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

September 30, 2013

on the subject of

The Office of Information and Regulatory Affairs:

Federal Regulations and Regulatory Reform

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 "The Office of Information and Regulatory Affairs: Federal Regulations and Regulatory Reform."

My name is Nicole Riley and I serve as the Virginia state director for NFIB. 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.

In my job as NFIB's Virginia state director, I routinely travel the state and visit with small business owners hoping to grow their business and create job opportunities within their community. All too often, however, I hear stories about how unreasonable federal and state regulation is becoming a greater ordeal to comply with. Our members tell me that routinely a new regulation affecting them is added to the list of rules they already struggle to comply with. And if a new rule doesn't directly threaten the existence of their business, it certainly takes time away from running their business and creating jobs.

The statistics back up the stories I hear. According to NFIB's monthly survey of its members, *Small Business Economic Trends*, "government requirements and red tape" is the second most-frequent response to the question: What is the single most important problem facing your business today? More than one in five small business owners answered that regulation is the biggest problem they face. The only problem ranking higher is taxes.[1]

Every day, the problem is getting worse. From January 1 through September 27 of this year, federal agencies have issued 2,878 rules according to regulations.gov, the federal government's online rulemaking portal.[2] That is more than 10 new requirements a day that small business owners need to review to see if they apply to their business. The entrepreneurs that I visit with simply don't have time to keep up with the load.

Accurate Cost Estimates are Important

Small business owners are increasingly concerned with what they believe are questionable agency estimates of the benefits of rules versus the cost. When we explain to them how an agency estimates the costs for a particular rule, they find it unfair that an agency is allowed to use indirect benefits to generate large purported benefits but there is no requirement that agencies calculate reasonably foreseeable costs to indirectly regulated entities, which often are small businesses. This discrepancy applies to regulatory flexibility analyses as well.

Take for example a proposed rule issued recently by the U.S. Environmental Protection Agency (EPA) to limit carbon emissions from new power plants. NFIB members are

greatly concerned about the potential impact of this rule on their ability to get affordable electricity. Yet in its regulatory flexibility analysis, the EPA concluded that the rule will not have a significant impact on small businesses because they are not directly regulated. So EPA has not even considered the impact of rising electricity prices on small businesses as a part of the total costs of the rule. The small business owners I talk to do not think this is fair.

NFIB believes that getting an accurate portrayal of indirect regulatory costs would help paint the picture of the impact these rules have on small businesses. That is why we have strongly supported the Regulatory Flexibility Improvements Act, which I'm pleased to say has been favorably reported by the House Judiciary Committee under the leadership of Chairman Goodlatte and Rep. Bachus.

Examples of the Impact of Regulation on Virginia Businesses

I want to take this opportunity to provide you with a few real life stories from NFIB members in Virginia that illustrate the bottom-line impact and frustration that regulations often cause small business owners.

The Department of Labor's Companionship Exemption Rule

The first example I want to mention is a rule that was just finalized by the U.S. Department of Labor (DOL) about two weeks ago. Even though it failed to adequately identify a market failure, the Wage and Hour Division finalized a rule eliminating what's known as the companionship exemption for minimum wage and overtime for home care workers employed by third party agencies, many of which are small businesses. These workers serve clients – typically the elderly and disabled that cannot fully take care of themselves – in a non-medical capacity by making sure clients stay safe. Occasionally, they will help prepare meals, help the client get dressed, or even play a board game with the client to pass the time. However, their primary function is to ensure the safety of the client by providing companionship.

This industry provides an affordable alternative for families that don't want to see a loved one placed in a nursing home or other type of care facility. Yet this recent rule has jeopardized an entire industry of third party providers, including the business of Chris and Betsy Head. The Heads are franchisees of Home Instead Senior Care, and their company is located in Roanoke County. Last year, as part of NFIB's Small Businesses for Sensible Regulations campaign, the Heads detailed how the proposed changes in the rule – which were substantively maintained in the final rule – would affect their company.

The Heads said they had no problem with the minimum wage portion of the rule. Their employees' average wage is $9.40 per hour and none make less than $8.50 per hour. However, the overtime portion is going to have serious negative impacts on their company, the clients, and – contrary to what DOL believes – the workers themselves.

The Heads often provide their clients "sleepover" service, where the worker comes in at night for a 10-12 hour shift, ensures the client eats dinner and gets them ready for bed.

Then, while the client is asleep, the worker sleeps as well on site in case of an emergency. The new DOL rule will require employees be paid time-and-a-half for every hour worked over 40 in a given week. Under the exemption, employees received their straight hourly wage for hours over 40.

However, the client simply can't afford this change. As Chris Head told the Roanoke Times last year, "we anticipate that between 20 and 25 percent of our clients receiving care will have to go elsewhere, either to institutionalized settings, or do without, or go into the gray market and hire someone by paying under the table without any of the insurance or oversight or other benefits of going through an agency."[3]

To stay competitive, the Heads will have to limit employees to 40 hours to keep costs down where the client can afford. A third party provider like the Heads will have to send multiple workers to cover the same number hours. This type of arrangement is not just a burden on the business, but can present dangers for the client as well. In cases of dementia, Alzheimer's or other cognitive impairment, the client relies on familiarity with the care provider. A client's safety may now be at risk because of this rule.

Paradoxically, this regulation intended to make workers better off will actually make them worse. One of the Heads' employees currently working 50 hours at Home Instead will now be limited to 40. In order to make up the 10 hours lost, he or she will have to find employment with another company and travel from site to site. The worker will not get to enjoy the overtime benefits promised by DOL and instead will spend additional time looking for and traveling from job to job.

DOL's removal of the companionship exemption is likely to lead to a significant drop off in the Heads' business, major disruptions and reduced care quality for those that need it, and worse circumstances with no increased pay for employees. Everyone loses with this rule.

The Environmental Protection Agency's Chesapeake Bay Runoff Rules

My next example illustrates how the continued ratcheting down of rules presents challenges for small businesses.

Bill Neff, Sr. has owned Bill Neff Enterprises, a commercial real estate development business in Harrisonburg, for over 50 years. He recently shared with me a story about how he agreed to help out a local church with its construction on a new site that ran into significant red tape and higher costs than he could have imagined.

Because the church is located in the Chesapeake Bay watershed, there are certain measures developers must take to prevent stormwater contamination from making its way downstream to the bay. In this instance, Mr. Neff originally proposed to incorporate an open pond or basin with rock to capture rain and treat it before it made its way into the ground water that heads to the bay.

Under previous standards, Mr. Neff quoted the church that such a pond would cost about $10,000. However, when Mr. Neff submitted the plan for approval of a permit, he

was surprised to learn that EPA had changed the water quality standard to the point that before being released into the ground the water had to be filtered to “drinking water” quality. The new filtration system required to reach the new levels would increase the total cost of the pond to nearly $60,000. But the added costs don't end there. The water quality must be monitored every month and a report sent in. Also, once a year an engineer must be hired to verify the water quality and send in yet another report.

Obviously, since Mr. Neff was trying to do things cost-effectively for the church, these expenses raised significant concerns and jeopardized the entire project.

The Mine Safety and Health Administration’s Emergency Reporting Rule

As my last example illustrates, many times even when there is clear direction from Congress on a very well-intended regulation, how an agency handles compliance efforts from small businesses can lead to frustration.

Rob Frazier operates The Frazier Quarry, a limestone quarry in Rockingham County and a third and fourth-generation family business. Mine safety is serious business. After disasters at the Sago and Aracoma Arma mines in West Virginia in January 2006, Congress responded by passing the Mine Improvement and New Emergency Response (MINER) Act. Within this act, Congress required mine operators to inform the Mine Safety and Health Administration (MSHA) within 15 minutes of a serious accident. Congress required this 15-minute deadline because the agency was already working on developing the requirement when the MINER Act was drafted in Congress.

To many in the mining business, including Mr. Frazier, the 15-minute requirement was too restrictive because when a serious accident happens the mine operator is focused entirely on making the situation as safe as possible, evacuating miners and other personnel, calling 911 to get medical attention to the site quickly, and taking other emergency measures. Surely notifying MSHA of a serious accident is important, but not at the cost of the safety of those on the site.

Regardless, mine operators expect that if such notification is required the agency must be equipped to deal with calls when a serious accident happens. Mr. Frazier had a reportable event happen at his job site. Rather than risk the $5,000 to $60,000 penalty for mine operators who fail to notify MSHA within 15 minutes, Mr. Frazier called the MSHA hotline. His call was answered by a phone answering service, and the person on the other end seemed to have no idea why he was calling.

This troubling story shows how frustrating compliance can be. Put yourself in the shoes of Mr. Frazier. Something serious has happened at your mine. You are responsible for the safety of everyone at the site. You take the time out of your emergency response to alert the federal government and the person on the other end of the line seems confused as to why you’re calling. If small businesses are held to high standards of compliance, then the least the government could do is be prepared to take their call.

Conclusion

As I hope these stories illustrate, small business owners do not take regulatory compliance lightly. They recognize that while it is certainly not the reason they started their business, it is a necessary task in running one. What small business owners ask is that the agencies that regulate them only regulate them. The owners that I talk to frequently are frustrated by what seems like a constant flow of new mandates coming out of Washington that provide little practical impact.

Agencies and OIRA need to recognize the genuine burden each regulatory requirement places on small businesses. To do so, they need to be committed to a true accounting of a proposed rule's actual costs and benefits, including those costs on indirectly affected small businesses.

Thank you for the opportunity to share these stories with you today.

Sincerely,

Nicole A. Riley

Nicole Riley
State Director
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[1] NFIB Research Foundation. *Small Business Economic Trends*. September 2013. pp. 18. http://www.nfib.com/Portals/0/PDF/sbet/sbet201309.pdf

[2] www.regulations.gov

[3] Roanoke Times. *NFIB, Del. Chris Head & wife complain about proposed Dept. of Labor regulation*. April 19, 2012. http://blogs.roanoke.com/politics/2012/04/19/nfib-del-chris-head-wife-complain-about-proposed-dept-of-labor-regulation/