

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

July 14, 2011

on the subject of

Regulating Chaos: Finding Legislative Solutions to Benefit Jobs and the Economy

Dear Chairman Shimkus and Ranking Member Green:

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 Environment and the Economy hearing entitled “Regulating Chaos: Finding Legislative Solutions to Benefit Jobs and the Economy.”

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.

NFIB and the small business owners it represents commend this Subcommittee for examining legislative solutions to help grow the economy by reducing overly burdensome regulation.

The burden of regulation on small business has been among small business’ top ten concerns for years. The NFIB Research Foundation’s Problems and Priorities, which has been conducted every four years since 1982 and is designed to establish the relevant importance of small business concerns, has found “unreasonable government regulations” to be a top ten problem for small businesses for the last two decades.<sup>1</sup>

Overzealous regulation 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 found that the total cost of regulation on the American economy is \$1.75 trillion per year.<sup>2</sup>

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 \$10,585 per employee on regulation, which amounts to 36 percent more per employee than their larger counterparts.

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<sup>1</sup> Phillips, Bruce D. and Wade, Holly, “*Small Business Problems & Priorities*”, June 2008, at Table 5.

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

Job growth in America remains at recession levels. Small businesses create two-thirds of the net new jobs in this country, yet those with less than 20 employees have shed more jobs than they have created every quarter but one since the second quarter of 2007, according to the Bureau of Labor Statistics.<sup>3</sup> Moreover, for the first six months of 2011, 17% of small businesses responding to the NFIB Research Foundation's *Small Business Economic Trends* cite regulation as their single most important problem.<sup>4</sup> Thus, reducing the regulatory burden would go a long way toward giving entrepreneurs the confidence they need to expand their workforce in a meaningful way.

NFIB believes that Congress must take actions — like those proposed in H.R. 527 to level the playing field, and the following ideas will help improve regulatory conditions for small businesses. In particular, we are very pleased to see that H.R. 527 provides for expansion of the Small Business Regulatory Enforcement Fairness Act (SBREFA) and the inclusion of indirect costs in economic impact analyses. If enacted, these reforms would be instrumental in giving small business owners a stronger voice in the regulatory process and better assessing regulatory impact on small business.

### **Expansion and oversight of SBREFA**

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

Furthermore, Congress should take steps to require independent agencies to follow SBREFA requirements. Last year, Congress took an important initial step to do this by requiring the new Consumer Financial Protection Bureau to conduct SBAR panels on the 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.

In reality, small business owners are not walking the halls of federal agencies lobbying about the impact of a proposed regulation on their businesses. Despite great strides in regulatory reform, too often small business owners find out about a regulation *after* it has taken effect. Expanding SBAR panels and SBREFA requirements to other agencies would help regulators learn the potential impact of regulations on small business before they are promulgated. In addition, it would help alert small business owners to new regulatory proposals in the first instance.

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<sup>3</sup> <http://www.bls.gov/bdm/>

<sup>4</sup> NFIB Research Foundation, *Small Business Economic Trends*, July 2011.

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. As an example, the Environmental Protection Agency's (EPA) proposed Boiler MACT rule from last year 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. This higher standard provided little, if any, additional benefit to the public over the health-based standard. Moreover, EPA is now revising its rule because the standard it proposed is too expensive and not practically attainable. If the agency had followed the SBAR recommendations in the first instance, it would not have to jump through these additional hoops.

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 instances where EPA declined to conduct an SBAR panel despite developing significant rules, or a rule that would greatly benefit from small business input.

Congress should require agencies to perform regulatory flexibility analyses. Agencies should also be required to list all of the less-burdensome alternatives that they considered, and in the final rule, provide an evidence-based explanation for why they 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.

SBREFA contains a process 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 it is disregarded by agencies. H.R. 527 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.

Finally, when SBREFA was enacted it required all agencies to perform a one-time report on how they 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. The indirect cost of environmental regulations is particularly problematic. It is hard to imagine a new environmental regulation that does not indirectly impact small business. Whether a regulation

mandates a new manufacturing process, sets lower emission limits, or requires implementation of new technology, the rule will increase the cost of producing goods and services. Those costs will be passed onto the small business consumers that purchase them. Does that mean that all environmental regulation is bad? No. But it does mean that indirect costs must be included in the calculation when analyzing the costs and benefits of new regulatory proposals. Following are a few recent examples of the indirect cost of regulation on small business:

- NFIB member Jack Buschur, of Buschur Electric in Minster, OH, recently testified that because of the time and financial costs of EPA's lead renovation and repair rule, which took effect in April 2010, he will no longer bid on residential renovation projects.<sup>5</sup> Because he will no longer bid on these projects, Mr. Buschur will not be hiring new workers at his company of 18 employees, down from 30 employees in 2009.<sup>6</sup>
- NFIB member Hugh Joyce, James River Air Conditioning, Inc., Richmond VA, projected in testimony that new greenhouse gas regulations will add two to ten percent in consulting costs to his projects.<sup>7</sup> This is particularly telling because Mr. Joyce is committed to doing business in an environmentally-friendly manner. He is a member of the U.S. Green Building Council and conducts LEED certified green housing projects.
- The moratorium on off-shore drilling in the Gulf of Mexico has indirectly hurt those small businesses that indirectly depend on that industry and has impacted all small business owners through further dependence on foreign oil and higher gas prices. Energy costs were ranked as the second biggest problem small business owners face in the NFIB Research Foundation's most recent Problems and Priorities.<sup>8</sup>

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

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<sup>5</sup> Testimony of Jack Buschur, before the House Committee on Oversight and Government Reform, "Regulatory Impediments to Job Creation, February 10, 2011.

<sup>6</sup> Id.

<sup>7</sup> Testimony of Hugh Joyce, before the House Energy and Commerce Subcommittee on Energy and Power, "EPA's Greenhouse Gas Regulations and Their Effect on American Jobs,," March 1, 2011.

<sup>8</sup> Phillips, Bruce D. and Wade, Holly, "*Small Business Problems & Priorities*", June 2008

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. About 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 H.R. 527, NFIB is hopeful that judicial review of agency actions will provide greater deference to small business concerns.

### **Agency focus on compliance**

NFIB is concerned that many agencies are shifting from an emphasis on small business compliance assistance to an emphasis on enforcement. Unfortunately, the evidence in this area is plentiful. Both of the five-year strategic plans released last year by EPA and the Department of Labor strongly emphasized increased enforcement. In OSHA’s FY 2011 budget request, it proposed shifting 35 staff members from compliance assistance

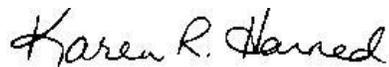
to enforcement activities. Most recently, OSHA has proposed significant changes in its On-site Consultation Program that would reduce incentives for small businesses to participate and identify potential workplace hazards. Small businesses rely on compliance assistance from agencies because they lack 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.

Additionally, 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.

With high rates of unemployment continuing, Congress needs to take steps to address the growing regulatory burden on small businesses. The proposed reforms in the Regulatory Flexibility Improvements Act are a good first step.

Thank you for holding this important hearing on reducing the regulatory burden on small businesses. I look forward to working with you on this and other issues important to small business.

Sincerely,

A handwritten signature in cursive script that reads "Karen R. Harned".

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

# 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.

## NFIB

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