opportunity to testify before you about the Regulatory Flexibility Improvements Act of 2013.

My name is Rosario Palmieri, and I am the vice president of infrastructure, legal and regulatory policy for the National Association of Manufacturers (NAM). The nation's largest manufacturing trade association, the NAM represents 12,000 member companies consisting of small and large manufacturers in every industrial sector and state. As the voice of the 12 million men and women who work in manufacturing in America, the NAM is committed to achieving a policy agenda that helps manufacturers grow and create jobs.

The United States is the world's largest manufacturing economy, producing 18.2 percent of global manufactured products. Manufacturing in the United States alone makes up 12.2 percent of our nation's GDP. More importantly, manufacturing supports an estimated 17.2 million jobs in the United States—about one in six private-sector jobs—and offers high-paying jobs. In 2011, the average manufacturing worker in the United States earned $77,060 annually, including pay and benefits—22 percent more than the rest of the workforce.

For many manufacturers in the United States, the economy is showing definite signs of improvement. Manufacturing has added about 500,000 jobs since the end of 2009, but it still has a long way to go. Manufacturing lost more than 2 million jobs during the past recession, and output remains well below the 2007 peak.

Nearly 95 percent of all manufacturers in the United States have fewer than 100 employees, and the Small Business Administration (SBA) defines manufacturers with fewer than 500 employees as small. To compete on a global stage, manufacturing in the United States needs policies that enable companies 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.

Because of the significant challenges affecting manufacturing, the NAM developed a strategy to enhance our growth. Earlier this year, the NAM released *A Growth Agenda: Four Goals for a Manufacturing Resurgence in America*, a policy blueprint for the Administration and new Congress that sets four goals with bipartisan appeal for enhanced competitiveness and economic growth: (1) The United States will be the best place in the world to manufacture and attract foreign direct investment; (2) Manufacturers in the United States will be the world's leading innovators; (3) The United States will expand access to global markets to enable manufacturers to reach the 95 percent of consumers who live outside our borders; and (4) Manufacturers in the United States will have access to the workforce that the 21st-century economy demands. To achieve these goals, we need sound policies in taxation, energy, labor, trade, health care, education, litigation and, certainly, regulation.

Regulatory Burdens: The Cost of Regulations

In recent years, the manufacturing economy has seen improvements despite the many government policies and regulations that impede manufacturers' ability to grow, export and create jobs. A 2011 study conducted by the Manufacturing Institute and the Manufacturers Alliance for Productivity and Innovation (MAPI), found that, excluding the cost of labor, manufacturers in the United States face a 20 percent structural cost burden compared to nine major trading partners because of government-imposed policies, including regulations. This is an increase from the 2008 study, which demonstrated domestic policies added 17.6 percent to the cost of manufacturing in the United States.

Excessive regulatory burdens weigh heavily on the minds of manufacturers. In a NAM/*IndustryWeek* Survey of Manufacturers released earlier this month, 67 percent of respondents cited an unfavorable business climate caused by regulations and taxes as a primary challenge facing businesses, up from 62.2 percent in March 2012. In the December 2012 survey, 76.4 percent of respondents indicated that a pressing priority for the Obama Administration and the 113th Congress should be reducing the regulatory burden on manufacturers.

The Administration recognizes the important role the Regulatory Flexibility Act (RFA) plays in reducing the regulatory burden on small business. In a January 2011 memorandum on regulatory flexibility, small business and job creation, President Obama stated, "The Regulatory Flexibility Act . . . establishes a deep national commitment to achieving statutory goals without imposing unnecessary burdens on the public." He directed executive departments and agencies and requested independent agencies to give "serious consideration" to using increased flexibility to reduce regulatory burdens on small businesses. The NAM has welcomed other efforts by the Administration to encourage agencies to reduce their regulatory burdens. The President has signed executive orders, and the Office of Management and Budget has issued memoranda on the principles of sound rulemaking, considering the cumulative effects of regulations, strengthening the retrospective review process and promoting international regulatory cooperation. Though well-intentioned, all of these initiatives have yet to realize significant cost reductions for manufacturers.

Instead, manufacturers—and particularly small manufacturers—continue to be inundated by the unnecessarily burdensome regulations that federal agencies have promulgated. Based on data from the Government Accountability Office, over the past four years, the Obama Administration has issued 331 major new regulations—defined as having an annual effect on the economy of at least $100 million. On average, the current Administration has issued 20 more major regulations per year than the previous Administration. 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.

Because manufacturing is such a dynamic process, involving the transformation of raw materials into finished products, it encompasses more environmental and safety issues than other businesses. A 2010 study commissioned by the SBA's Office of Advocacy found that manufacturers in 2008 spent on average $14,070 per employee to comply with regulations, 75 percent more than all U.S. businesses spend per employee. The study estimated that manufacturers spend $7,200 per employee to comply with environmental regulations alone. For all regulations, small firms (fewer than 20 employees) spent $28,316 per employee, or more than twice the amount for larger firms.

The burden of regulation falls disproportionately on manufacturers, and it is heaviest on small manufacturers because their compliance costs often are not affected by economies of scale. We find that when agencies thoughtfully comply with the requirements of the Regulatory Flexibility Act (as the President directed in his January

2011 memorandum), regulatory burdens are reduced. The SBA's Office of Advocacy estimates that it saved small businesses $3.6 billion in regulatory costs during FY 2012 as a result of helping agencies comply with RFA requirements.

Agency Failures to Conduct a Regulatory Flexibility Analysis

Under the RFA, agencies are required to prepare a regulatory flexibility analysis to determine the impact of a forthcoming proposed or final rule on small entities and to consider any regulatory alternatives that would accomplish the rule's objective while minimizing the burden imposed on those small entities. Unfortunately, agencies can avoid this expanded analysis and other important RFA requirements by simply asserting that the rule will not significantly impact small entities.

An examination of the Fall 2012 Unified Agenda indicates the extent of which agencies are failing to conduct regulatory flexibility analyses to determine the impact of their rules and how to best reduce the small business burden. As a whole, agencies currently have 437 significant rules[1] in the final rule stage. Agencies determined that only 16 percent of these rules require regulatory flexibility analysis. Of the 401 completed rules, agencies determined that only 14 percent required the additional analysis. The Environmental Protection Agency (EPA) conducted a regulatory flexibility analysis for only 3 percent of its 61 proposed or final rules listed in the most recent Agenda.

Under the RFA, only a small number of regulations require expanded analysis because "indirect effects" cannot be considered. The purpose of the law is to ensure that agencies thoughtfully consider the impact of regulations on small entities, but they routinely avoid the requirements that Congress placed upon agencies and that President

[1] As defined by Executive Order 12866 or determined to be a priority by an agency head; Executive Order 12866 defines a "significant regulatory action" as an action that would result in a rule that may have "an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities."

Obama confirmed in January 2011. The Regulatory Flexibility Improvements Act of 2013 would implement needed reforms to the law, greatly improving the quality of regulations and saving small businesses billions of dollars in regulatory costs.

A timely example of this shortcoming is the EPA's National Ambient Air Quality Standards (NAAQS) for Ozone. Because implementation is done through the regulation and approval of state implementation plans, there are said to be no direct effects on small entities. This is clearly contrary to what Congress intended when it passed the RFA. Further, the Obama Administration's consideration of a new ozone standard this year will significantly impact local communities and their small business economies. The most stringent standard under consideration could result in the loss of 7.3 million jobs by 2020 and add $1 trillion in new regulatory costs per year between 2020 and 2030. Those costs should fit any agency's definition of a significant impact on small entities, but they are currently excluded from analysis.

Another important reform is enhanced periodic review of regulations that impact small businesses, often referred to as "Section 610 reviews." There was great hope that this original provision would rationally reduce or eliminate unnecessary burdens that had outlived their usefulness or had not appropriately considered the concerns of small business when they were first promulgated. The Obama Administration has continually highlighted its effort to conduct retrospective reviews of existing regulation to remove conflicting, outdated and often ineffective regulations that have accumulated over time. Those efforts follow similar efforts of the Reagan, Clinton and George W. Bush Administrations to eliminate unnecessary or poorly designed rules. If government is to embrace this cultural shift, it must be made permanent in statute. One way to ensure the continuation of this activity is to make these reforms into law. Manufacturers have long found on the factory floor that the elimination of unnecessary steps leads to productivity gains and more capital to invest in our plants, equipment and people. Government efforts to remove unnecessary burdens on a continuing basis can have similar effects.

We believe it is very important for the SBA's chief counsel for advocacy to have regulatory authority. Court cases involving the chief counsel's interpretations have failed to provide the proper weight to that office's interpretations of the RFA. Rulemaking authority would provide that certainty. And since more than 80 percent of the government's billions of hours of paperwork burden imposed on the American people comes from the Internal Revenue Service (IRS), efforts to fix the loopholes by which the IRS avoids compliance with the RFA are certainly welcome.

Conclusion

Chairman Bachus, Ranking Member Cohen and members of the Subcommittee, thank you again for the opportunity to testify today on the regulatory burdens borne by domestic manufacturers. The President stated in his Memorandum on Regulatory Flexibility, Small Business and Job Creation that the Administration is "firmly committed to eliminating excessive and unjustified burdens on small businesses and to ensuring that regulations are designed with careful consideration of their effects, including their cumulative effects, on small businesses." Manufacturers believe that reforms to the Regulatory Flexibility Act are necessary to achieve the President's goal. Too many regulations that have significant effects on small businesses escape the current process because of loopholes in the Act and unchallenged traditions. The NAM urges the Subcommittee to move forward with this legislation expeditiously. Jobs and growth for small manufacturers depend upon your efforts.

Mr. BACHUS. Let me say this. And this isn't one of my questions. But I think all four opening statements were excellent, and they really had a lot of substance in them. And so I appreciate it.

At this time, Mr. Collins.

Mr. COLLINS. Thank you, Mr. Chairman.

Again, I come back to this because this is one of the issues that I believe is dominant in the issue, and I appreciate the testimony that is being given. I do, however, you know, believe that this is an issue that we continue to need to look at.

Mr. Harris, I want to go to you first because I believe so many times, and no disrespect to the other witnesses, their views, you are a business owner who comes on behalf of. And I think we lose that face sometimes. We are here up here a good bit and we talk to each other, but when you bring that face to it, I think it is important.

You know, in the issue, and I read your testimony and I also listened to you, probably would not surprise you to learn that a recent study found that every American family pays about $15,000 in hidden regulatory tax annually when you calculate it out. It is amazing what you could buy with that.

What else other than passing this legislation can Congress do to help you do what you do best, create jobs and grow the economy? I would just love to hear your opinion on that.

Mr. HARRIS. Well, thank you, Mr. Collins. I really appreciate the question.

This is a first step. Again, we are not talking about specific regulation, only the process in which we should come up with regulations. As a small business owner, the uncertainty of the market is plenty, without having to deal with the uncertainty in the regulatory framework or governmental. Gone are the times when governmental agencies used to be consultive and now they are more punitive. Let's work together to find out what is better for all our employees and better for our community. That is what we need.

Mr. COLLINS. From what I am hearing and you saying and I have heard the other witnesses as well, you are just looking for some certainty. So tell me what I have got to do, you know, is sort of the bottom line whether you like it or not, and this is the part of the issue, that certainty issue that we lack sometimes.

Mr. HARRIS. Before I make investments in additional employees, before I make investment in additional capital for manufacturers, before I give some certainty to other small business subcontractors, I really have to feel better about the market in which I am dealing with and some certainty in regard to the regulations that affect that market and the things that go into the cost of our product.

I mean, our studies have shown that in the cost of any house 25 percent of it can be directly linked to the cost of regulations, 25 percent of the house. I am here today to make sure that doesn't get any higher. I am not talking about doing less than that. Let's just see what we can do about stemming the tide of increased unnecessary regulation.

Mr. COLLINS. And you actually, it is amazing, I think you are reading my notes up here, because I actually flagged that in your testimony here, this 25 percent issue. And look, I could talk to each one of you witnesses for hours on this issue because it is something, but I want to go back to that. Flesh that out a little bit for me. Because one of the things was mentioned, I think, in, Mr. Narang, your testimony about Dodd-Frank, which, frankly, in my area, has been a disaster for community banks. It is just absolutely a disaster because a lot of what it is, is it has tied up the money flowing, it has tied up people like you not being able to get to it to actually create jobs. Talk about that 25 percent just a little bit more.

Mr. HARRIS. Well, 25 percent comes in a number of ways. One, the regulations on subcontractors that I employ in the production of anything that we are building, whether it is a residential property, whether it is a home for a small business. I mean, all of those are in there.

And then you take into account the cost to manufacture the products we are going to put in the house, the cost of transportation, and all the regulation that goes into that. As you go back the link, it seems like government regulation has their hand in the pocket of everything we do, and I am not sure that those things, if given the right process, would have been flushed out.

Mr. COLLINS. I am going to actually, because we are on a tight timeframe today, so I am just going to sort of end with this and just say, you believe that some regulations are necessary in what we do.

Mr. HARRIS. Absolutely.

Mr. COLLINS. And you and most—you know, and the vast, vast majority of business owners and all have no desire to hurt employees, to see them injured, to see them endangered or anything else. Would that be an honest statement from you as a business owner?

Mr. HARRIS. Absolutely. And if I could tell you about my employee mix, we could start with my office, which is my wife, my sister, my father. I go to the field, it is my brother-in-law, my nephew, my sister's nephew.

Mr. COLLINS. Sounds like Thanksgiving table.

Mr. HARRIS. I am just telling you, we know our employees, we know their birthdays, we know their wives' and children's names, why on earth would you think that I would want to hurt those employees, because they are members of my family?

Mr. COLLINS. I understand. Thank you for your testimony.

And to the other witnesses, thank you. I could go on.

Mr. Chairman, I yield back.

Mr. BACHUS. All right. Thank you.

Mr. Cohen.

Mr. COHEN. Thank you, Mr. Bachus.

Mr. Narang, you said that the compliance assistance to small business hasn't been as extensively made available by the Federal Government, that that hadn't been an emphasis. I think Ms. Harned said the same thing. Do you all kind of in agreement on that area, do you think? Did you listen to her testimony?

Mr. NARANG. I did, and I do agree that what Ms. Harned said is critical. Compliance assistance is part of the conversation that, frankly, you know, has not really attracted much attention and it deserves much more attention.

Mr. COHEN. What else in her testimony or in Mr. Harris' or Mr. Palmieri's did you find that you could agree on?

Mr. NARANG. Well, I mean, I agree that small businesses share a higher proportion of compliance cost with respect to their expenses than of course large businesses. And so I think that this is, you know, a critical reason to provide direct compliance assistance to small businesses.

Large corporations, they don't need the compliance assistance. They have big compliance departments. Small businesses need the compliance assistance.

Mr. COHEN. So that would involve, I guess, Ms. Harned, would that involve having more appropriations for Small Business Administration to have people that could help with compliance. Is that what you need?

Ms. HARNED. Right, within the agencies. And what we have actually seen over the last few years is agency budgets have diverted resources from their compliance assistance programs to in, like, the case of OSHA, for example, to enforcement. And that is where we are hoping that those funds can be protected and not diverted so that small business owners can really get, you know, the help they need from regulators to know what they are supposed to be doing.

Mr. COHEN. Would you support additional appropriations to the different agencies to help in compliance and specify that it would be for compliance for small business, to help them?

Ms. HARNED. Well, we definitely think that there should be significant resources for compliance assistance. You know, whether that is additional money or, you know, a rebudgeting of an agency is left to the legislators. But that is an important——

Mr. COHEN. But you have got to have both compliance, which is—and I agree with you that there is a whole bunch of mazes, and small business could use the help and we could supply it—but you have got to enforce it, too. If you don't enforce things, then why, you know, comply, if you don't have to. So you have got to have that, and I don't know if they just don't have enough money where they could do both. And if they need more money to do the compliance assistance, would you, would the NFIB support that?

Ms. HARNED. I mean, we want more resources for compliance assistance, like I said. That is what I would say.

Mr. COHEN. Okay. Thank you.

The analysis of indirect effects, how could that be dealt with, Mr. Narang?

Mr. NARANG. Well, I think it is crucial first to make sure that indirect effects, if they are going to be a part of agency analyses, and I don't agree that it is necessary, but if they are going to be a part, that they be well defined. We need to know exactly——

Mr. COHEN. Like a number, a threshold?

Mr. NARANG. That is right. We need to know exactly what agencies must consider an indirect effect, what agencies should not consider an indirect effect. And, frankly, I think the most important thing is to not make it judicially reviewable. Once you drag an agency into court over a standard that is this ambiguous, it is going to be very hard for them to say, you know, we considered all the indirect effects. You know, litigants can very easily point to indirect effects that exist that, frankly, the agencies couldn't consider because indirect effects are nebulous, you know, they have no boundaries. And so I think it is very dangerous to have courts essentially overseeing this very ambiguous issue.

Mr. COHEN. Your response is like some of the folks that are called here as witnesses by the majority, and they don't like that either, so it is interesting kind of coming together. And I think maybe you and Ms. Harned and Mr. Palmieri and you all could get together. You all could probably come up with a bill we could pass. I mean, there are some things we ought to do, but we just need to narrow in on what we can accomplish. And I think one of them is the compliance area and how we get them to do more compliance and not necessarily take away from enforcement.

Do you believe that they are over-enforcing or do you believe they just don't have enough funds.

Mr. NARANG. First of all, I think it is extremely important that agencies be funded, fully funded, when they are conducting compliance assistance, that they don't shift around shrinking budgets to try to create compliance systems that reaps great benefits to smaller businesses.

I do agree with Ms. Harned that in certain instances we don't want compliance assistance to be a front for gotcha enforcement, for example. We don't want companies thinking that they are seeking compliance assistance and then having agencies bring enforcement actions. But that is a very narrow issue, maybe only relevant to a few agencies, and I think that compliance assistance, as it has been fashioned in the first steps Congress has taken, is not going to result in the kind of enforcement issues.

Enforcement is critical. You know, we can't have responsible companies following regulations, you know, and irresponsible companies not following regulations, cheating, and not enforcing, you know, the wrongdoers and not placing enforcement mechanisms on them. That harms, you know, the small businesses that are following the rules.

Mr. COHEN. If I can have 30 seconds additional.

Mr. BACHUS. Sure.

Mr. COHEN. Thank you.

Ms. Harned, you said that first-time paperwork errors, that there is no way to kind of get a second chance. That is not provided for, that they can waive the fine in the law?

Ms. HARNED. Right. There is really no flexibility there. And that is something that again, for the small business owners, I mean, regulatory paperwork is a real——

Mr. COHEN. That seems like a very simple thing we could agree on and get some kind of—maybe we could pass something just to say that on a first-time offense for paperwork, you can, you know, waive the penalty.

Mr. PALMIERI. Ranking Member Cohen, could I just mention that Congresswoman Tammy Duckworth, a Democrat from Illinois, has actually introduced legislation, the Small Business Paperwork Relief Act, to waive penalties for just paperwork violations, not something that is imminent for health or safety, and we are very supportive of that legislation and would encourage you to support it as well.

Mr. COHEN. Thank you. We will look at it and probably do it.

Are you related to Rafael.

Mr. PALMIERI. No, sir.

Mr. COHEN. Okay. Just checking. Thank you.

Mr. BACHUS. Thank you.

Mr. Jason Smith, our newest Member from Missouri, is now recognized.

Is this your first investigative hearing?

Mr. SMITH OF MISSOURI. It is, Mr. Chairman.

Mr. BACHUS. It is. So all eyes are on Mr. Smith from Missouri.

Mr. SMITH OF MISSOURI. Don't have high expectations.

You know, as I sat here, I have been here 23 days, and I think of the phrase that I have heard numerous times, that if it is moving the government will tax it, and if it continues to move they will regulate it, and if it stops moving they will subsidize it. And that is what we clearly see with the regulation that is here.

Ms. Harned, I would maybe like to ask you if you know offhand an estimate of how many different Federal regulations there are that is affecting small businesses.

Ms. HARNED. Yeah, it is thousands, and that is really again the issue, because small business owners like, you know, Mr. Harris, they do not have an in-house person that can keep up with all that. The person that is doing it is Mr. Harris, and that is what we see with our small business owners, and that is why the regulatory state really is a problem for them.

Mr. SMITH OF MISSOURI. You know, in the State of Missouri, we reformed all rules and regulations. It was actually my bill that put a systematic review process. Originally we tried to sunset every rule every 5 years. And we were upset that we had over 6,281 rules.

From the last I have monitored at the Federal level, there is over 170,000 pages of rules and regulations. These are rules and regulations that directly affect small businesses and family farmers and individuals.

And, Mr. Narang, I have a question from you. In your written testimony, you made this statement. It says, "Experts from across the political spectrum have acknowledged that arguments linking regulations to job losses are nothing more than mere fiction." Could you state where you get that information?

Mr. NARANG. So, I believe I was referring to a particular study called the "Crain and Crain" study, commissioned by the SBA Office of Advocacy. It has been criticized both by former OIRA Administrator Cass Sunstein as deeply flawed and nothing more than an urban legend; and interestingly, also by John Graham—now, that is the former OIRA Administrator under George W. Bush—who indicated that a previous version of the study would not meet OMB information quality guidelines. I believe I also cited Bruce Bartlett, an ex-economist—well, an economist from the Reagan administration who did not agree that regulations lead to job losses.

Mr. SMITH OF MISSOURI. So maybe it is just because I have been out in the district for the last 6 months, but we have a company that cited losing 475 jobs moving to Mexico because of government regulation in Butler County, Missouri, Poplar Bluff. Those are real jobs, real people that are being affected, and the reason they are moving to Mexico is because the regulations we have here—it is a manufacturing business—are more burdensome than what they are in Mexico. Those are real families that no longer will have income and that are going to be relying on government, and that is the last thing, in my opinion, that we need.

We have another business. Because of new EPA regulations they are closing the last lead smelter in the United States in our area. That is 300 jobs. That is serious problems. And whenever you see these burdensome regulations that the executive branch just continues to promulgate, there are no checks and balances.

And I think we need a true systematic approach that reforms all rules and regulations and to make sure that they don't cause an undue burden on businesses or individuals or family farmers, to make sure that these rules are narrowly tailored to actually carry out the true purpose and to make sure that rules are absolute.

We had rules on the books in Missouri that said that every small business had to have a land line phone. It is not necessary. Times are changing. And that is what we need to see at the Federal Government. We need to get with the times and reduce these burdensome regulations. And I gladly support this legislation.

Mr. BACHUS. Thank you.

I thought that was excellent for his first hearing. And I think what Mr. Smith says, you know, he has been in the district. He has been living in the district full-time and he has been hearing it even more than we who travel back and forth, so bring it down to jobs.

Ms. DelBene from Washington State, recognized for 5 minutes, very capable Member of our Subcommittee.

Ms. DELBENE. Thank you, Mr. Chair.

And thanks to all of you for taking the time to be here today.

I just want to start with you, Mr. Palmieri. You talk in your testimony about agencies continually engaging in a retrospective review of rules, and we are talking a little bit about funding and how that will happen. So would you also support that we fund agencies so they can conduct those retrospective reviews?

Mr. PALMIERI. So currently President Obama asked all agencies to undergo retrospective review after his executive order in 2011, and they have been implementing with current resources and even fewer resources to accomplish the task.

All I think we would say is that if they are able to do it with current resources today and if we all think this is a good thing—and we do—that agencies should continuously look back, we should be continuously improving our regulatory system, and as Congressman Smith noted, getting rid of regulations that don't make sense, that on a going-forward basis we should make sure this is institutionalized and Congress should put its imprint on retrospective review and use the mechanism that is typically used, and many others, including in the RFA, section 610, look back and sunsetting where regulations actually have a point at which they must undergo an additional review before they move forward.

And so we think whatever way that is done, it should continue to be done and that there should not be kind of a one-time exercise or activity that this Administration has undergone.

Ms. DELBENE. And one of the things that I hear, have definitely heard in my State, just differing definitions and terms, sometimes within individual bills, et cetera. So how much of it is also just having some commonality so that there is a little more awareness on what a certain term might mean and knowing that that is consistent even sometimes across agencies so that it helps businesses understand the playing field? How important is that, do you believe?

Mr. PALMIERI. And I think one of the tenets of this legislative proposal is kind of a review of requirements across agencies. And I agree with you, I don't think that is done enough, because there are conflicting, duplicative, all sorts of challenges among different requirements that businesses face.

And if you are in an individual regulatory agency, at EPA say, you don't have a really good sense of what OSHA is doing today or what the Federal Trade Commission might be thinking about in the next 6months or others in a variety of areas. And so better coordination, better interagency review. And part of this process requires that you actually talk to a small business, to sit down with them, representatives of small business, in advance of your rulemaking and ask how would this affect you and how does it interact with all the other requirements that you are currently facing and makes a specific note to look at the cumulative burden of regulation.

So just like President Obama's executive order that identified the emerging threat of kind of the cumulative burden of regulation, this legislation would make sure that that is a part of the analysis that agencies have to do for small entities.

Ms. DELBENE. And Ms. Harned, you said that the NFIB's research foundation reports that 23 percent of small businesses said that red tape is the most important problem that they face. How much of that do you think is Federal versus State and local? Because I know, you know, from a business you are looking at a combination of rules, and they are not all Federal rules. A lot of them sometimes are State and local rules. What do you think the challenges are on the entire landscape, if you can take a look at that and separate those out a little bit?

Ms. HARNED. Right. I mean, your point is a good one, because it isn't just Federal rules, it is State rules, too. But that being said, our research for the past, you know, decades has shown that specifically Federal regulations have been in the top 10 list of concerns that small business owners have. So we have a survey called "Problems and Priorities" that we release every 4 years. And I apologize, because I can't remember the exact ranking right now, but I know in that survey we do separate out the State and local versus the Federal. But again, our research continues to show that Federal is a real problem.

Ms. DELBENE. Well, I also assume that you have got a businesses who are in more than one State, and so that compounds the problem a little bit, or in multiple localities within a State. And so the different points of presence sometimes it might increase that challenge, too, for businesses.

Ms. HARNED. Right. Except I would say with NFIB's membership most of our members are intrastate, so that is not as much of an issue for our members as it might be for other business associations.

Ms. DELBENE. I know with more folks having kind of an online presence, it has kind of created a slightly different playing field than there has been in the past. I was just curious. Thank you very much. My time has expired.

I yield back, Mr. Chair.

Mr. BACHUS. Thank you.

The Chair now recognizes myself for questions. One thing I will tell you, that we had a hearing just 2 or 3 months ago, and I think Members on both sides of the aisle were shocked at Marathon Steel, which was a small company in Baltimore that had been praised highly by the Congress on Racial Equality, and several civil rights groups, and by the City of Baltimore for establishing businesses in inner city Baltimore, and they started a profit sharing plan. And they were exporting to like 31 countries and had hired, you know, I think over a hundred employees. And jobs right where we needed them the most. And they were fined by the Treasury Department for missing a signature line on their profit sharing plan, although when they came in and fined them, they had totally complied with that. And they were actually sharing their profits with their employees.

And I noticed one of you said Tammy Duckworth has proposed legislation—I don't know if that was you—to be able to waive that. And the Treasury Department adjusted it down to $20,000. But still, you know, it was just Members on both sides said, you know, that shouldn't happen. We have seen examples of that.

Let me, Mr. Narang, and I am going to ask the others, but, you know, one of the things that does strike me is the agencies compute indirect benefits, which also can be harder to assess. And I know Ms. Harned in her testimony, and I think Mr. Harris and Mr. Palmieri, they all mentioned that they are—they compute those. And it seems like if they are going to compute benefits, indirect benefits, they ought to compute indirect costs just in a balance. And I think her testimony, and it is the last paragraph of page five on her testimony, says that actually that President Clinton issued an executive order mandating consideration of a rule's indirect impact. Are you aware of that executive order?

Mr. NARANG. I am.

Mr. BACHUS. And but you disagree with it, I guess, right?

Mr. NARANG. I don't disagree with the executive order. And I would like to take a closer look at the examples that were cited in terms of indirect benefits against the actual specific rules mentioned. What I would say is I think that is an excellent example of a kind of basic methodological fundamental flaw with the whole notion of cost-benefit analysis. One person's benefits is another person's costs. This is something that——

Mr. BACHUS. And I agree. I agree. But, you know, if you are going to consider one person's benefit, indirect benefit, you ought to consider one person's indirect costs, I would think just in fairness.

Mr. NARANG. You know, I believe if that is happening, I will take a closer look at those instances. You know, again, I think that the problem here is an overreliance on cost-benefit analysis. Congress mandates that agencies carry out certain responsibilities, fashion certain rules. When it comes to cost-benefit analysis, we shouldn't be making this something that is second-guessing congressional mandates.

Mr. BACHUS. Okay. Mr. Palmieri?

Mr. PALMIERI. Yeah, love to comment. I think something that Mr. Narang and I would probably agree on is, say, if we were looking at government fuel efficiency rules, if you only looked at kind of the direct impacts you would look at the impact of the fuel efficiency rules on automobile manufacturers and kind of the costs they impose and where the benefits they impose for automobile manufacturers.

It would require a review of the indirect impacts to see what the benefits to consumers would be of higher fuel efficiency in their vehicles and cost savings over time.

So we are already doing this type of analysis in a range of other rules. For whatever reason, the courts just looked at this law after it was passed in 1980 and decided that it wasn't clear enough and the legislative history wasn't clear enough. So this is just a correction. The RFA is a transparency law. It just says we are looking at impacts. It doesn't tell the agency what they have to do after they have considered that impact. But they have to consider it. So, to us, a review of indirect effects makes complete sense and is consistent with how Congress has operated for a long time.

And Ranking Member Cohen mentioned foreseeability as an issue. And I think there are some ways to look at that are perhaps less complicated than Palsgraf. And products, you know consumer products manufacturers already comply with the Consumer Products Safety Act, which requires us to kind of anticipate foreseeable use and misuse of the products for consideration of product safety standards and making sure that they are right. So foreseeability I think is a completely reasonable definition for us to use.

Mr. BACHUS. Thank you. And let me just close by stating—and then Mr. Jeffries, we are going to go to you—Mr. Smith mentioned a lead smelter which will close in his district. I don't know, but I would imagine that it may result in lead being smelted right across the border in Mexico. And I know the EPA, when they proposed new regulations on our cement plant, they actually said that this cement, it will eliminate a certain capacity in the United States, but we can get that cement from Mexico and China. Well, I asked, well, in Mexico, the environmental standards are much more lax, and like that lead smelter, what if it moves right across the border? We know that a lot of our lead and arsenic in the air actually comes from Mexico, particularly in our Gulf Coast States. I mean, that is the source of them. If you look at a map, the West Coast has the largest—a lot of particulate matters—they have the largest concentration, even though the plants may be in the east, and that is because it comes from China in the jet stream. So we shut something down here, it results in more pollution here. And I asked the EPA, and they said, they could not consider—they didn't have any control over Mexico. Well, they certainly ought to compute that if it is going to result in more cement or more lead smelting across the border in Mexico, which then comes over in the air, they ought—to me, they ought to consider that. It is only fair. At this time, I recognize Mr. Jeffries from New York is free to ask any questions.

Mr. JEFFRIES. Thank you very much, Chairman Bachus. And let me also thank the witnesses. Certainly the issue of small business success and vitality in America should be a nonpartisan issue. And I think everyone on this panel and within this Congress wants to ensure that small businesses can be successful, given the importance of your success to our economy, to the constituents that I represent, to those that all of us represent throughout this great country.

But I did have some questions that I wanted to ask, you know, related to this concept of regulation as well as what is really hurting the pace of the recovery. And I will start with Mr. Harris. It appears that, based on some studies that I have taken a look at, homeownership in the United States and homeowners since the first quarter of 2006 have suffered approximately $7 trillion in home equity loss. Is that correct?

Mr. HARRIS. That is—I don't know exact numbers, but we have seen significant decrease in equity positions on residential homes, yes.

Mr. JEFFRIES. Right. So certainly there has been a staggering loss of home equity that has greatly impacted working families in middle class America throughout this country connected to the events surrounding—connected to the events related to the great recession of 2008. Is that fair to say?

Mr. HARRIS. Yes, that is fair.

Mr. JEFFRIES. And there are many explanations as it relates to the collapse of the economy in 2008, but a lot had to do with activity that was taking place in the housing market. Is that fair to say?

Mr. HARRIS. I am not sure what you mean by activity in the housing market in regard to the downturn.

Mr. JEFFRIES. Okay. To be specific, you are familiar with the term mortgage-backed securities, correct?

Mr. HARRIS. Oh, absolutely.

Mr. JEFFRIES. And mortgage-backed securities were being bundled in ways that were ultimately difficult to untangle, sold and resold, and directly related to the collapse of the economy in 2008. Is that fair to say?

Mr. HARRIS. Yes. Agreed.

Mr. JEFFRIES. And is it also fair to say that predatory lending activity related to the circumstances leading up to the collapse of the economy in 2008? Is that fair to say?

Mr. HARRIS. I would think that the way in which loans were made in areas that they were made to people who obviously could not repay had a great deal to do with the downswing in that market, yes.

Mr. JEFFRIES. Absolutely. And that would essentially capture what you just described sort of subprime lending to individuals who clearly did not have a capacity to sustain the ability to pay loans on a moving forward basis.

Mr. HARRIS. That is correct.

Mr. JEFFRIES. And would it be fair to say that your business, or other similarly situated businesses suffered tremendously as a result of the collapse of the economy and the downturn of the housing market given the events of 2008?

Mr. HARRIS. Absolutely.

Mr. JEFFRIES. And would it also be fair to say that some of the activity that we just discussed related to predatory loan activity, mortgage-backed securities, credit default swaps that were connected to those mortgage-backed securities all operated in a context where they were not as regulated pre-2008 as they clearly should have been with the hindsight of 20/20 vision? Is that a fair statement?

Mr. HARRIS. Well, I think it is fair, but again, we are talking about regulating other than small businesses, when you start talking about regulating the large banks that had the no doc lending, the negative amortization lending, those did not come from small community banks in small communities that would be affected in this ruling.

Mr. JEFFRIES. I agree with that point.

Mr. HARRIS. Okay.

Mr. JEFFRIES. One of the concerns that we have here, however, and Mr. Narang has articulated it, is that in our desire, which is a legitimately held one, to support small businesses and their ability to move forward, we may actually create opportunities for some of the larger corporations and/or businesses, and Mr. Narang gave an exact example, to escape the reach of regulation in a manner that in the past has proven to be harmful not just to American homeowners, but to your businesses and others that are similarly situated. Is that a fair observation?

Mr. HARRIS. I think that is a fair observation. But again, if I could add, some of us who are in areas that weren't affected did not have the opportunity to have, nor did we want, no doc, negative amortization, pie-in-the-sky lending that occurred in various areas. We were penalized because of that activity, not because our members either benefited from that or not. It was just that was part of the outflow of that situation.

Mr. JEFFRIES. I agree. And I know my time has expired. But I think we share a similar concern that you didn't necessarily benefit from the lack of regulation and you were hurt by the subsequent behavior that took place.

And with that, I yield back. Thank you.

Mr. BACHUS. All right. Thank you. I appreciate those questions and the responses of our panel.

At this time, I would like unanimous consent to submit the statement of Chairman Bob Goodlatte, our Chairman of our Committee in support of this bipartisan bill, and also a letter from the Associated Builders and Contractors in support of this comprehensive legislation, bipartisan.

[The information referred to follows:]

Statement of Judiciary Committee Chairman Bob Goodlatte
Subcommittee on Regulatory Reform, Commercial and Antitrust Law
Hearing on H.R. 2542, the
"Regulatory Flexibility Improvements Act of 2013"
Friday, June 28, 2013, at 9:00 a.m.
2141 RHOB
(Draft 1 – Daniel Flores)

I thank Subcommittee Chairman Bachus for his introduction of this important, bipartisan bill, and this Subcommittee for their prompt and careful consideration of it.

Every day, America's small business owners and their workers live out three of the most important facts of current American life. First, small businesses create the largest share of new American jobs. Second, small businesses face historic obstacles, as reflected by today's historically low levels of small

business start-ups. Third, at the top of the list of those obstacles – as poll after poll demonstrates – is the level of federal regulation coming from Washington.

Until these facts are corrected, they should not only be at the forefront of America's small businesses' concerns. They should be at the forefront of Congress' concerns. We cannot escape from America's virtual jobs depression until we help America's small businesses escape from unnecessary hurdles to the creation of new jobs.

That is why the legislation we consider today is so important. The Regulatory Flexibility Improvements Act will, for the first time in over fifteen years, overhaul the laws that govern how federal regulators should consider – and minimize – the

adverse impacts of new regulations on small businesses.

The bill primarily reinforces the Regulatory Flexibility Act of 1980 and the Small Business Regulatory Enforcement Fairness Act of 1996. And it only requires agencies to do what current law tries to achieve and what common sense dictates should be done.

Current law requires agencies to prepare "regulatory flexibility analyses" so agencies will know how proposed regulations will affect small businesses before they are adopted. But the Government Accountability Office has found in numerous studies that agencies do not sufficiently adhere to these laws.

For example, current law allows an agency to avoid preparing a regulatory flexibility analysis if the agency head certifies that the new rule will not have a "significant economic impact on a substantial number" of small businesses. But these terms are not defined in the law, and agencies routinely take advantage of this to decline to prepare analyses.

The bill fixes this problem by requiring the Small Business Administration to define these terms uniformly for all agencies. It also requires agencies to justify their certifications in detail and to give the legal and factual grounds for the certifications. Further, it restricts agencies' abilities to waive the Regulatory Flexibility Act's requirements.

This legislation also requires agencies to document all economic impacts – direct and indirect –

that new regulations could have on small businesses. Agencies already must account for indirect impacts under the National Environmental Policy Act. Indirect impacts on small businesses – the backbone of our economy – deserve the same level of scrutiny.

Just as important, the bill assures that small businesses will finally have a real voice throughout the regulatory system. Currently, only three agencies – the Occupational Safety and Health Administration, the Environmental Protection Agency and the Consumer Financial Protection Bureau – must consult with small business advocacy review panels before issuing new major regulations. This bill requires all agencies to use advocacy review panels, which exist specifically to help identify and avoid unnecessary impacts on small businesses.

Equally important, this bill strengthens requirements that agencies review and improve existing regulations whenever possible to lower burdens on small businesses.

Some critics of regulatory reform may claim that this bill undermines agencies' abilities to issue new regulations. On the contrary, the bill only strengthens existing law with carefully tailored, common sense reforms.

Especially in light of current economic conditions, this bill is a timely and logical step to protect small businesses from over-regulation. Like the Regulatory Flexibility Act of 1980 and the Small Business Regulatory Enforcement Fairness Act of 1996, the Regulatory Flexibility Improvements Act of 2013 recognizes that economic growth ultimately depends

on job creators – not regulators. This bill represents a critical step towards converting that recognition into reality.

# # #

Associated Builders and Contractors, Inc.

June 27, 2013

The Honorable Spencer Bachus
Chairman
Subcommittee on Regulatory Reform, Commercial and Antitrust Law, Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Steve Cohen
Ranking Member
Subcommittee on Regulatory Reform, Commercial and Antitrust Law, Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Bachus and Ranking Member Cohen:

On behalf of Associated Builders and Contractors (ABC), a national association of 72 chapters representing nearly 22,000 members from more than 19,000 construction and industry-related firms, I am writing in regard to the Subcommittee on Regulatory Reform, Commercial and Antitrust Law hearing on the, "Regulatory Flexibility and Improvements Act of 2013." ABC supports this legislation which would require agencies to examine regulatory impacts on small businesses.

For the last four years, the White House has encouraged federal regulatory agencies to assert their power through rulemaking. These agencies operate relatively unchecked and unsupervised, especially during the early stages of the regulatory process. Many rulemakings are accompanied by poor or incomplete economic cost-benefit forecasting and other data analysis that could have helped to create practical and sustainable rules and regulations. At times, even the will of Congress and the American public are disregarded in order to issue regulations.

Small businesses are the backbone of our nation's economy, and their ability to operate efficiently and free of unnecessary regulatory burdens is critical for our country's economic recovery. Proposed and existing regulations need to be thoroughly examined from cost standpoints to ensure they do not encumber our country's primary job creators.

This legislation requires federal agencies to more closely examine regulatory impacts on small businesses. It gives the Small Business Administration's (SBA) Office of Advocacy additional authority and requires the office to establish more in-depth "regulatory flexibility" analyses during the federal rulemaking process. In addition, the legislation's provisions on periodic review of rules are in line with President Obama's Executive Order 13563, which requires agencies to conduct a retrospective analysis of existing rules to identify and modify rules in need of reform.

The need to create jobs is imperative, and so is the need for regulatory reform. We applaud the committee for addressing these regulations and the environment of uncertainty they create for America's job builders.

Sincerely,

Geoffrey Burr
Vice President, Federal Affairs

4250 North Fairfax Drive, 9th Floor • Arlington, VA 22203 • 703.812.2000 • www.abc.org

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Mr. BACHUS. And I am going to leave the record open if other Members, Mr. Conyers or others, wishes to submit a statement or documents in support or opposition to the legislation. And also I would ask the witnesses, Members may want a follow-up question, to send you a follow-up question.

I do want to commend the Members, I think this is the very type of hearing that we can try to build some consensus. Because I think we all realize that with the House and the Senate we have to try to work together or we are not going to accomplish anything. And we have to do that by listening to all stakeholders.

We are not going to bring the Members back. We have got a series of votes. But this concludes today's hearing. Thanks to all our witnesses for attending, for their excellent statements.

Without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record. This hearing is adjourned.

[Whereupon, at 10:24 a.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

Statement of Subcommittee Chairman Spencer Bachus,
Subcommittee on Regulatory Reform, Commercial and Antitrust Law, Hearing on H.R. ____,
the
"Regulatory Flexibility Improvements Act of 2013"
Friday, June 28, 2013
9:00 a.m., 2141 RHOB

Most economic experts would agree that small businesses and small business trends drive and shape our economy and our ability to provide employment for American workers. In my view, the health of small businesses is one of the most important issues confronting our country.

Small businesses are the source for almost half of our workforce, and while I'm concerned about many economic factors, it's also my view that government regulations have a disproportionate impact on small businesses. While all businesses have to comply with state and local regulations, federal regulations can impose an even greater burden, because most small businesses simply do not have the resources or the time to monitor and participate in the federal regulatory process or dispute new rules.

According to the Small Business Administration, businesses with fewer than 20 employees spend on average 36 percent more per employee than larger firms to comply with federal regulations. The SBA also (reports) that these small employers represent 99.7 percent of all businesses and have created well over 60 percent of all new jobs for over the past 15 years.

Although our economy may be showing signs of improvement, we are still suffering from job loss, lack of job creation and long term unemployment or underemployment. It only makes sense that we look to small businesses and work to create an environment that will help them prosper.

We all know the importance of small businesses in our districts, so certainly this should be an area for bipartisan cooperation. It is my belief that the Regulatory Flexibility Improvements Act of 2013 offers one such opportunity and I am pleased to have been able to introduce the legislation with my colleagues, Congressman John Barrow, Congressman Jim Matheson, the Chairman of the Small Business Committee, Chairman Sam Graves, and Former Judiciary Committee Chairman Lamar Smith. It is my belief that improving the Regulatory Flexibility Act aud the Small Business Regulatory Enforcement Fairness Act will have a lasting impact on small business and help support long-term small business growth.

We have a responsibility as legislators to ensure that regulations are appropriately tailored and that our regulatory process is effective. We have an excellent panel today that will offer a diverse range of viewpoints on this legislation, and I want all of you to know that your input will serve a very important role as this legislation comes up for further consideration.

Prepared Statement of the Honorable Steve Cohen, a Representative in Congress from the State of Tennessee, and Ranking Member, Subcommittee on Regulatory Reform, Commercial and Antitrust Law

The Regulatory Flexibility Improvements Act "proposes some needlessly drastic measures that threaten to undermine public health and safety and waste public resources."

"I am open to ideas on tweaking the regulatory process in modest ways to make regulatory compliance easier for small businesses and perhaps finding better ways for small business to provide input to specific rules. As drafted, though, [the bill] . . . simply goes too far."

If these statements sound familiar, it is because I am quoting myself from two and half years ago when we considered what appears to be an almost identical bill in this Subcommittee.

Yet notwithstanding the concerns that I expressed and my hope that we instead consider more modest and meaningful assistance for small businesses, this latest measure simply rehashes the shortcomings of the bill from last Congress.

Once again, this is the movie *Groundhog Day,* and I am Bill Murray's character.

Although I say this at every regulatory hearing, it is worth repeating as we consider the merits of the bill before us today. Regulations are critical to protecting the American people from a vast array of harms, including dirty air and water, dangerous toys, reckless financial behavior, and unsafe workplaces.

This is not an abstract notion. On the question of workplace safety, for instance, the Bureau of Labor Statistics reports in its 2011 Census of Fatal Occupational Injuries that there were **4,693 workplace deaths** in 2011.

According to researchers from the National Institute for Occupational Safety and Health, the American Cancer Society, and Emory University's School of Public Health, there are an estimated **50,000 to 70,000** deaths from occupation-related diseases in the United States annually.

And, while we are talking about regulatory costs, we should also consider the costs of insufficient regulation. According to a joint study by Liberty Mutual Insurance Company and health economists at the University of California at Davis, the estimated costs of workplace-related injuries is **$250 billion**, only 25% of which is covered by workers' compensation.

I do not doubt that Chairman Bachus and the other proponents of the RFIA sincerely share my appreciation for the importance of regulation in protecting all of us from a myriad of harms. I emphasize the importance of regulation only to point out that this bill, if enacted, could jeopardize these types of protections in the future.

For example, this bill will expand the use of regulatory review panels by requiring that they apply to rules proposed by all agencies and by applying them to all major rules, not just those that are subject to the Regulatory Flexibility Act.

Currently, such review panels are required only for rules that: (1) are subject to the Regulatory Flexibility Act; and (2) are proposed by the Environmental Protection Agency, the Occupational Safety and Health Administration, or the Consumer Financial Protection Bureau.

These review panels, which consist of the Chief Counsel for Advocacy of the Small Business Administration, a representative of the issuing agency, and a representative from the Office of Information and Regulatory Affairs, review the covered rules and can send them back to the issuing agency.

Clearly, the process is intended to slow down rulemaking. By dramatically expanding their use, this bill will effectively stop most rules from going into effect.

The bill also burdens agencies with numerous additional and amorphous analytical requirements, including the requirement that agencies assess the indirect economic effects of a proposed rule.

The requirement to assess indirect effects has almost no limitation, other than that such indirect effects should be "reasonably foreseeable," which is not much of a limitation.

Under this fairly open-ended requirement, agencies would be at a loss to determine how much is enough when it comes to their regulatory analysis obligations. For example, what is the "reasonably foreseeable indirect economic effect" of a regulation requiring heightened security measures at airports? Would the issuing agency have to take into account the potential loss of business for the hot dog stand that is located far past the security checkpoint?

These are just two of the many concerns with the RFIA. We will hear in more detail from Amit Narang of Public Citizen about the remaining concerns with the bill.

There are things we can do to help small entities, including measures to assist small businesses with regulatory compliance. We ought to be able to support such measures on a bipartisan basis. I understand that Mr. Narang may have a proposal to that effect and I hope his fellow witnesses and the other members of this Subcommittee will give it real consideration.

Prepared Statement of the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, Ranking Member, Committee on the Judiciary, and Member, Subcommittee on Regulatory Reform, Commercial and Antitrust Law

Under the guise of protecting small businesses from burdensome regulatory requirements, the "Regulatory Flexibility Improvements Act" is actually yet another attempt to—

- prevent regulatory agencies from promulgating regulations that protect the health and safety of Americans;
- overwhelm regulatory agencies with unnecessary and costly analyses; and
- give well-financed businesses and anti-regulatory organizations greater opportunities to thwart the rulemaking process.

Not surprisingly, similar legislation considered in the last Congress was opposed by the Obama Administration, which issued a veto threat, stating that the bill "would seriously undermine the ability of agencies to execute their statutory mandates" and " impede the ability of agencies to provide the public with basic protections."

And, many of the Nation's leading consumer, labor, and environmental organizations have expressed similar concerns about this "dangerous" measure, including—

—the AFL–CIO,

—the American Lung Association,

—the Consumer Federation of America,

—Consumers Union,

—the Natural Resources Defense Council,

—Public Citizen,

—the United Auto Workers, and

—the National Women's Law Center, just to name a few.

One of my principal concerns about this bill is that it could jeopardize Americans' health and safety.

Our federal agencies are charged with promulgating regulations that impact virtually every aspect of our lives, including the air we breathe, the water we drink, the food we eat, the cars we drive, and the play toys we give our children.

Small businesses, like all businesses, provide services and goods that also affect our lives. So, it makes no difference to a victim who breathes contaminated air or drinks poisoned water, whether the hazards were caused by a small or large business.

The far-reaching legislation before us today would undermine the ability of federal agencies to quickly respond to emergent health and safety concerns.

Section 5 of the bill, for example, repeals the authority under current law that allows an agency to waive or delay the initial analyses required under the Regulatory Flexibility Act "in response to an emergency that makes compliance or timely compliance . . . impracticable."

Instead, the bill empowers the Chief Counsel for Advocacy to issue regulations about how agencies in general should comply with the Act.

So, imagine if there is an epidemic E. coli or listeria infection caused by some item in our Nation's food distribution network, or an imminent environmental disaster that could be addressed systemically through regulation, this bill says "Don't worry. Don't rush. Let's have the Chief Counsel for Advocacy decide."

This override of an agency's authority to respond to emergencies without having first go through the arduous and time-consuming task of review and analysis is simply wrong.

Another problem with this bill is that it will result in the wasteful expenditure of taxpayer dollars by forcing agencies to redirect their scarce resources to meet the bill's needlessly burdensome compliance requirements.

Section 6 of the bill, for example, would require agencies to review not only all rules, but, in addition, all guidance documents currently in effect as of the bill's date of enactment.

We are talking about thousands of pages of regulations in the Code of Federal Regulations and several hundred thousands of guidance documents.

This requirement even applies to regulations that have provided long-proven health safeguards, such as regulations banning lead in gasoline.

It's no wonder that the Congressional Budget Office estimates that it will cost $80 million over a five-year period to implement these new requirements.

We understand that some small businesses often have limited resources and that they can be more vulnerable to unnecessary, redundant, or conflicting regulations than their larger counterparts.

But, we are not talking about your typical Mom and Pop small businesses under this bill. No, this bill applies to businesses that employ up to 500 workers.

And, the answer is not to burden the agencies that are responsible for protecting public health and safety. Rather, our goal should be to help small businesses comply with these regulations.

By overburdening the very agencies charged with protecting us, this bill clearly prioritizes corporate special interests.

What a waste of scarce taxpayer dollars.

A further concern I have about this bill is that it will result in paralysis by analysis and give corporate interests too much control over the rulemaking process.

Section 2 of the bill, for example, would task agencies with the duty to examine the *indirect economic effects* of proposed regulations on small businesses, which would be in addition to their current obligation to assess the direct effects of these regulations.

Now I ask you: what is an "indirect economic effect" of a regulation? Just think of the litigation that well-funded businesses and anti-regulatory organizations could fund to stop a rulemaking.

This bill, if ever enacted, would force agencies to conduct highly speculative and labor-intensive assessments, all of which could be subject to litigation by well-financed business interests.

Agencies would be required to engage in a virtual guessing game to divine the indirect effects of a proposed regulation, which, of course, would be subject to judicial review.

Other ways in which the bill will result in regulatory paralysis are the following:

- It greatly expands the types of rules subject to analysis under the Regulatory Flexibility Act;
- It mandates that agencies prepare excessively detailed analyses for proposed rules; and
- It requires review panels to ensure that certain rules issued by *all* agencies—not just the three agencies under current law, namely, Environmental Protection Agency, OSHA, and the CFPB—consider the interests of small businesses.

Glaringly missing from the bill is *any* provision requiring consideration of public interest concerns and of the benefits of regulations.

This is a harmful bill that could potentially put the health and safety of all Americans at risk while adding nothing to the efficiency or cost-effectiveness of agency rulemaking. I strongly oppose this bill.

40 YEARS
PUBLIC CITIZEN
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Cranes & Derricks

The Prolonged Creation of a Key Public Safety Rule

April 2011

Acknowledgments
This report was written by Taylor Lincoln and Negah Mouzoon of Public Citizen's Congress Watch division. Celeste Monforton, Professorial Lecturer at the George Washington University Environmental and Occupational Health Department, provided valuable comments.

About Public Citizen
Public Citizen is a national non-profit organization with more than 225,000 members and supporters. We represent consumer interests through lobbying, litigation, administrative advocacy, research, and public education on a broad range of issues including consumer rights in the marketplace, product safety, financial regulation, safe and affordable health care, campaign finance reform and government ethics, fair trade, climate change, and corporate and government accountability.

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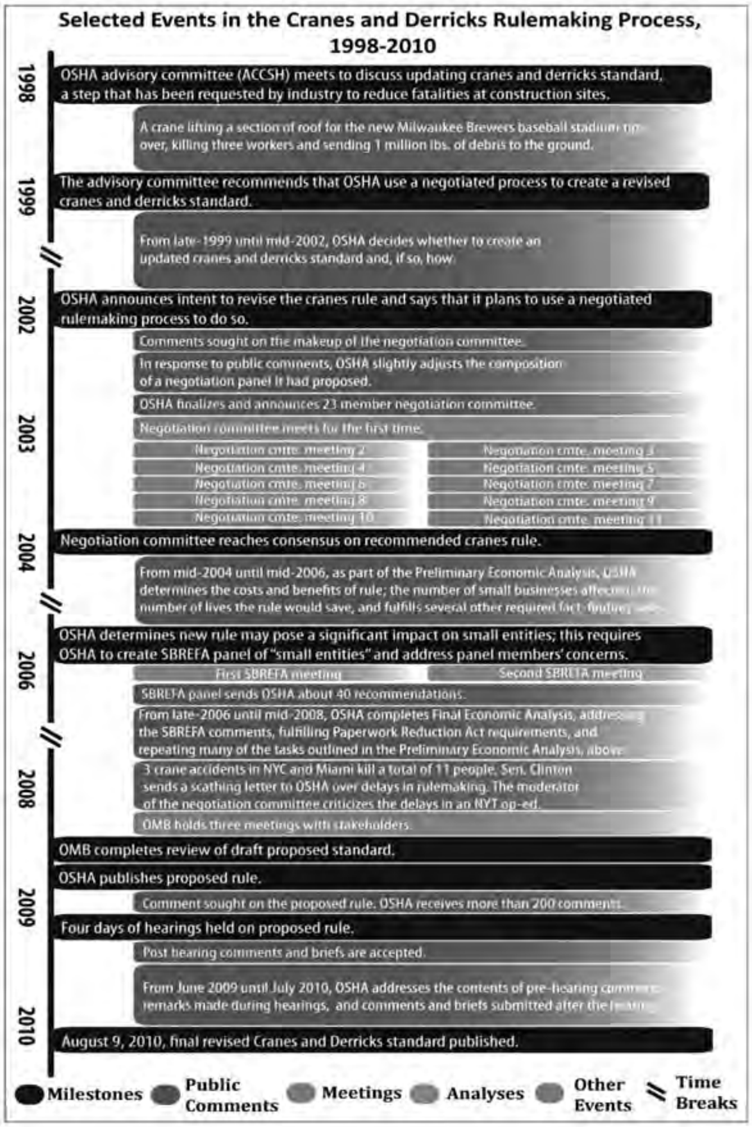
Selected Events in the Cranes and Derricks Rulemaking Process, 1998-2010
1998
OSHA advisory committee (ACCSH) meets to discuss updating cranes and derricks standard, a step that has been requested by industry to reduce fatalities at construction sites.
A crane lifting a section of roof for the new Milwaukee Brewers baseball stadium
over, killing three workers and sending 1 million lbs. of debris to the ground.
1999
The advisory committee recommends that OSHA use a negotiated process to create a revised cranes and derricks standard.
From late-1999 until mid-2002, OSHA decides whether to create an updated cranes and derricks standard and, if so, how.
2002
OSHA announces intent to revise the cranes rule and says that it plans to use a negotiated rulemaking process to do so.
Comments sought on the makeup of the negotiation committee.
In response to public comments, OSHA slightly adjusts the composition of a negotiation panel it had proposed.
OSHA finalizes and announces 23 member negotiation committee.
2003
Negotiation committee meets for the first time.
Negotiation cmte. meeting 2
Negotiation cmte. meeting 3
Negotiation cmte. meeting 4
Negotiation cmte. meeting 5
Negotiation cmte. meeting 6
Negotiation cmte. meeting 7
Negotiation cmte. meeting 8
Negotiation cmte. meeting 9
Negotiation cmte. meeting 10
Negotiation cmte. meeting 11
2004
Negotiation committee reaches consensus on recommended cranes rule.
From mid-2004 until mid-2006, as part of the Preliminary Economic Analysis, OSHA
determines the costs and benefits of rule; the number of small businesses
number of lives the rule would save, and fulfills several other required fact-
2006
OSHA determines new rule may pose a significant impact on small entities; this requires OSHA to create SBREFA panel of "small entities" and address panel members' concerns.
First SBREFA meeting
Second SBREFA meeting
SBREFA panel sends OSHA about 40 recommendations.
From late-2006 until mid-2008, OSHA completes Final Economic Analysis,
the SBREFA comments, fulfilling Paperwork Reduction Act requirements, and
repeating many of the tasks outlined in the Preliminary Economic Analysis, above.
2008
3 crane accidents in NYC and Miami kill a total of 11 people. Sen. Clinton sends a scathing letter to OSHA over delays in rulemaking. The moderator of the negotiation committee criticizes the delays in an NYT op-ed.
OMB holds three meetings with stakeholders.
OMB completes review of draft proposed standard.
OSHA publishes proposed rule.
2009
Comment sought on the proposed rule. OSHA receives more than 200 comments.
Four days of hearings held on proposed rule.
Post hearing comments and briefs are accepted.
From June 2009 until July 2010, OSHA addresses the contents of pre-hearing
remarks made during hearings, and comments and briefs submitted after the
2010
August 9, 2010, final revised Cranes and Derricks standard published.
Milestones
Public Comments
Meetings
Analyses
Other Events
Time Breaks

Introduction

Federal agencies have long been the object of scorn and criticism by political actors who claim that the employees of public health agencies like the Occupational Safety and Health Administration (OSHA) act as unelected, unaccountable autocrats who hand down burdensome safety rules with little concern about their effects on businesses. But the process of writing these rules—which serve to put the laws that Congress passes into practice—is usually long, complicated, and involves significant input from affected industries and other stakeholders. Additionally, agencies need to be meticulous in fulfilling myriad arcane steps or risk having their final rules overturned by court challenges. In fact, the federal agencies that are charged with protecting public health and safety may be some of the most tightly "regulated" entities in the United States.

This report recounts the creation of an important rule that was badly needed to protect workers—and, sometimes, passersby—from the dangers posed by cranes at construction sites. The final rule, published in August 2010, enhances worker training and certification requirements and adds protocols for job-site analyses before putting cranes into use. But the rule was a long time in the making.

By 1998, federal construction safety standards for the operation of cranes and derricks were badly out of date. Most of the standards were from 1971, when hydraulic cranes (now prevalent) were still rare. Meanwhile, many industry associations' protocols were out of sync with federal rules.[1]

Construction accidents have historically been the leading cause of workplace injuries and fatalities, and cranes have been implicated in a quarter to a third of those accidents.[2] In the late 1990s, construction accidents involving cranes were killing 80 to 100 workers a year. OSHA later estimated that a modernized rule would prevent about 20 to 40 of those annual tragedies.

Not just worker safety advocates, but even industry wanted an updated cranes and derricks rule. Industry officials, OSHA later recounted, "were concerned that accidents involving cranes and derricks continued to be a significant cause of fatal and other serious injuries on construction sites and believed that an updated standard was needed to address the causes of these accidents and to reduce the number of accidents."[3]

If ever there were a rule that seemingly should have breezed to adoption, this was it. The urgency of preventing avoidable deaths and injuries was clear, the regulated industries were asking for a new standard, and a large committee of business and labor representatives would reach near unanimous consensus on a draft rule very early in the process.

[1] Final Rule, Cranes and Derricks in Construction, 29 CFR Part 1926, *Federal Register*, Aug. 9, 2010.
[2] Anthony Suruda, *et al.*, "Crane-Related Deaths in the U.S. Construction Industry, 1984-94," Rocky Mountain Center for Occupational and Environmental Health, Department of Family and Preventive Medicine, University of Utah School of Medicine, October 1997.
[3] Final Rule, Cranes and Derricks in Construction, 29 CFR Part 1926, *Federal Register*, Aug. 9, 2010.

But a revised cranes and derricks rule did not breeze through. A dozen years, spanning three presidential administrations, would pass between OSHA's initial action on industry's request for a new rule and completion of the revised standard. More than 750 construction workers died from crane related incidents during this time. [See Figure 1] By OSHA's most conservative estimate, the new rule would have saved about 220 of those lives if it took effect in 2000 instead of 2010.[4]

Figure 1: Number of Occupational Crane-related Fatalities, 1997-2009

1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
97	93	80	90	72	80	62	87	85	72	67	93	53

Source: U.S. Department of Labor, Bureau of Labor Statistics.

During the dozen years it took to finalize the cranes rule, OSHA and other federal agencies held at least 18 meetings about it. At least 40 notices were published in the *Federal Register*. OSHA was required by a hodgepodge of federal laws, regulations and executive orders to produce several comprehensive reports, and revisions to such reports, on matters such as the makeup of industries affected by the rule, the number of businesses affected, and the costs and benefits of the rule. OSHA also was repeatedly required to prove that the rule was needed, that no alternative could work, and that it had done everything it could to minimize the effects on small businesses. The regulatory process afforded businesses at least six opportunities to weigh in with concerns that the agency was required to address.

1998 to 2004: The Negotiated Rulemaking Committee Is Formed and Reaches Consensus

The process of updating the cranes and derricks standard began in 1998, when OSHA's Advisory Committee for Construction Safety and Health (ACCSH)—a 15 member panel made up equally of representatives from government, labor and business—established a workgroup to recommend changes to the rule. The workgroup sent its recommendations to the full ACCSH, which recommended to OSHA in late 1999 that the agency update the rule through "negotiated rulemaking." Under this rarely used process, OSHA would form a committee—made up primarily of manufacturers, employers, other business interests, and labor representatives—that would seek to develop a draft rule by consensus.[5]

The dangers of under-regulated cranes became the subject of national attention in July 1999, when a 567-foot crane being used in the construction of a new baseball stadium for the Milwaukee Brewers tipped over as it was lifting a section of a retractable roof. The crane's collapse sent more than a million pounds concrete and debris crashing to the ground and killed three workers.[6]

[4] Calculation based OSHA's estimate that the final rule would save 22 lives a year.
[5] Final Rule, Cranes and Derricks in Construction, 29 CFR Part 1926, *Federal Register*, Aug. 9, 2010.
[6] Sheila Hotchkin, "Huge Crane Topples Over New Stadium Under Construction," Associated Press, July 15, 1999.

In July 2002, two-and-a-half years after ACCSH recommended to OSHA that it use a negotiated process to create a new standard, OSHA announced it would follow the advisory committee's advice.[7] In a conversation with Public Citizen, an OSHA official who was involved in the creation of the revised crane standard explained the delay by saying that the agency decides to create a new or revised rule only after extensive deliberations.[8]

That month, OSHA published a notice in the *Federal Register*, listing about 15 "interests"—such as crane manufacturers, construction companies, labor groups, insurance companies, public interest groups, and government entities—that it proposed to be represented on the rule negotiation committee to create a revised cranes standard. The agency sought public comment on this proposed universe of interests and asked for nominees to serve on the committee. In July 2003, OSHA announced a final committee of 18 representatives of affected businesses, four labor representatives, and an OSHA employee.[9]

The negotiation committee convened for the first time at the end of July of 2003. It established ground rules that no decision could be reached without the agreement of at least 21 of the 23 members, including OSHA's lone representative. The committee deemed that OSHA could not subsequently alter its decisions without seeking the committee's input. Additionally, committee members agreed not to criticize the rule during the public comment period.[10]

The negotiation committee met 11 times between July 2003 and July 2004. On July 30, 2004, the committee reached consensus (meaning that at least 21 members agreed) and sent a draft standard to OSHA for review.[11]

2004-2008: Regulatory Red Tape

The negotiation committee had crafted a draft rule that was satisfactory to at least 21 of its 23 members but work on the rule had just begun. For the next five years, OSHA would toil to satisfy a potpourri of prerequisites for formally proposing a rule.

For example, the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) required OSHA to evaluate and address the concerns of "small entities," defined as small businesses, small governmental units, and small nonprofit organizations. This general mandate involves several component parts.

First, SBREFA required OSHA to engage in extensive fact-finding merely to determine which special requirements it needed fulfill. For instance, OSHA was required to produce an Initial Regulatory Flexibility Analysis, including a Preliminary Economic Analysis, to de-

[7] Final Rule, Cranes and Derricks in Construction, 29 CFR Part 1926, *Federal Register*, Aug. 9, 2010.
[8] Public Citizen spoke with two OSHA employees to clarify facts for this report on April 7, 2011. The officials asked not to be identified.
[9] Final Rule, Cranes and Derricks in Construction, 29 CFR Part 1926, *Federal Register*, Aug. 9, 2010.
[10] Celeste Monforton, "Gearing up for OSHA's Crane Hearing," The Pump Handle, March 10, 2009. Available at http://thepumphandle.wordpress.com/2009/03/10/gearing-up-for-oshas-crane-hearing/.
[11] Final Rule, Cranes and Derricks in Construction, 29 CFR Part 1926, *Federal Register*, Aug. 9, 2010.

termine whether the proposed rule could potentially pose a "significant economic impact" on a substantial number of small entities. If it did, OSHA would have to convene a panel to advocate for small entities.

The requirements of an Initial Regulatory Flexibility Analysis are extensive. They required OSHA to document that it had considered all reasonable regulatory options to minimize the rule's economic effects on small entities and explain why it chose the approach in its proposal over the alternatives. Additionally, OSHA was required to enumerate the types and number of small entities that would be affected by the rule; the projected reporting and recordkeeping requirements of the proposed rule; and to list all federal rules that may duplicate, overlap or conflict with the proposed rule.[12]

OSHA also was required to produce several other reports and determinations to move forward:

- OSHA needed to demonstrate, pursuant to its authorizing legislation, that the proposed rule was addressing a significant risk, and that the proposed standard would substantially reduce the risk. OSHA initially determined that the rule would prevent 53 fatalities annually, confirming both that a risk existed and that the rule would help fix it. Additionally, OSHA was required to evaluate whether the market was capable of fixing the safety hazards in the operations of cranes. The agency determined that crane operations involved inequities, such as employers typically knowing more about the risks than employees, and that such inequities were beyond the curative powers of the market. As such, the agency determined that a rule was required.[13]

- To meet the requirements of executive order 12866, OSHA was required to estimate costs, benefits, and net benefits of the proposed standard.

- Under Regulatory Flexibility Act, OSHA was required to determine the number of small entities (such as general contractors with revenue of less than $31 million) that would be affected. The agency found 204,000.[14]

- OSHA was required by executive order 13132 to ensure that the rule did not restrict state or local policy any more than necessary, that it only took actions for which it had clear constitutional authority, and that the rule addressed a national problem. The agency made each determination.[15]

[12] "A Guide to the Regulatory Flexibility Act," U.S. Small Business Administration, May 1996.
[13] Final Rule, Cranes and Derricks in Construction, 29 CFR Part 1926, *Federal Register*, Aug. 9, 2010.
[14] *Ibid.*
[15] *Ibid.*

Fulfilling these tasks took the agency a significant amount of time. In December 2005, an agency official apologized to members of ACCSH for its failure to make the SBREFA "significant impact" decision, which the agency had expected to complete much earlier that year.[16]

"We have limited resources, and competing priorities were the reasons for [the delay], particularly the hexavalent chromium rule," said Keith Goddard, the director of OSHA's Evaluation and Analysis Directorate. "We have also diverted a considerable amount of resources to meet our commitments on the preliminary regulatory analysis on [the] beryllium [standard], as well."[17]

In roughly June 2006, OSHA determined that the cranes and derricks rule would potentially have a significant impact on a substantial number of small entities. That determination required OSHA to convene a SBREFA panel. Such panels, typically drawn largely from recommendations of trade associations, consist of small businesses, small governments, and small nonprofits that are provided with the draft rule and regulatory flexibility analysis. Invited parties are offered an opportunity to comment.

In October 2006, the SBREFA panel sent OSHA about 40 recommendations. These included requests that OSHA reexamine several costs estimates, study the potential effects of the proposed rule's certification requirements (and the potential loss of jobs that the requirement might cause), and ensure that OSHA's estimates of the benefits of the rule could be independently verified. The panel also requested that OSHA seek public comment on many its suggestions. SBA's Office of Advocacy provided a separate set of recommendations, including a request that OSHA "consider and document any 'significant alternatives' to the proposed rule."[18]

At a January 2008 ACCSH meeting, some members expressed frustration at delay in issuing a proposed rule. The director of OSHA's Office of Construction Standards and Guidance said that the negotiated committee's proposal was extremely detailed, rendering the process of writing an explanation and justification for the rule very time-consuming. The director also said that other standards moving through the agency's rulemaking process were consuming limited resources.[19] Notably, however, OSHA completed only one major rule during the time from 2001 to 2009, and that rule was completed in response to a court order.

While OSHA struggled to fulfill its obligations, several tragedies focused attention on the dangers of crane operations, and on the agency's lagging effort to produce a new rule. Six construction workers and a bystander died and 24 people suffered injuries when a crane collapsed in New York City on March 15, 2008. Ten days later, a 20-foot crane section in

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16 "Crane Rule Awaits SBREFA Panel Decision; Other Construction Standards Move Forward," Occupational Safety & Health Reporter, Dec. 14, 2005.

17 *Ibid.*

18 SBA Office of Advocacy, SBA Office of Advocacy, Acting Assistant Secretary of Labor for Occupational Safety and Health Thomas M. Stohler, Jan. 16, 2009.

19 Linda Levine, "Worker Safety in the Construction Industry: The Crane and Derrick Standard," CRS Report for Congress, Nov. 21, 2008.

Miami fell 30 stories, killing two construction workers and injuring five. On May 30, another crane fell in New York City, killing two construction workers and injuring a worker and a bystander.[20]

In May 2008, Sen. Hillary Clinton (D-N.Y.) sent a letter to OSHA Administrator Edwin G. Foulke demanding an explanation for why the new rule was not finished. Clinton noted that the industry-union advisory committee had reached consensus on a proposed rule almost four years earlier.[21]

"This delay is inexplicable and inexcusable," Clinton wrote. "Casualties due to crane accidents are occurring at an alarming rate."[22]

About then, progress on the rule appeared to quicken:

- In May 2008, the director of OSHA's Office of Construction Standards and Guidance informed members of ACCSH that it had completed its Final Economic Analysis. The report estimated that the standard would prevent 22 fatalities and 175 non-fatal injuries per year.[23] This estimate represented a significant reduction from the initial estimate that the rule would prevent 53 fatalities. The discrepancy was due to a shift in methodology from using records maintained by the Bureau of Labor Statistics to data maintained by OSHA. The agency determined that the costs of compliance would be $154.1 million, and the annual benefits would be $209.3 million, resulting in net benefits of $55.2 million. The agency also was required to provide a comprehensive breakdown of the compliance costs. It determined the additional costs would average about 0.2 percent of affected businesses' annual revenue, which it deemed "effectively negligible."[24]

- Also at that time, pursuant to the Paperwork Reduction Act, the agency submitted to the Office of Management and Budget (OMB) an analysis of the rule's paperwork requirements for affected businesses.

- During the summer, OMB held four meetings on the proposed standard. Attendees included representatives of businesses that operate cranes, the builders' insurance industry, the crane operator certification organization, and labor.[25]

- In late August, 2008, OMB completed its review of the draft proposed standard.[26]

[20] Linda Levine, "Worker Safety in the Construction Industry: The Crane and Derrick Standard," CRS Report for Congress, Nov. 21, 2008.
[21] Sen. Hillary Rodham Clinton (D-N.Y.) letter to OSHA administrator Edwin G. Foulke, May 30, 2008,
[22] *Ibid.*
[23] Final Rule, Cranes and Derricks in Construction, 29 CFR Part 1926, *Federal Register*, Aug. 9, 2010.
[24] *Ibid.*
[25] *Ibid.*
[26] Linda Levine, "Worker Safety in the Construction Industry: The Crane and Derrick Standard," CRS Report for Congress, Nov. 21, 2008.

2008-2010: The Rule Is Completed

The proposed rule was published in the *Federal Register* on October 8, 2008. It largely reflected the language approved in 2004 by the negotiation committee and responses to the comments sent to OSHA by the SBREFA panel.[27]

Publication of the proposed rule initiated a public comment period that was initially slated to run through early December but which OSHA extended to Jan 22, 2009, in response to stakeholders' requests.

Among the comments OSHA received were those from several industries seeking to be exempted from the rule. These included railroads, shipbuilders, electric utilities, the propane gas industry, and companies that install signs. OSHA eventually rejected most of these requests.

The National Association of Homebuilders, which had participated on the negotiation committee, also submitted comments. Although the committee's members had agreed not to submit "negative comments," NAHB sent in 45 pages that criticized the rule for being "too complex," "unduly onerous," and imposing "disproportionate burdens."[28]

The SBA's Office of Competitiveness requested that the agency consider and document any "significant alternatives" to the proposed rule. An agency official familiar with the proceedings disputes the Competiveness office's contention that OSHA had failed to document such alternatives.[29]

In March 2009, four days of hearings were held to discuss the rule, after which the agency accepted post-hearing comments and briefs. In June 2009, the record was closed. OSHA was then left with the task of addressing the contents of over 200 prehearing comments, more than 1,500 pages of transcribed text from the four days of hearings, as well as post-hearing submissions.

The summary of the final rule published in the *Federal Register* runs 159 pages, many of which are consumed by OSHA's summaries of public comments on particular sections and the agency's responses to those comments. An OSHA official estimated to Public Citizen that 30 to 40 percent of the final rule's sections include substantial alterations that were prompted by the comments the agency received. But a review of OSHA's summary of its responses to the comments indicates that most concerns were subtle, such as improving the clarity of some of the rule's language and addressing relatively rare hypothetical scenarios.

[27] Linda Levine, "Worker Safety in the Construction Industry: The Crane and Derrick Standard," CRS Report for Congress, Nov. 21, 2008.
[28] Celeste Monforton, "Gearing up for OSHA's Crane Hearing," The Pump Handle, March 10, 2009. Available at http://thepumphandle.wordpress.com/2009/03/10/gearing-up-for-oshas-crane-hearing/.
[29] Public Citizen telephone conversation with OSHA officials, April 7, 2011.

On Aug. 9, 2010, the final rule was published. In October 2010, the Edison Electric Institute (EEI), which represents publicly traded electric utilities, and the Association of American Railroads filed federal lawsuits challenging the rules. These cases are ongoing.

Discussion

A dozen years passed between the first meeting of the ACCSH on the cranes rule to the completion of the standard. By the government's measure, in which the clock starts ticking only after the agency publishes a notice of its intent to pursue a new or revised rule, the cranes rule took eight years to complete. While slightly longer than average, this timespan was fairly typical. The average length of time for OSHA to complete a major rule since 1990 has been 6.5 years.[30] For a health or safety standard, this means 6.5 years of preventable injuries and deaths.

Although the length of time to make the cranes rules was relatively typical over the past 20 years, OSHA's rulemaking in the past decade stands in stark contrast to its earlier work because the number of rules it has issued has slowed dramatically. The agency produced 14 major rules between 1990 and the end of the Clinton administration in January 2001. Between January 2001 and 2010, OSHA finalized only one major rule aside from the cranes and derricks standard. Its creation of that rule, on hexavalent chromium, was court ordered. Both the slow pace of individual rules and the sparcity of total final rules suggest that the anti-regulatory philosophy of President George W. Bush's administration may have hindered progress.

The use of the negotiated rulemaking process was intended to accelerate the creation of the cranes rule, but there is little evidence that it did. Susan Podziba, who moderated the negotiation committee's work, complained in a 2008 *New York Times* op-ed that she had expected the rule to be finalized within three years after the negotiation committee finished its work. Instead, seven years passed.[31]

The creation of the cranes and derricks standard clearly illustrates that tremendous redundancy exists in the rulemaking process. Setting aside the rare decision to employ a negotiated rulemaking process, stakeholders in the cranes rule had at least five opportunities to have their voices heard: at the SBREFA stage; to the Office of Management and Budget before it signed off on the proposed rule; during the conventional comment period after the proposed rule was published; during hearings on the proposed rule; and in post-hearing comments and briefs. [See Figure 2] Then, if still unsatisfied, stakeholders retained the right to seek redress in court—which two trade associations are now doing.

[30] Public Citizen analysis of data at reginfo.gov.
[31] Susan Podziba, "Safety Starts at the Top," *The New York Times*, June 12, 2008.

Figure 2: Businesses Opportunities to Influence the Cranes and Derricks Rule

Stage	Description
Negotiated Rulemaking	18 of 23 members represented business interests. The committee agreed that the rule could not go forward without the consent of 21 members, including the lone OSHA representative.
SBREFA	Small entities (small businesses, small governmental units, and small nonprofit organizations) were given a chance to review the draft rule and offer comments. The panel made about 40 recommendations to OSHA.
Review by the Office of Management and Budget	Businesses and other organizations were afforded the chance to express their concerns to OMB before it signed off on the proposed rule.
Comments on Proposed Rule	All members of the public, including businesses, were allowed to submit formal comments on the proposed rule.
Hearings on Proposed Rule	Members of the public, including businesses, had an opportunity to testify during four days of hearings on the proposed rule.
Post Hearing Comments and Briefs	Parties were allowed to enter comments and briefs into the public record after the hearings.

In the current Congress, several bills have been introduced to force agencies to fight through even more red tape to create new rules, no matter how sensible and uncontroversial the proposals might be.

These proposals would only waste government resources and add additional delays and costs to an already slow and costly process. An OSHA official who spoke with Public Citizen on background estimated that about 50 percent of the work involved in creating a new rule goes to satisfy bureaucratic requirements that have nothing to do with making a good rule—in other words, waste.[32]

Moreover, because all new safety rules prevent injuries or deaths, and virtually all provide benefits that outweigh their costs, every unnecessary delay of a new safety rule causes major harm. OSHA estimates that the final cranes and derricks rule will save $55.2 million a year, a benefit largely stemming from value the agency places on the lives the rule will save. By that standard, if the agency were able to complete the rule in half the time, six years instead of 12, it would have saved 100 lives and the equivalent of more than $330 million.

Policymakers who wish to eliminate waste and streamline government functions should seek to improve the speed and efficiency with which agencies can write worthy rules rather than saddling agencies with additional burdens.

[32] Public Citizen telephone conversation with OSHA officials, April 7, 2011.

PUBLIC CITIZEN

Business as Usual

99.9 Percent of Banks Would Be Unaffected by Volcker Rule

Acknowledgments

This report was written by Bartlett Naylor, Financial Services Advocate for Public Citizen's Congress Watch division, and edited by Taylor Lincoln, Research Director for Congress Watch.

About Public Citizen

Public Citizen is a national non-profit organization with more than 300,000 members and supporters. We represent consumer interests through lobbying, litigation, administrative advocacy, research, and public education on a broad range of issues including consumer rights in the marketplace, product safety, financial regulation, worker safety, safe and affordable health care, campaign finance reform and government ethics, fair trade, climate change, and corporate and government accountability.

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Contents

I. Introduction: The Ride of the Volcker Rule Can Banks Live with It?

There are 7,181 federally insured banks in the United States.[1] After a new rule is implemented to prohibit banks from making risky trades, the business activities of 7,175 of these banks will remain essentially unchanged.

The Volcker Rule, among the most controversial aspects of the Dodd-Frank Wall Street Reform and Consumer Protection Act, will prohibit federally insured banks from engaging in proprietary trading, which involves speculation through short-term trades in stocks, derivatives and other securities.[2]

The financial crash, borne of reckless banking practices, cost the economy about $12 trillion, give or take.[3] But Wall Street lobbyists have succeeded in elevating concerns over the relatively minuscule costs of the Volcker Rule to a paramount position in the debate over how regulations should be crafted to implement it. In reality, the Volcker Rule will mean no change, no closure of business divisions, no costs from foregone financial activity, for more than 99.9 percent of banks.

What follows is an examination of how American banks will adapt to the Volcker Rule. We review three banks—one small, one medium-sized, and one giant—as case studies. This report examines the details of these banks' revenue and earnings, how the Volcker rule might alter them, and how the managers of some of the banks evaluate the effect that the rule will have on them.

The nation's banking regulators are entering the last stages of finalizing the Volcker Rule this month, long after the July 21, 2012, deadline for completion imposed by Congress in Dodd-Frank. In all, 21 individuals nominated by the president and confirmed by the U.S. Senate (serving at the Federal Reserve, Federal Deposit Insurance Corp., Office of the Comptroller of the Currency, Commodity Futures Trading Commission, or Securities and Exchange Commission) must agree to the precise language of this rule. While the regulators undoubtedly understand the impact of the financial crisis, they will inevitably consider the effects on the industry they regulate. These regulators have conducted 4,000 meetings with

[1] FDIC, *Statistics at a Glance* (Sept.) 12, 2012), available at: http://www.fdic.gov/bank/statistical/stats/2012sep/industry.pdf These institutions include commercial banks as well as federally insured savings and loan institutions. It does not include the 6,888 federally insured credit unions; none of these institutions engage in Volcker Rule-prohibited activity.
[2] The Volcker Rule is the informal name for Section 619 of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Federal officials at present are finalizing the rules, or regulations, to implement Section 619.
[3] *See, e.g.,, Cost of the Crisis*, BETTER MARKETS (Fall 2012), available at: http://www.bettermarkets.com/cost-crisis#.UMYFZdSUrl4

outsiders, the overwhelming majority of which have been Wall Street representatives.[4] But these regulators must understand that the banking industry will thrive with a robust Volcker Rule.

II. The Rise of Casino Banking

The lure of astronomical profits from proprietary trading prompted a select group of large banks to deviate from sensible risk management practices. This sober account from the Group of 30, a non-profit international group consisting of private sector and academic leaders on financial issues,[5] recalls how the industry succumbed to a gambling ethos:

> Recent experience in the United States and elsewhere has demonstrated instances in which unanticipated and unsustainably large losses in proprietary trading, heavy exposure to structured credit products and credit default swaps, and sponsorship of hedge funds have placed at risk the viability of the entire enterprise ... These activities, and the "originate-to-distribute" model, which facilitated selling and reselling highly engineered packages of consolidated loans, are for the most part of relatively recent origin. In essence, these activities all step away from the general concept of relationship banking, resting on individual customer service, toward a more impersonal capital markets transaction-oriented financial system. What is at issue is the extent to which these approaches can sensibly be combined in a single institution, and particularly in those highly protected banking institutions at the core of the financial system.[6]

Concerns over the activities outlined above prompted Congress to institute the Volcker Rule—informally named after Group of 30 member and former Federal Reserve Chairman Paul Volcker—to prohibit federally insured banks from engaging in proprietary trading or owning hedge funds of more than *de minimis* size. Opponents and proponents alike commonly observe that this provision promises the greatest change in American banking since the enactment in 1933 of the Glass-Steagall Act, which separated of commercial and investment banking.

In principle, the Volcker Rule aims to protect banking's core function of aggregating savings so that savings can be deployed in loans to consumers, homebuyers, and businesses. Federal deposit insurance protects the savers, which encourages them to accept lower returns (in this case, in the form of interest rates) than they would expect for higher-risk investments. Banks, in turn, are expected to pass on savings from their reduced cost of

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[4] Davis-Polk, *Dodd-Frank Progress Report* (November 2012), available at: http://www.davispolk.com/files/Publication/9a990de9-911b-4e6b-b183-08b071d8b008/Presentation/PublicationAttachment/8363256a-524d-4d65-8ebe-096127dab2a3/Nov2012_Dodd.Frank.Progress.Report.pdf.

[5] *See* Group of 30 Web site, available at: http://www.group30.org/about.shtml.

[6] *Financial Reform, a Framework for Financial Stability, Group of Thirty* (Jan. 15, 2009), available at: http://www.group30.org/images/PDF/Financial_Reform-A_Framework_for_Financial_Stability.pdf.

capital to their borrowers. The benefits that accrue from reduced costs of capital justify expectations that the banks abstain from high-risk activities.

The Independent Community Bankers of America (ICBA), consisting of more than 5,000 member banks,[7] articulated this view in a comment letter it submitted to federal regulators on the proposed regulations to implement the Volcker Rule: "Banks are accorded access to federal deposit insurance and liquidity facilities because they serve a public purpose: facilitating economic growth by intermediating between savers and borrowers, *i.e.*, taking deposits and making loans, and by maintaining liquidity in the economy throughout the economic cycle. These activities constitute the fundamental business of banking."[8]

By its nature, a proprietary trade is a bet—a gamble. For every winner, there is a loser. A bank's gain from a proprietary trade results in a corresponding loss for the counterparty. No factories are financed, homes mortgaged, or cars purchased as a result of gambles won or lost by banks engaged in proprietary trading.

Gambling can generate profits for institutions. Last decade, traders and bank managers pocketed mind-boggling sums in exchange for presiding over successful betting strategies. But when the traders' bets turned sour, wiping out the earlier gains and forcing their institutions to accept massive taxpayer-financed bailouts, the bankers retained the fortunes they had reaped in the previous years. Protecting the ability of bank executives and traders to command such bounties is a key reason that certain Wall Street leaders have intensely contested the Volcker Rule. The debate over the Volcker Rule has arguably been the subject of more lobbying expenditures, regulatory meetings, congressional meetings, formally commissioned studies, and media coverage than any other regulation called for in Dodd-Frank.

Public Citizen documented the scope of industry's obsession of the Volcker Rule earlier this year.[9] Wall Street interests contributed $67 million to the campaigns of members of Congress who asked regulators to weaken the proposed regulations to implement the Volcker Rule. By contrast, members of Congress who pressed for a stronger regulations received a collective $1.9 million from Wall Street donors. However, a crucial fact is: More than 99.9 percent of banks' circumstances won't change because of the Volcker Rule. This rule is important to prevent a fraction of 1 percent of banks from putting our financial system—and, ultimately, our economy—at risk.

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[7] ICBA Web site, *About Us*, available at: http://www.icba.org/aboutICBA/index.cfm?ItemNumber=527.
[8] ICBA comment letter on the Volcker Rule (Feb. 13, 2012), available at: http://www.federalreserve.gov/SECRS/2012/March/20120305/R-1432/R-1432_021312_104966_451638070183_1.pdf.
[9] NEGAH MOUZOON AND BARTLETT NAYLOR, PUBLIC CITIZEN, *Industry's Messengers* (March 2012), available at: http://www.citizen.org/documents/industrys-messengers-volcker-rule-report.pdf.

There are 7,181 banks in the United States. Of these, six account for 88 percent of all proprietary trading affected by the Volcker Rule.[10] Four banks account for 93 percent of total derivatives holdings, a major venue in proprietary trading.[11] "Proprietary trading in any real volume is confined to a very few large, sophisticated U.S. banks," Volcker wrote in a letter to federal regulators.[12] The nation's 6,888 credit unions are legally barred from using derivatives.[13] In other words, of the 14,069 institutions that the average consumer would consider a "bank," the Volcker Rule means business as usual for 14,063 of them.

It should be noted that banks do maintain investment accounts consisting of easily sellable securities, and will be able to continue doing so after the Volcker Rule takes effect. "Trading accounts," which may include U.S. Treasuries, corporate stocks and other securities, help banks meet unexpected cash demands, such as an unusual surge in withdrawals. Managers of trading accounts typical invest in conservative securities and retain their investments for a longer time than do proprietary traders. Under the Volcker Rule, trading accounts may not be a playground for short-term speculation.

III. Three Case Studies: Safe at any Size

The banking industry is composed of firms of various sizes, ranging from banks with only a single store front, to mid-sized regional firms, to a handful of mega-banks. How will the Volcker Rule apply, based on bank size? Examined here are three case studies: A smaller bank, Generations Bank of Seneca Falls, N.Y.; a mid-size bank, M&T Bancorp, of Buffalo, N.Y.; and a mega-bank, Wells Fargo Bancorp, headquartered in San Francisco.

It's a Wonderful Life: Generations Bank

In the heartland of America, largely served by community bankers, the type of activity targeted by the Volcker Rule is unknown.

One of the 7,181 American banks that will not be unaffected by the Volcker Rule is Generations Bank, of Seneca Falls, N.Y.

[10] GOVERNMENT ACCOUNTABILITY OFFICE, *Proprietary Trading* (July 2011), available at: http://www.gao.gov/assets/330/321006.pdf.
[11] U.S. Comptroller of the Currency, *OCC's Quarterly Report on Bank Trading and Derivatives Activities Second Quarter 2012*, available at: http://www.occ.gov/topics/capital-markets/financial-markets/trading/derivatives/dq212.pdf.
[12] Paul Volcker, letter to regulators (Feb. 13, 2012), available at: http://www.sec.gov/comments/s7-41-11/s74111-182.pdf.
[13] GOVERNMENT ACCOUNTABILITY OFFICE, *Proprietary Trading*, at 64 (July 2011), available at: http://www.gao.gov/assets/330/321006.pdf. The credit union industry is lobbying to remove restrictions on derivative use. For example, here is a letter from the Credit Union National Association from April 3, 2012: http://www.ncua.gov/Legal/CommentLetters/CL20120403DunnDerivatives.pdf.

"It's a Wonderful Life," Frank Capra's iconic Hollywood film about the travails of a small town banker, is set in mythical "Bedford Falls." Seneca Falls claims to be Frank Capra's inspiration. This real "Bedford Falls" features a museum dedicated to the film, and an annual "It's a Wonderful Life" festival. The Clarence Hotel was named in honor of the angel Clarence who talks banker George Bailey off the bridge of despair by reviewing the virtues of traditional banking. This year, the actress who played the daughter of the beleaguered banker joined the December festival.[14]

Generations Bank, headquartered in Seneca Falls, founded in 1870, fits the description of George Bailey's bank to a tee: Folks in the community deposit their savings ($193 million) in one of the bank's nine branches, and then the bank loans out this money in mortgages to home buyers, in loans to car buyers, and credit to small business ($190 million).[15]

The bank has reported rising net income: $476,000 in 2009, $1.1 million in 2010, and $1.3 million in 2011. Through nine months of 2012, the bank reported $1.2 million in income.[16]

Generations Bank has transformed, at least in name, over the 14 decades since its founding in 1870 as Seneca Falls Savings Bank.[17] Before the financial crash of 2008, the institution was called Seneca-Cayuga Bancorp. With the acquisition of other banks, the firm adopted Generations Bank as its umbrella name. CEO Menzo Case is the bank's largest single shareholder.[18]

The Volcker Rule will result in no substantial change of operations for Generations Bank. none of the bank's 85 employees are derivatives traders. None engage in market making or risky gambles. Generations Bank does hold some securities, in addition to its loans. In 2009, for example, the bank held $1.7 million worth of securities, and earned a total of $1,000 from trades involving them.[19] Because of the minimal nature of its trading, Generations will not be subject to reporting requirements of the Volcker rule will require of larger banks.

[14] Web site for Seneca Falls town festival. Available at: http://www.therealbedfordfalls.com/.
[15] Generations Bank, Third quarter report, 2012. Available at: https://www.mygenbank.com/files/financial_filings/quarterly_reports/2012_3.pdf.
[16] *Id.*
[17] Generations Bank, Annual Report, 2009, available at: https://www.mygenbank.com/files/financial_filings/annual_reports/2009_annual_report.pdf.
[18] Generations Bank, Annual Report, 2010, available at: https://www.mygenbank.com/files/financial_filings/annual_reports/2010_annual_report.pdf.
[19] This was the last year the company reported its trading activity; it deregistered as a public company after that.

What Is the Ideal Size for a Bank?

How do banks perform based on size? While iconic, community banks lack the economies of scale enjoyed by larger banks. But the largest banks, others contend, may be unwieldy or difficult to manage. Is there a sweet spot in size? The field of industrial organization applies sophisticated metrics to examine the issue of the ideal size of a bank. This field of study figures into current issues about ideal bank size, evidenced by a December 4, 2012, speech by Federal Reserve Gov. Daniel Tarullo.[20]

The simplest measure of efficiency is the ratio of expenses to revenue. How much does each dollar of revenue cost a bank to generate? A bank that generates $1 in revenue with 45 cents in expenses is more efficient than the bank that generates $2 in revenue with $1 in expense. The former can generate a greater profit for its shareholders. The more efficient bank may be better for consumers, as it is better positioned to provide greater customer value in competition with its less efficient competitor.

As it happens, small banks dominate the list of "most efficient" banks. While rankings change with each quarterly report, *American Banker* routinely shows that banks with less than $5 billion in assets command the lion's share of "top 200" most efficient banks. In its most recent report, *American Banker* found that the top 10 most efficient banks all managed assets of less than $3.3 billion, and most managed less than $2 billion. U.S. Bancorp made this "top 200" list with an efficiency rating of 52 percent, placing it 89th on the list. U.S. Bancorp lists assets of $340 billion. Two other banks with more than $100 billion also made this efficiency list: BB&T Corp., with $174 billion, ranked 173rd; and Fifth Third Bancorp, with $116 billion, ranked 177th.

"No one can find such efficiency enhancements for banks with more than $100 billion in total assets," according to MIT economist Simon Johnson.[21]

[20] Speech by Gov. Daniel Tarullo at Brookings Institution, *Industry Structure and Systemic Risk Regulation* (Dec. 4, 2012), available at: http://www.federalreserve.gov/newsevents/speech/tarullo20121204a.htm.
[21] Simon Johnson, *Why Are the Big Banks Suddenly Afraid*, THE NEW YORK TIMES (Aug. 30, 2012), available at: http://economix.blogs.nytimes.com/2012/08/30/why-are-the-big-banks-suddenly-afraid/. Identifying the sweet spot for efficiency and economies of scale has been compromised by vast changes in banking law. First, banks were allowed to branch across state lines only in the last three decades. Second, their powers were expanded, ultimately allowing the kinds of activity that the Volcker Rule will prohibit. Finally, major financial catastrophes cloud conclusions. Risky trading may have figured in the 2008 crash, but that led to problems at less culpable banks in the form of cascading housing prices and mortgage values.

"We have an [asset liability management] committee that reviews our position monthly, which includes consideration of whether we should purchase additional securities," Case explained. "If securities are to be purchased, either myself or the CFO will make the purchase."[22] Generations devotes one employee to compliance.

"Our Company has a history of conservative risk management—we don't 'reach' for yield by entering into areas that we do not understand or for which the risk is not understood," Case wrote to shareholders.[23] "I have yet to find an NY community bank that is actively trading securities. It's just not the way we operate," he wrote in e-mail to Public Citizen.[24]

Sweet Spot of Efficiency: M & T Bank

Will larger banks find their business undermined by the Volcker Rule? An examination of M&T Bank, the nation's 31st largest with $77 billion in assets,[25] shows that the Volcker Rule will cause no change to the bank's operations. M&T Bank believes it will continue to thrive. Its efficiency ratio in the first quarter of 2011 ranked 83rd of the nation 6,900 bank holding companies on the *American Banker* list.[26]

"Based on the proposed rules, M&T does not currently anticipate that the Volcker Rule will have a material effect on the operations of M&T and its subsidiaries," the bank informed shareholders.[27]

Founded in 1856 in western New York, the Buffalo-headquartered bank maintains 750 branches in eight states and the District of Columbia.

M&T employs 15,666 people, up from 13,869 in 2007 before the financial crash. M&T has grown by making acquisitions. Its largest acquisition, coincidentally, followed a proprietary trading fiasco at Allied Irish Bank's Baltimore-based division.[28] Since the financial crash of 2008, M&T has purchased Provident Bank of Baltimore, the failed Bradford Bank (seized by

[22] Menzo Case, CEO, Generations Bank, e-mail response to Public Citizen questions (Nov. 16, 2012). On file with author.
[23] Generations Bank, Annual Report, 2010, available at: https://www.mygenbank.com/files/financial_filings/annual_reports/2010_annual_report.pdf.
[24] Menzo Case, CEO, Generations Bank, e-mail response to Public Citizen questions (Nov. 16, 2012). On file with author
[25] *Banks and Thrifts with the Most Assets*, AMERICAN BANKER (Second quarter 2012).
[26] *Most Efficient Banks,* AMERICAN BANKER (First quarter 2011).
[27] M&T Bank, Annual Report, 2011, available at: http://files.shareholder.com/downloads/MTB/2107851053x0x546897/5C592DA0-5A87-4F46-8AF6-8639E1B8963E/2011_Annual_Report.pdf.
[28] *See* Conor O'clery, PANIC AT THE BANK (2002).

the FDIC), Wilmington Trust, and Hudson City Bancorp. Berkshire Hathaway is its largest shareholder, owning 5.6 percent of its stock.[29]

M&T has reported a profit in every quarter since 1970. Net income increased from $380 million in 2009 to $736 million in 2010, and $859 million in 2011.[30]

M&T reported $27 million in trading account gains in 2011, in line with gains of $17 million to $30 million from 2007 to 2010.[31] Its trading profits represented 3 percent of its net income in 2011.[32]

M&T did report a "gain on bank investment securities" of $150 million in 2011 that was not pursuant to its trading account. The bank explained that this stemmed from an agreement to boost its capital following its acquisition of Wilmington Trust. It booked the gain by selling slightly riskier securities, and then purchasing less risky securities. Capital, or the amount of investor funds in the bank, is measured against the relative risk of its assets. These assets include loans and securities. By holding less risky securities, its capital measure is considered stronger. [33]

The fact that M&T derives only 0.6 percent of its total income from trading reflects a conscious decision by the bank's leadership. CEO Robert Wilmers reported to shareholders: "Banks have traditionally played a clear, if limited, role in the economy: to gather savings and to finance industry and commerce. Trading and speculation were nowhere included—nor should they be. "[34]

Of his larger peers that engage in proprietary trading, Wilmers expresses little sympathy. "The Wall Street banks continue to fight against regulation that would limit their capacity to trade for their own accounts—while enjoying the backing of deposit insurance—and thus seek to keep in place a system which puts taxpayers at high risk."[35]

Wells Fargo: Old School Banking

While the Volcker Rule essentially applies to only the largest banks with dedicated staff handling its trading account, mega-banks can remain large and profitable under the forthcoming restrictions on proprietary trading and hedge fund ownership. Wells Fargo proves this.

[29] M&T Bank, Annual Report, 2011, available at: http://files.shareholder.com/downloads/MTB/2107851053x0x546897/5C592DA0-5A87-4F46-8AF6-8639E1B8963E/2011_Annual_Report.pdf.
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*

Of the nation's 7,394 commercial banks, four institutions stand out in size: JP Morgan Chase, Bank of America, Citicorp, and Wells Fargo. Each of these banks holds roughly $1 trillion in deposits, ranging from $906 billion at Wells Fargo to $1.1 trillion at JP Morgan.[36] Together, they account for nearly half of the nation's $9 trillion in total deposits.[37] (The fifth largest depository is U.S. Bancorp, which holds $233 billion in deposits, about a fifth of the next largest.[38]) In the basic intermediation of savers and borrowers, these large four banks control about half of all deposits. How they deploy these dollars shapes the economy. Even a small diversion into proprietary trading of depositor savings is the equivalent to a wholesale decision by Generations, M&T, and hundreds of other like-sized banks to allocate all of their deposits to proprietary trading.

Government Report Says Proprietary Trading Is Not a Winner for Big Banks

Congress required the Government Accountability Office to study the role of proprietary trading at the largest banks. In July 2011, the GAO concluded that even at the six major banks, proprietary trading did not generate consistent profits. The researchers examined the 13 quarters from 2006 to 2010, before, during, and after the financial crash. While the firms collectively posted occasional winnings, they also suffered substantial losses. Proprietary trading resulted "in an overall loss from such activities over the 4.5 year period of about $221 million, " the government researchers concluded.[39]

Citicorp and Bank of America received considerable taxpayer bailouts. Meanwhile, government leaders such as former FDIC chair Sheila Bair and even President Obama have called for the closure of one or both of these institutions.

Citigroup does not object to the Volcker Rule. For example, in Citigroup's relatively brief 10-page comment letter on the proposed rule to federal regulators, the firm states: "We stand firmly behind the Volcker Rule's core principles of re-focusing trading businesses on the needs of customers and markets, while reducing potential risk to financial institutions and our financial system."[40] No representatives of Citigroup or Bank of America have testified in any of the congressional hearings on the Volcker Rule in the 112th Congress. In

[36] Research by SNL Advisers, available at: http://www.snl.com/InteractiveX/Article.aspx?cdid=A-15031738-14889.
[37] Federal Reserve statistics (Nov 7, 2012). Available at: http://www.federalreserve.gov/releases/h8/current/.
[38] Research by SNL Advisers, available at: http://www.snl.com/InteractiveX/Article.aspx?cdid=A-15031738-14889.
[39] GOVERNMENT ACCOUNTABILITY OFFICE, PROPRIETARY TRADING (July 2011), available at: http://www.gao.gov/assets/330/321006.pdf.
[40] Letter from Brian Leach, chief risk officer, Citigroup (Feb. 13, 2012), available at: http://www.federalreserve.gov/SECRS/2012/March/20120307/R-1432/R-1432_021312_104979_542079506624_1.pdf.

fact, former Citi Chairman John Reed counts as one of the Volcker Rule's earliest and most outspoken supporters.[41]

JP Morgan's opposition to the Volcker Rule is well known. The firm's proprietary trading became infamous in the spring of 2012 when it revealed a $5 billion to $7 billion loss from self-described "egregious" trades in London.

And Wells Fargo?

The name Wells Fargo derives from the 1850s entrepreneurs who profited from the traffic generated by the California gold rush. The bank itself served as a side business to the freight enterprise. Today's Wells Fargo is more accurately understood as Norwest Bank, a Minnesota branch-bank network, which bought the more familiar San Francisco-based Wells Fargo in 1998.[42] Norwest senior management has served in the top positions of Wells Fargo since the merger.

Of the largest four American banks, Wells Fargo's business is decidedly old school. Summarized a *New York Times* columnist, "It focuses on plain-vanilla lending like mortgages, credit cards and corporate loans, and ... emerged relatively unscathed from the financial crisis."[43] Wells Fargo boasts a high rating for its own debt.[44]

Will the Volcker Rule undermine this San Francisco-based giant's prospects? Proprietary trading generated the firm $2 million in profits in the third quarter of 2012, and $16 million over the first nine months of the year.[45] The $2 million in income represented 0.04 percent of the Wells' $4.94 billion in net income.[46] Proprietary trading accounted for a $9 million loss in the third quarter of 2011, and an $18 million loss for the first nine months of 2011. Proprietary trading, concluded Wells Fargo CEO John Stumpf, is "almost zero for us."[47]

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[41] Letter from John Reed to federal regulators (Feb. 13, 2012), available at: http://www.federalreserve.gov/SECRS/2012/March/20120301/R-1432/R-1432_021312_105359_329619421677_1.pdf.

[42] Wells Fargo annual report, 2000, available at: http://sec.gov/Archives/edgar/data/72971/0000912057-00-012168.txt.

[43] Peter Eavis, *Banks Tread a Fine Line in Trading*, THE NEW YORK TIMES (May 13, 2012), available at: http://dealbook.nytimes.com/2012/05/13/banks-tread-a-fine-line-in-trading/

[44] Wells Fargo Web site: https://www.wellsfargo.com/invest_relations/debt/.

[45] Wells Fargo quarterly report, third quarter 2012, available at https://www.wellsfargo.com/downloads/pdf/invest_relations/3Q12_10Q.pdf.

[46] Wells Fargo quarterly report, third quarter 2012, available at https://www.wellsfargo.com/downloads/pdf/invest_relations/3Q12_10Q.pdf.

[47] *Wells Fargo's Stumpf on the Volcker Rule*, CNBC (Feb. 17, 2012), available at: http://video.cnbc.com/gallery/?video=3000073921.

The firm does engage in market-making, which the proposed Volcker Rule will allow. (Market making involves trading activities in which the bank aims to profit through commissions rather than through changing values of the underlying investments.) "We make active markets in more than 400 issues and are recognized as a top 10 trader in convertible bonds," Wells Fargo says on its Web site.[48]

Berkshire Hathaway—run by Warren Buffett, the nation's second wealthiest person,[49] and Charles Munger—holds nearly 10 percent of Wells Fargo's stock,[50] accounting for nearly 20 percent of the value of Berkshire Hathaway's investment portfolio.[51] On why Berkshire Hathaway and others might find Wells Fargo "so attractive," *Forbes* observed: "Well, Wells Fargo is distinctive for what it doesn't do: rely on proprietary trading."[52]

The one way the Volcker Rule could impact Wells Fargo is through the law's ban on hedge fund ownership. Wells Fargo fears federal regulators might bar its venture capital and merchant banking subsidiaries under the Volcker Rule. The funds largely fall under the name of Norwest, such as Norwest Equity Partners, Norwest Venture Partners, etc. [53] Wells Fargo lists 1,207 separate subsidiaries. [54]

Wells Fargo does not explicitly report the results of its venture and merchant capital subsidiaries. It does report various investment gains. In the latest quarter, Wells Fargo reported a gain of $167 million from the sale of debt and equity securities. That represented 1.5 percent of its total $10.5 billion in non-interest income, and 0.6 percent of its total interest and non-interest income of $21.5 billion for the quarter. Income from these sales represented 3.3 percent of its net income.[55]

Despite the apparent lack of significance of Volcker Rule-prohibited activity for Wells Fargo and CEO Stumpf's dismissal of the importance of proprietary trading, Wells Fargo has joined the vigorous industry effort to contest robust implementation. The firm penned two

[48] This assertion appears in the promotional material of a Wells Fargo Web site, available at: https://www.wellsfargo.com/com/securities/equity-sales.
[49] *See* FORBES (Sept. 19, 2012), available at: http://www.forbes.com/forbes-400/.
[50] Wells Fargo, proxy statement 2012, http://sec.gov/Archives/edgar/data/72971/000119312512117239/d285202ddef14a.htm.
[51] *Buffett How Has 19.4% of Portfolio in Wells Fargo: Why it's the Better Bank Stock*, FORBES (Nov. 25, 2012), http://www.forbes.com/sites/ycharts/2012/11/25/buffett-how-has-19-4-of-portfolio-in-wells-fargo-why-its-the-better-bank-stock/.
[52] *Id.* Buffett discusses the Volcker Rule in this video: Buffett on Volcker rule: http://www.valuewalk.com/2012/05/warren-buffett-talks-about-volcker-rule-video/.
[53] Wells Fargo exhibit to annual report, 2012, available at: http://sec.gov/Archives/edgar/data/72971/000119312512084528/d280360dex21.htm.
[54] *Id.*
[55] Wells Fargo quarterly report, third quarter 2012, available at https://www.wellsfargo.com/downloads/pdf/invest_relations/3Q12_10Q.pdf.

letters to the federal agencies, and joined in endorsement of two others.[56] Instead of a rule, Wells Fargo asks for special treatment: "We believe that a better approach would be to allow each covered banking entity to work with its primary federal regulator to tailor more general rules applicable to each covered banking entity and its unique trading attributes."[57]

The Volcker Rule should portend minimal change for the company's business. Further, Wells Fargo's largest shareholder may be impatient with any attempts by management to violate the Volcker Rule. Berkshire Hathaway's Munger commented, "Take the rapid trading by the computer geniuses [responsible for proprietary trading at banks]. Those people have all the social utility of a bunch of rats admitted to a grainery. I never would have allowed the rats to get in the grainery. I don't want the brilliant young men of America being rats in somebody else's grainery."[58]

IV. Conclusion: Closing the Casino

While large bank lobbyists and others who profit from bank proprietary trading vocally oppose the Volcker Rule, Washington representatives of the vast majority of American banks endorse this reform. The Independent Community Bankers of America boasts 5,000 members among the nation's 7,181 banks.[59] While Wall Street lobbyists forecast grave harms from the Volcker Rule, here's what the trade association for the lion's share of the banking industry concludes: "ICBA generally supports the Volcker Rule, which is an important step toward protecting the business of banking from the speculation inherent in proprietary trading and sponsoring or investing in hedge funds."[60] The trade association explains: "The recent financial crisis and the ensuing government bailout show what happens when banks depart from the fundamental business of banking."[61]

If the Volcker Rule affects relatively few players on Wall Street, why the storm and fury? M&T Bank CEO Wilmers speculates that personal compensation figures at the center of this public controversy, and that compensation undermines public perception of the social utility of banking. "Public cynicism about the major banks has been further reinforced by the salaries of their top executives, in large part fueled not by lending but by trading. At a

[56] Compilation of all letters to Federal Reserve on Volcker Rule. Available at: http://www.federalreserve.gov/apps/foia/ViewAllComments.aspx?doc_id=R-1432&doc_ver=1.
[57] Letter from Wells Fargo counsel James Strother (Feb. 13, 2012), available at: http://www.federalreserve.gov/SECRS/2012/March/20120309/R-1432/R-1432_021312_104984_362706050221_1.pdf.
[58] Video interview of Charles Munger, available at: http://www.webcompact.net/index.php/news/29149-charlie-munger-and-buffett-disagree-on-volcker-rule-video.
[59] ICBA Web site, available at: http://www.icba.org/aboutICBA/index.cfm?ItemNumber=529.
[60] ICBA comment letter on the Volcker Rule (Feb. 13, 2012), available at: http://www.federalreserve.gov/SECRS/2012/March/20120305/R-1432/R-1432_021312_104966_451638070183_1.pdf.
[61] *Id.*

time when the American economy is stuck in the doldrums and so many are unemployed or under-employed, the average compensation for the chief executives of four of the six largest banks in 2010 was $17.3 million—more than 262 times that of the average American worker. Thus, it is hardly surprising that the public would judge the banking industry harshly—and view Wall Street's executives and their intentions with skepticism ... The Wall Street banks continue to fight against regulation that would limit their capacity to trade for their own accounts—while enjoying the backing of deposit insurance—and thus seek to keep in place a system which puts taxpayers at high risk."[62]

The thousands of bankers unaffected by the Volcker Rule may not travel frequently to Washington to defend it. Who petitions City Hall about a stop light on a street where one doesn't drive? But as Washington's rulemakers finalize this important regulation, they should he especially attuned to the silence of 7,000 banks.

[62] M& T Bank, Annual Report, 2011, available at: http://files.shareholder.com/downloads/MTB/2107851053x0x546897/5C592DA0-5A87-4F46-8AF6-8639E1B8963E/2011_Annual_Report.pdf.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

November 29, 2011
(House Rules)

STATEMENT OF ADMINISTRATION POLICY

H.R. 527 – Regulatory Flexibility Improvements Act of 2011
(Rep. Lamar Smith, R-Texas, and 26 cosponsors)

The Administration is committed to ensuring that regulations are smart and effective, that they are tailored to advance statutory goals in the most cost-effective and efficient manner, and that they minimize uncertainty. Accordingly, the Administration strongly opposes House passage of H.R. 527, the Regulatory Flexibility Improvements Act. The Regulatory Flexibility Improvements Act would impose unneeded and costly analytical and procedural requirements on agencies that would prevent them from performing their statutory responsibilities. It would also create needless regulatory and legal uncertainty and increase costs for businesses and further impede the implementation of commonsense protections for the American public.

The Regulatory Flexibility Improvements Act would impose unnecessary new procedures on agencies and invite frivolous litigation. When a Federal agency promulgates a regulation, the agency must adhere to the robust and well understood procedural requirements of the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act, as well as the Administrative Procedure Act and other federal statutes such as the Unfunded Mandates Reform Act and the Paperwork Reduction Act. In addition, for decades, agency rulemaking has been governed by Executive Orders issued and followed by administrations of both political parties. These require regulatory agencies to promulgate regulations only upon a reasoned determination that the benefits justify the costs, to consider regulatory alternatives, and to promote regulatory flexibility. With respect to the Regulatory Flexibility Act in particular, agencies already have in place procedures and policies, as required by Executive Order 13272, to ensure that agencies take into account the consequences of rulemaking on small businesses. Furthermore, this Administration's deep commitment to promoting small business and ensuring that regulations do not unduly burden the Nation's small businesses is reflected in Executive Order 13563, which requires agencies to examine existing regulations and to eliminate, streamline, or alter them where they are excessively burdensome, and the January 18 President Memorandum on Regulatory Flexibility, Small Business, and Job Creation. Furthermore, this Administration's deep commitment to promoting small business and ensuring that regulations do not unduly burden the Nation's small businesses is reflected in Executive Order 13563, which requires agencies to examine existing regulations and to eliminate, streamline, or alter them where they are excessively burdensome.

Passage of H.R. 527 would replace the existing framework with layers of additional procedural requirements that would seriously undermine the ability of agencies to execute their statutory mandates. It would unjustifiably expand the use of advocacy review panels, require excessive and unnecessary retrospective review of rules, and create needless grounds of judicial review and judicial remedies. It would also impose unrealistic analytic requirements on agencies far beyond the already rigorous existing requirements that promote commonsense regulation. In these ways and others, the Regulatory Flexibility Improvements Act would impede the ability of agencies to provide the public with basic protections, and create needless confusion and delay that would prove disruptive for businesses, as well as for state, tribal and local governments.

If the President were presented with the Regulatory Flexibility Improvements Act, his senior advisors would recommend that he veto the bill.

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Questions for the Record of the Hearing on H.R. 2542, the Regulatory Flexibility Improvements Act of 2013
from Ranking Member Steve Cohen
June 28, 2013

Questions for Karen Harned

1. You and Mr. Narang seemed to agree, at least in principle, that Congress should provide for more regulatory compliance assistance for small entities.

   Would you support Mr. Narang's suggestion that Congress establish certain "best practices" guidelines for agencies with small business ombudsmen, which would include things like proactive contacts with industry trade groups, local and regional chambers of commerce, and regional SBA offices informing as many small businesses as possible about the availability of this assistance and clear public identification of a single point of contact for small business regulatory compliance matters?

   Answer: NFIB would support any government educational efforts, like those noted above, that make it easier for small business owners to understand the federal laws that apply to them and provide them with a single point of contact at each agency that can answer their questions. NFIB believes these efforts can be accomplished without additional federal funding. For more than 15-years, the Small Business Regulatory Enforcement Fairness Act of 1996, which amended the Regulatory Flexibility Act, has required agencies to help small businesses with compliance assistance. In addition, SBREFA provides for a small business ombudsman, housed at the U.S. Small Business Administration (SBA), to help small businesses in their dealings with regulatory agencies. NFIB believes that existing agency resources should be channeled to ensure that small business compliance assistance is a priority in all federal agencies.

2. Although the manner in which such an initiative might be a source of disagreement, would you support a requirement that all federal agencies establish small business regulatory compliance assistance or small business ombudsmen offices?

   Answer: SBREFA already requires that each federal agency provide compliance assistance to small businesses. NFIB believes that Congress should hold each agency accountable for ensuring that they are doing all they can to educate small businesses about their legal obligations.

Questions for the Record of the Hearing on H.R. 2542, the Regulatory Flexibility Improvements Act of 2013 from Ranking Member Steve Cohen June 28, 2013

Questions for Amit Narang

1. Your fellow witnesses suggest that regulations undercut economic efficiency and job growth. What is your response to that assertion?

   The existing empirical evidence on the relationship between regulations and economic efficiency or job growth strongly suggests that this assertion is false. Data from the Bureau of Labor Statistics has consistently shown that government regulations account for a negligible percentage of mass layoffs according to employers. Other studies that survey and compare business conditions in countries across the world also show that the U.S. has one of the most robust environments for conducting business, including the benefits that come with baseline regulatory standards.

2. What, if anything, can the country's recent experience with under-regulation in the financial sector teach us about the benefits and costs of regulatory activity?

   The financial crash of 2008 and the ensuing Great Recession was a dramatic and tragic example of the enormous costs imposed on our society, much of which was borne by taxpayers, when under-regulation is the norm. The estimates of the total cost of the financial crash range from 14 to 22 trillion dollars of lost wealth and economic output. Clearly, the benefits of putting in place common-sense financial regulations to avoid the next financial crisis are overwhelming.

3. Critics of regulation often cite the "Crain and Crain study" commissioned by the Small Business Administration. This study reports that federal rulemaking imposed a cumulative burden of $1.75 trillion on our economy, which amounts to fourteen percent of national income. How reliable are this study's findings?

   This study has been thoroughly discredited for flaws relating both to the flawed methodology that the study employs as well as the limited scope of the study that makes it inappropriate for use in policy making decisions. Experts on both sides of the aisle have criticized the study, with former OIRA Administrator Cass Sunstein calling it "deeply flawed" and nothing more than an urban legend and OIRA Administrator under George W. Bush, John Graham, asserting that a previous iteration of the study would not pass OMB information quality standards. Even the authors of the study have conceded that since the study only looks at the costs of benefits, while entirely ignoring the benefits, it should not be used for assessing government policy.

4. What do you believe is the single most significant problem with the rulemaking process today?

The most important problem with the current regulatory process is that it does not allow federal agencies to address emerging public health and safety threats in a timely and efficient manner. Under the guise of so-called regulatory reform, Congress has placed an extensive number of requirements that agencies must satisfy before putting new regulatory standards in place. Many of these analytical and procedural requirements are duplicative and redundant, and the rulemaking process as a whole would greatly benefit from streamlining and harmonization. Unfortunately, H. R. 2542 would make the current situation worse

5. The RFA requires agencies to prepare a regulatory flexibility analysis if the agency determines that the rule will have a "significant economic impact on a substantial number of small entities." Today's bill would broaden "economic impact" from only direct impacts on small entities to indirect impacts as well. How much guidance does the proposed bill give regulatory agencies on the meaning of the term "indirect"? What are the repercussions under this bill for agencies that guess wrong on indirect effects? Will this provision render the regulatory process more efficient or create an extra obstacle to an already slow regulatory process?

   H.R. 2542 gives no guidance or criteria to agencies as to what they should legitimately consider to be indirect effects of their regulations. This, in turn, places agencies in the difficult position of making ad hoc determinations as to a particular regulation's indirect effects, a burdensome new requirement that is not funded to any degree in H.R. 2542. Making matters worse, the ambiguity of this new indirect effects analytical requirement will likely result in increased and unnecessary litigation because litigants challenging a regulation will be able to argue that an agency didn't consider all the indirect effects of its regulation, an open-ended mandate that by definition is impossible to satisfy. H.R. 2542 makes the regulatory process far more inefficient by imposing an undefined indirect effects requirement on agencies.

6. The RFIA gives the Office of Advocacy unprecedented powers to intervene in agency rulemakings and shape and influence the substance of rules. Why might this be problematic?

   As referenced in my testimony, The Office of Advocacy has come under scrutiny for funneling large industry opposition to new regulatory standards, most notably with respect to toxic chemicals. The Office of Advocacy's mission is to represent small business interests, not the interests of large industries under the guise of helping small businesses. Until more is known about how the Office of Advocacy operates in practice, legislation to give more powers to the Office of Advocacy is unwise. If Congress is seeking to further empower the Office of Advocacy with additional authority and responsibilities, it should at the very least include minimal transparency requirements so the public is assured that the Office of Advocacy is remaining faithful to mission. Unfortunately, H.R. 2542 does not provide any increased transparency to ensure that the Office of Advocacy would be using its new authority appropriately.

7. The RFIA would entail a dramatic expansion of the Small Business Regulatory Flexibility Act (SBREFA) review panel process, even when no small business impacts are present. How costly do you anticipate this expansion in review panels to be? What resources does RFIA set aside to support these panels? What practical effect will this expansion have on the regulatory process?

   H.R. 2542 would require SBREFA panels for all agencies and all major rules, in addition to those rules determined to have a small business impact. Given that, on average, federal agencies produce about 50 to 100 major rules every year, this would represent an enormous increase in the use of SBREFA panels. Since H.R. 2542 provides no additional funding for the increase in SBREFA panels, agencies will be forced to divert resources to complying with this new mandate. The end result will be even more delays in a regulatory process that is the paragon of inefficiency.

8. Mr. Harris cites OSHA's Safety Standard for Cranes and Derricks in Construction as an example of the need for the RFIA and the limits of SBREFA panels. What is your response?

   Public Citizen issued a report in 2011 documenting the evolution of the OSHA Safety Standard for Cranes and Derricks, a rule that took OSHA over 10 years to put in place despite the numerous crane-related fatalities that had occurred at construction sites and the broad-based support of both industry and public interest groups in favor of a new standard. The report catalogues the various reasons for the extensive delays that forced OSHA to push back issuance of the rule repeatedly. For example, OSHA spent many months empaneling and conducting a SBREFA review panel for the rule. Further, the rule was the result of a "negotiated" rulemaking process which is a different process that OSHA employs which allows regulated industries to be heavily involved with the development of the rule. The NAHB was an integral player in the development of the rule, and appears to have violated the terms of the negotiated rulemaking process by submitting negative comments on the rule after OSHA proposed it (page 9 of the report).

   Whether or not the NAHB was in favor or opposed to the final cranes and derricks safety standard, what is clear is they had extensive opportunities to have their opinions and comments on the rule thoroughly considered. Indeed, the rule is an excellent example of how serious OSHA takes the SBREFA panel process, to the detriment of an efficient and timely rulemaking process.

9. You and Ms. Harned seemed to agree, at least in principle, that Congress should provide for more regulatory compliance assistance for small entities.

   Although the manner in which such an initiative might be a source of disagreement, would you also support a requirement that all federal agencies establish small business regulatory compliance assistance or small business ombudsmen offices?

   I would support a requirement that all federal agencies provide meaningful small business compliance assistance for regulations that can be demonstrated to apply to genuine small

businesses. One significant obstacle to this will be adequate funding. If agencies are being asked to provide small business regulatory compliance assistance, they should not be required to divert funds from other activities and responsibilities to do so.
An alternative, less resource-intensive approach, approach would be for Congress to establish so-called "best-practice" guidelines for agencies with existing small business ombudsmen offices to ensure that these offices are engaging with small business in a meaningful and pro-active fashion. Ideally, the small business ombudsmen offices could be expanded to other agencies as appropriate upon a later determination of the program's effectiveness.

10. If you would like to respond to anything said by your fellow witnesses that you did not otherwise have a chance to respond to, please do so here.