

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 Energy and Commerce
Subcommittee on Environment and the Economy**

on the date of

February 15, 2011

on the subject of

“Environmental Regulations, the Economy, and Jobs”

Chairman Upton and Ranking Member Waxman,

On behalf of the National Federation of Independent Business (NFIB), I appreciate the opportunity to submit for the record testimony for the Committee on Energy and Commerce, Subcommittee on Environment and the Economy, in the hearing entitled, "Environmental Regulations, the Economy, and Jobs."

My name is Karen Harned and I serve as the executive director of the NFIB Small Business Legal Center. NFIB is the nation's leading small business advocacy association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents about 350,000 independent business owners who are located throughout the United States.

The NFIB Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small business in the nation's courts.

Overzealous regulation is a perennial cause of concern for small business owners, and is particularly burdensome in times like these when the nation's economy remains sluggish. Unfortunately, the regulatory burden on small business has only grown. A recent study by Nicole and Mark Crain for the U.S. Small Business Administration Office of Advocacy (Office of Advocacy) found that the total cost of regulation on the American economy is \$1.75 trillion per year.¹

If that number is not staggering enough, the study reaffirmed that small businesses bear a disproportionate amount of the regulatory burden. The study found that for 2008, small businesses spent 36 percent more per employee on regulation than their larger counterparts.

Job growth in America remains stagnant. Although small businesses create two-thirds of the net new jobs in this country, the NFIB Research Foundation's most recent edition of Small Business Economic Trends¹ revealed in the next three months 12 percent of respondents plan to increase employment while 8 percent plan a reduction in workforce.²

Small business owners consistently cite government regulation as one of their primary problems in running their business. In its most recent edition of SBET, the NFIB Research Foundation found that 17% of small business owners describe government regulations and red tape to be their single most important problem.³ Only taxes and poor sales were more commonly cited. In fact, for the past 26 months of the survey,

¹ The NFIB Research Foundation has collected Small Business Economic Trends data with quarterly surveys since 1974 and monthly surveys since 1986. Survey respondents are drawn from NFIB's membership. The report is released on the second Tuesday of each month.

² NFIB, Small Business Economic Trends, Page 1, February 2011.

³ NFIB, Small Business Economic Trends, Page 18, February 2011.

regulation and red tape has been in the top three of problems. This is not a recent trend either. NFIB surveys demonstrate that overzealous government regulation has ranked in the top ten of problems facing small business since 1991.⁴ Reducing the regulatory burden would go a long way toward giving entrepreneurs the confidence they need to expand their workforce in a meaningful way.

Last month, President Obama issued an executive order directing agencies to follow certain processes “to improve regulation and regulatory review.” I share the view of Susan Dudley, a former administrator of the Office of Information and Regulatory Affairs (OIRA). Dudley wrote: “Whether the President’s actions signal a real recognition that regulations can place unreasonable burdens on economic growth remains to be seen. Over the first two years of his term, the federal government issued 132 economically significant regulations (defined as having impacts of \$100 million or more per year). That averages out to 66 major regulations per year, which is dramatically higher than the averages issued by [the previous two administrations].”⁵

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

Moreover, NFIB hopes that the President’s order causes agencies to more closely follow the Administrative Procedures Act and regulate only within their legislative purview. When agencies do not follow the procedures of the APA they frequently enact rules that are not sensitive to the unique circumstances of small businesses. For example, notice and comment periods and regulatory impact analyses allow the agencies to interface with stakeholders to measure benefits and burdens of rules before they are enacted. Foregoing that necessary step in the rulemaking process leads to the enactment of “one size fits all” rules that unduly burden small businesses and often lead to unintended consequences.

An important tool in the arsenal to ensure that federal regulations are developed in a way that considers small business impact is the Small Business Regulatory Enforcement and Fairness Act,⁶ which amended the Regulatory Flexibility Act.⁷ SBREFA requires federal agencies to analyze the impact of proposed regulations on small firms and, as a result, gives small businesses a voice in the federal rulemaking process.

For all rules that are expected to have a “significant economic impact on a substantial number of small entities,”⁸ the Environmental Protection Agency is required by the RFA to conduct a Small Business Advocacy Review Panel to assess the impact of the

⁴ NFIB, Small Business Problems and Priorities, Table 5, June 2008.

⁵ Dudley, Susan E. *President Obama’s Executive Order: Improving Regulation and Regulatory Review*, January 2011. http://www.regulatorystudies.gwu.edu/images/commentary/20110118_reg_eo.pdf

⁶ Pub. L. 104-121, Title II, 110 Stat. 857 (1996)(codified in various sections of 5 U.S.C. § 601, et. seq.).

⁷ 5 U.S.C. § 601, et. seq.

⁸ See 5 U.S.C. § 609(a), (b).

proposed rule on small entities,⁹ and to consider less burdensome alternatives. Moreover, federal agencies must give every appropriate consideration to any comments on a proposed or final rule submitted by the SBA's Office of Advocacy. Agencies also must include, in any explanation or discussion accompanying publication in the Federal Register of a final rule, the agency's response to any written comments submitted by Advocacy on the proposed rule.¹⁰

SBREFA – when followed correctly -- can be a valuable tool for agencies to identify flexible and less burdensome regulatory alternatives. 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.

While SBREFA itself is a good first step, in order for it to provide the regulatory relief that Congress intended the agencies must make good-faith efforts to comply with it. By following the letter and spirit of SBREFA, agencies, like EPA, would avoid many of the unnecessary burdens and costs of regulations small businesses experience.

When EPA and other agencies follow the procedures for evaluating small business impact of regulations before they are promulgated, it's a "win-win" for the economy, the public and small business.

An example of such a regulatory "success" story concerned an EPA rule to reduce pollution from non-road diesel engines, like tractors, early in the last Administration. Prior to issuing the rule, EPA convened a SBAR as required by SBREFA.

According to former Office of Advocacy Chief Counsel Tom Sullivan, during the dialogue between EPA and small entities, it became clear that EPA had not considered how a tractor hood could fit over a new device EPA was proposing to require be placed in all tractor engines in order to filter emissions. As a result, EPA went back and re-tooled its proposal. When EPA finalized the rule June 29, 2004, it contained flexibility that allowed small manufacturers additional time to meet new engine/equipment design requirements.¹¹ With a phased-in approach, the new technology becomes less expensive, more efficient and any design flaws are able to be remedied.

Even with the small business flexibilities, the rule was set to reduce emissions from non-road diesel engines by up to 90 percent. That was expected to yield \$78 billion in

⁹ Under the RFA, small entities are defined as (1) a "small business" under section 3 of the Small Business Act and under size standards issued by the SBA in 13 C.F.R. § 121.201, or (2) a "small organization" that is a not-for-profit enterprise which is independently owned and operated and is not dominant in its field, or (3) a "small governmental jurisdiction" that is the government of a city, county, town, township, village, school district or special district with a population of less than 50,000 persons. 5 U.S.C. § 601.

¹⁰ 5 U.S.C. § 604, as amended by the Small Business Jobs Act of 2010, Pub. Law No. 111-240, Sec. 1601.

¹¹ U.S. EPA, Control of Emissions of Air Pollution from Nonroad Diesel Engines and Fuel, 69 Fed. Reg. 38,958 (June 29, 2004).

benefits by preventing premature mortality and non-fatal heart attacks.¹² SBA's Office of Advocacy estimated that the small business flexibilities minimized the impact on small firms by \$1.38 billion annually.¹³

Unfortunately for small businesses, however, there have been recent instances where EPA has not taken the regulatory steps needed to gather small business input or rejected that input altogether.

EPA recently determined that six greenhouse gases, including carbon dioxide, pose a danger to public health and could be regulated under the Clean Air Act.¹⁴ The agency then extended its regulation of GHGs from motor vehicles to stationary sources.¹⁵ Subsequently, EPA issued a series of decisions that required state and local agencies to issue permits to these sources of GHG emissions.

Multiple states and business groups, including NFIB, have challenged these regulations. EPA's finding that GHGs pose a danger to human health has been challenged as being "arbitrary and capricious" because, among other things, EPA failed to provide an independent analysis and failed to consider the offsetting benefits of GHGs. EPA's extension of regulation from mobile sources to stationary sources leads to absurd results because of the administrative backlog created by the fact that already overburdened state and local authorities now need to issue millions of new permits.

NFIB believes that each of the GHG rulemakings could have a significant impact on its members. Although EPA was obligated under the RFA to convene SBAR panels to ascertain the impact of GHG rulemakings on small businesses, and explore less burdensome alternatives, it did not. As a result, small business stakeholders were left out of the discussion.

The GHG regulations are not the only rules from EPA to impose heavy burdens on small businesses. Two separate rules, one affecting pre-1978 housing (finalized in 2008) and one affecting public and commercial buildings (tentatively expected to be proposed in Dec. 2011), are having an impact on small contractors and construction companies.¹⁶ The 2008 rule, the purpose of which is to reduce the amount of lead dust in home renovations and repairs, requires small businesses to pay for expensive certification and training, and conduct costly testing that drives up the price of projects. Although lead abatement is a worthy objective, EPA failed to explore other less costly alternatives and refused to limit the scope of the rule to the most vulnerable populations – homes with pregnant women and children under the age of six. Moreover, EPA's

¹² Id. at 38,961.

¹³ Office of Advocacy, Small Business Administration, "Report on Regulatory Flexibility Act, FY 2004, February 2005.

¹⁴ U.S. EPA, Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66496 (Dec. 15, 2009).

¹⁵ U.S. EPA, Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31, 514 (June 3, 2010).

¹⁶ U.S. EPA, Lead; Renovation, Painting and Repair Program; Lead Hazard Information Pamphlet; Notice of Availability; Final Rule, 73 Fed. Reg. 21,692 (Apr. 22, 2008).

inability to adequately enforce the rule has decreased the likelihood that a compliant small business can compete for work since non-certified firms – by doing the work illegally – can charge lower prices.

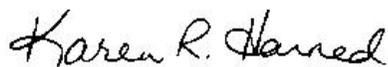
In June EPA's proposed a rule to reduce emissions from boilers by requiring businesses to implement the most expensive control technology standard for boilers.¹⁷ Rather than set limits based on levels of emissions that harm public health, as recommended by the SBAR panel that studied the issue, EPA sought to establish a standard based on technology that few, if any, current boilers can attain. This higher standard would provide little, if any, additional benefit to the public over the health-based standard. One study places the cost of the rule at \$20 billion. Using a health-based standard could cut that price tag in half.

EPA also has issued a notice of proposed rulemaking affecting commercial and industrial solid waste incineration (CISWI) units.¹⁸ Similar to the area source boiler rule, this proposal will broaden the regulated community, impose excessively stringent emissions requirements, and increase the paperwork burden on small business owners.

Small businesses are the engine of our economy. Unfortunately, they also bear a disproportionate weight of government regulation. While this regulation is well-intentioned, many rules are unnecessary, or overbroad. The effects of overregulation require an enormous expense of money and time to remain in compliance. The effort required to follow these regulations prevent small business owners from growing and creating new jobs.

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, Esq.
Executive Director
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¹⁷ U.S. EPA, National Emissions Standards for Hazardous Air Pollutants for Area Sources: Industrial, Commercial, and Institutional Boilers, 75 Fed. Reg. 31,896 (June 4, 2010).

¹⁸ U.S. EPA, Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Commercial and Industrial Solid Waste Incineration Units, 75 Fed. Reg. 31, 938 (June 4, 2010).

CORE VALUES

We believe deeply that:

Small business is essential to America.

Free enterprise is essential to the start-up and expansion of small business.

Small business is threatened by government intervention.

An informed, educated, concerned, and involved public
is the ultimate safeguard for small business.

Members determine the public policy positions of the organization.

Our employees and members, collectively and individually, determine the success of
the NFIB's endeavors, and each person has a valued contribution to make.

Honesty, integrity, and respect for human and spiritual values are important
in all aspects of life, and are essential to a sustaining work environment.

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