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EXAMINING HOW SMALL BUSINESSES CONFRONT AND SHAPE REGULATIONS

HEARING

BEFORE THE

COMMITTEE ON SMALL BUSINESS AND ENTREPRENEURSHIP UNITED STATES SENATE

ONE HUNDRED FIFTEENTH CONGRESS

FIRST SESSION

MARCH 29, 2017

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EXAMINING HOW SMALL BUSINESSES CONFRONT AND SHAPE REGULATIONS

WEDNESDAY, MARCH 29, 2017

UNITED STATES SENATE,
COMMITTEE ON SMALL BUSINESS
AND ENTREPRENEURSHIP,
Washington, DC.

The Committee met, pursuant to notice, at 3:00 p.m., in Room SR–428A, Russell Senate Office Building, Hon. James E. Risch, Chairman of the Committee, presiding.

Present: Senators Risch, Ernst, Inhofe, Young, Rounds, Kennedy, Shaheen, and Heitkamp.

OPENING STATEMENT OF HON. JAMES E. RISCH, CHAIRMAN, AND A U.S. SENATOR FROM IDAHO

Chairman RISCH. Welcome, everyone. We will call the meeting to order. I want to welcome everyone to this issue-focused hearing, and the issue, of course, today, we are talking about is the federal regulatory structure. From my perspective, the best thing that Congress can do to help small businesses is to get out of the way. The first way you do that is to get a handle on the regulatory structure.

Often, when I talk to small business people they feel, and I think correctly so, that their complaints, when there is a regulation proposed, fall on deaf ears. We all know that it is much easier for a large business to comply when the Federal Government decides it is going to enact some type of regulation. If you are a large corporation, you have a fleet of lawyers and compliance officers and accountants that can handle it. If you are fixing lawn mowers in your garage, in a one- or two-person operation, that becomes a much, much more challenging prospect.

I think that small businesses need a break from the regulations that they have been suffering under for the last eight years. Under the Regulatory Flexibility Improvement Act that we have proposed, agencies will be required to evaluate the impact of regulations and do it in a realistic fashion. As we all know, that is already required, but our poster child for avoiding review is the Waters of the United States Rule. When the rule was proposed, incredibly, the agency said that that rule would not significantly impact small businesses, and we all know—particularly those of us from the West—how untrue that is.

I am extremely confident in America's entrepreneurs, who provide robust economic growth when we give them the chance to advance business and innovation. We need to ensure that federal agencies listen to small businesses when making rules.

I look forward to working on this committee to pass much needed reforms that empower the Office of Advocacy and give businesses—particularly small businesses—a stronger voice, while also limiting the ability of the federal agencies to impose new regulatory costs on small businesses. It is small businesses that were responsible for building this country. They built this country not because of the Federal Government, but in spite of the Federal Government. We want to go back to that, as far as I am concerned.

With that, I want to yield to my good friend and distinguished colleague, Senator Shaheen.

OPENING STATEMENT OF HON. JEANNE SHAHEEN, RANKING MEMBER, AND A U.S. SENATOR FROM NEW HAMPSHIRE

Senator SHAHEEN. Well, thank you very much, Chairman Risch, and thank you to our two witnesses who are here today. We appreciate your taking time to be here and share with us your views. And I apologize for being late. I have two other hearings going on at the same time, as is often the case in the Senate.

Mr. Chairman, I also thank you for holding this hearing today, because, as you point out, we can do better with how the regulatory process addresses small businesses. I started out life, my husband and I did, as small business owners, and I understand the challenges that small businesses face. They need to balance their budgets, meet payroll, find new customers, attract talented workers, and keep pace with the changing economy.

Small businesses have a lot to worry about and our job, on this committee, is to try and help them grow their businesses and make their lives easier, and there is no question that poorly crafted regulations can result in an excessive burden for small businesses. That is why we need to ensure that federal agencies have a regulatory process that produces smart, common-sense, and easy-to-understand rules, why we need to help them comply, and why we need to harmonize and streamline and repeal regulations that no longer make sense.

At the same time, I think it is important that we are mindful that well-crafted regulations have the potential to both encourage innovation and provide critical protections that small businesses need, and in anticipation of this hearing I reached out to small businesses in New Hampshire and heard from a few owners about what they would like to see with respect to regulations, and I want to just share two of those stories.

I heard from Jesse Laflamme, who is a CEO of Pete and Gerry's Organics, which is a small business located in Monroe, New Hampshire, which is northern New Hampshire. They produce USDA certified organic eggs. Senator Risch thinks we do not have farming in New Hampshire, but we do.

[Laughter.]

Chairman RISCH. No, I know you do.

Senator SHAHEEN. Jesse's business has thrived for over the last decade, with sales growing by more than 30 percent each year. That is a pretty good growth rate. He now sells his organic eggs at more than 9,600 locations across the country, and he writes—and I am quoting him now—"The regulations on organic food and the labeling associated with adhering to these regulations give us

an important competitive advantage in our market." He further adds that "the organic label must have real meaning or our products will lose their value-added advantage."

I also heard from Jamey French, who is the CEO of Northland Forest Products, which is a family-run business in Kingston, New Hampshire, that produces lumber for markets throughout the United States. In his letter, Jamey writes that "as a small family- and employee-owned business, we rely on a stable, consistent, and fair regulatory environment to protect us from unfair market competition and to level the competitive playing field." And he adds that "clean air, clean water, and regulations that discourage mismanagement of the working landscape are key to our future."

So I believe we can accomplish the goals that all of us would like to see, in terms of fair, effective regulations, and that is hopefully the mission of this committee and the goal of the hearing today is to hear from you all as representatives of small businesses what you would like to see us do to address these regulations.

So thank you very much, Mr. Chairman, and I look forward to hearing from our witnesses.

Chairman RISCH. Thank you so much. I appreciate it.

I am now going to recognize Senator Kennedy, who will introduce one of our witnesses.

OPENING STATEMENT OF HON. JOHN KENNEDY, A U.S. SENATOR FROM LOUISIANA

Senator KENNEDY. Thank you, Mr. Chairman. It is my pleasure today to introduce Mr. Randy Noel, who is one of our witnesses today.

Mr. Noel is from Laplace, Louisiana, which is near my place of residence in Madisonville. He is a second-generation home builder. He has more than 30 years of experience in the residential construction industry. Since founding his company, Reve Inc., in 1985, he and his company have built more than 1,000 custom homes in the greater New Orleans area. Throughout his career, he has been active with the National Association of Home Builders at the state, local, and national levels. That includes serving on the Board of Directors for more than 20 years, and is the President of the Louisiana Home Builders Association, which is a very important trade association in my State.

In 2018, Mr. Noel will become Chairman of the National Association of Home Builders Board of Directors, and I hope you will join me in welcoming Mr. Noel today. I know small businesses are important to America. They are especially important to Louisiana. We have over 400,000 in my state. Each is very important and Mr. Noel here is going to talk to us a little bit about some of the problems they have today.

Thank you for coming, Mr. Noel.

Mr. NOEL. Thank you, Senator Kennedy, my Senator from Louisiana.

Chairman RISCH. Mr. Noel, we will hear from you, and then we will hear from Mr. Knapp. We would ask you to please keep your comments to about five to six minutes. Anything you have in writing will be submitted for the record, and we will have it published in the record.

So thank you very much and welcome.

STATEMENT OF RANDY NOEL, PRESIDENT, REVE INC.; FIRST VICE CHAIRMAN, NATIONAL ASSOCIATION OF HOME BUILDERS (NAHB)

Mr. NOEL. Yes, sir. Chairman Risch, Ranking Member Shaheen, and members of the Committee, Senator Kennedy, I am pleased to be here on behalf of the National Association of Home Builders on how small businesses confront and shape regulations.

You already know, my name is Randy Noel, and I am from Laplace, a second-generation home builder, and I have been doing it for 30 years, and as Senator Kennedy said, we have built over 1,000 homes in that area.

But I understand how difficult and costly it can be to comply with government regulations. But it is not just costly for me and my business. These costs also deny too many Americans the opportunity to own a home.

According to NAHB's research, government regulations account for nearly 25 percent of the cost of a new single-family home. Worse, 14 million American households are priced out of the market for a new home. In order to reduce the regulatory burden on small businesses, NAHB believes you must restore congressional oversight authority to the process. Fix what is broken and focus on the disproportionate burden small businesses bear in complying with regulations. Today I will focus on the small business component.

While the Regulatory Flexibility Act requires federal agencies to consider the effect of their actions on small entities, agencies regularly neglect input from the regulated community and, as a result, produce very poor impact analysis. Even with these flaws, the rules go into place and businesses are forced to divert precious resources to lengthy and uncertain legal challenges.

Unfortunately, there is no other way to hold agencies accountable when they ignore the effects of regulation on small businesses, and agencies are not required to confirm their economic analysis with a respected, neutral third party.

As an example of how agencies often go off the rails, I would draw your attention OSHA's 2013 silica rulemaking. OSHA stated the cost to industry would be only—only—$511 million. A coalition of construction groups, including the NAHB, commissioned an independent study that found the true cost to the industry at approximately $5 billion—with a B—$5 billion to the industry. If I provided my clients with quotes that were 9 or 10 times below the actual cost, I would not be getting very much business. We would not have built 1,000 homes.

Part of the reason OSHA got this so wrong is they relied on a SBREFA panel that was conducted more than a decade previously. The independent study showed that OSHA just does not understand the construction industry. For example, OSHA ignored some 1.5 million workers in the construction industry who would be indirectly impacted.

Congress can help here. It is critical to include indirect costs as part of any true economic impact analysis. Additionally, that economic analysis should be reviewed by a trusted third party to en-

sure the integrity of the process. Had OSHA worked more closely and actually listened to the construction industry during the formation of the silica rule, perhaps the results would have been more effective, less burdensome rule for the industry. But at least they faked it.

The same cannot be said for the EPA Waters of the U.S. In 2014, the EPA proposed a rule challenging the definition of waters of the United States under the Clean Water Act. The agency certified the rule and, in so doing, avoided the initial economic analysis and small business panel requirements which are so critical to the rulemaking process.

I told EPA that a more thorough analysis would have revealed the burdens that this rule places on small entities, including small home builders. This rule should have triggered the requirements to convene a SBREFA panel. But the EPA claimed otherwise and there is no means to overrule.

Clearly, EPA was not interested in a hearing for the regulated community. Their only objective was to move the rule past the finish line. For a rule of this magnitude, small businesses should have had a voice in the rulemaking process. Congress set up a process for small businesses to be considered in the rulemaking process but it did not include the mechanism to hold the agencies accountable for the failure to comply.

There is no judicial review provision for the failure to convene a small business advocacy review panel. The RFA should be amended to fix this critical oversight and hold agencies accountable.

In addition to the common-sense changes to the RFA I have listened here today, there are other key components of regulatory reform being considered by Congress. Specifically, the REINS Act, which would restore congressional oversight authority, and the Regulatory Accountability Act, which would fix our decades-old, badly broken regulatory system. These two pieces of legislation, along with the changes to the RFA and SBREFA discussed today, will add fuel to the engine of economic growth that American small businesses represent.

Thank you again for the opportunity to testify, and I will be ready for questions when they come.

[The prepared statement of Mr. Noel follows:]

Testimony of

Randy Noel

On Behalf Of the
National Association of Home Builders

Before the
United States Senate
Committee on Small Business and Entrepreneurship

Hearing on
"Examining How Small Businesses Confront and Shape Regulations"

March 29, 2017

Testimony of Randy Noel
On Behalf of the National Association of Home Builders
March 29, 2017

Chairman Risch, Ranking Member Shaheen and Members of the Committee, thank you for the opportunity to testify today. My name is Randy Noel. I am a home builder and small business owner from LaPlace, Louisiana, and the First Vice Chairman of the Board of Directors of the National Association of Home Builders (NAHB).

NAHB is a federation of more than 700 state and local associations representing more than 140,000 members nationwide. NAHB's members are involved in home building, remodeling, multifamily construction, land development, property management, and light commercial construction. Taken together, NAHB's members employ more than 1.26 million people and construct about 80 percent of all new American housing each year.

The goal of today's hearing, "Examining How Small Businesses Confront and Shape Regulations," is an incredibly important one given small businesses are both the engine of growth for the American economy and disproportionately affected by regulations. According to U.S. Small Business Administration Office of Advocacy, small firms comprise 99.9% of all businesses in America and are responsible for 63% of net new jobs.[1]

The majority of NAHB's home builder members are truly small businesses constructing 10 or fewer homes each year with fewer than 12 direct employees. These builders, in addition to building homes, must navigate an ever-increasing thicket of regulations. NAHB estimates, on average, regulations imposed by government at all levels account for nearly 25 percent of the final price of a new single-family home built for sale.[2]

The significant cost of regulations reflected in the final price of a new home is not just a problem for the small businesses that build them, it has a very practical effect on main street U.S.A. – it makes affording a home that much more difficult. According to NAHB research, approximately 14 million American households are priced out of the market for a new home by government regulations.[3] It is therefore imperative that new and existing regulation must address policy objectives while recognizing the burdens of compliance, particularly for small businesses.

As a second-generation home builder with more than 30 years of experience, I understand how difficult (and often costly) it can be to comply with the many and varied government regulations that apply to my day-to-day work. And as an occasional industry representative in the regulatory rulemaking process, I am well aware of the role small businesses play in

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[1] https://www.sba.gov/sites/default/files/Whats_New_With_Small_Business_Text_Version.pdf

[2] http://www.nahbclassic.org/generic.aspx?sectionID=734&genericContentID=250611&channelID=311&_ga=1.255452874.358516237.1489032231

[3] http://eyeonhousing.org/2016/05/14-million-households-priced-out-by-government-regulation/

informing regulators of the potential burdens borne by small businesses with new regulations. I am also aware of the weaknesses inherent to the regulatory rulemaking process.

NAHB has long-supported three critical steps to address these weaknesses: restore congressional oversight authority to the rulemaking system; fix what is broken in the rulemaking process; and ensure that burdens on small businesses are a primary focus for existing and future regulations. Today, I will focus on how small businesses factor into the regulatory process.

The Good

The Regulatory Flexibility Act (RFA),[4] passed in 1980, 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 (IRFA). Such analysis must describe the impact of the proposed rule on small entities."[5]

Considering the impact of regulations on small businesses is critical to informing balanced rulemaking that achieves statutory objectives while minimizing the burdens of regulation. But this is only part of the equation. Well-crafted regulations must consider the challenges of implementing new rules in the field. This can only happen with meaningful input from affected small businesses.

Under the 1996 amendments to the RFA, known as the Small Businesses Regulatory Enforcement Fairness Act (SBREFA),[6] certain rulemaking agencies must notify the Chief Counsel for Advocacy of the Small Business Administration ("Advocacy") of a proposed new regulation who then identifies individual representatives of affected industries. The agency proposing the rule must then convene a review panel to review the materials the agency has prepared (including any draft proposed rule), collect advice and recommendations of the small entity representatives and issue a report on the comments of the small entity representatives and the findings of the panel. Following this process, the agency is supposed to modify the proposed rule, update the Initial Regulatory Flexibility Analysis (IRFA), or reconsider a decision not to conduct an IRFA.[7]

This process is designed to inform federal agencies on how to design a rule to work well for small businesses, but to be successful, input from the SBREFA process must be incorporated

[4] 5 U.S.C. 601-612
[5] 5 U.S.C. 603(a).
[6] 5 U.S.C. 609.
[7] 5 U.S.C. 609(b) (1) through (6).

into the bill. Unfortunately, the feedback from small entity representatives is rarely heeded or incorporated in final rules.

The Bad

While the congressional intent of the RFA and the subsequent SBREFA amendments are to be lauded, the rulemaking process often goes off the rails with poorly informed and woefully inaccurate cost-benefit analyses. It is imperative that proposed rules consider the true cost, including indirect costs, of compliance for small businesses.

As an example, in 2013, the Occupational Safety and Health Administration (OSHA) issued a proposed new rule to regulate workers exposure to crystalline silica. Despite evidence of a significant decline in the instances of silica related deaths (down 93% from 1968-2010)[8] and OSHA's inability to enforce the existing standard, the agency went forward with a new rule. This rule carried a cost estimate to the construction industry of approximately $511 million per year.

The Construction Industry Safety Coalition (CISC), a coalition of construction groups of which NAHB is a founding member, commissioned an independent study[9] of the proposed silica standard. This study demonstrated that the true cost to the industry would be nearly $5 billion per year—roughly $4.5 billion per year more than OSHA had estimated. If I provided my clients with quotes that were 9 or 10 times below the actual cost, I wouldn't be in a business very long.

Moreover, the study revealed a fundamental misunderstanding of the construction industry. Among other problems, the OSHA analysis had inexplicably omitted from their analysis some 1.5 million workers in the construction industry who routinely perform dusty tasks on silica-containing materials and failed to account for a variety of indirect costs associated with set-up, clean-up, materials, and productivity penalties.

The many glaring omissions and errors contributed to a fatally-flawed estimate of the true cost small businesses would bear in complying with the rule. The result was a rule that is both technologically and economically infeasible for businesses to comply with and, more importantly, one which will do little to improve the health and safety of my workers.

Congress must provide some direction to address the problem of poor or non-existent economic impact analyses. NAHB believes it is critical to include indirect costs as part of any

[8] https://wwwn.cdc.gov/eworld/Data/Silicosis_Number_of_deaths_crude_and_age-adjusted_death_rates_US_residents_age_15_and_over_19682010/768
[9] http://www.buildingsafely.org/wp-content/uploads/2015/06/CISC-New-Report-re-Occupational-Exposure-to-Crystalline-Silica_Docket-No....pdf

economic impact analysis. Additionally, economic analysis should be reviewed by a non-partisan, third party. Implementing these changes will undoubtedly improve the analysis and provide a more accurate accounting of the burdens small businesses face in complying with regulations.

The Ugly

It is bad enough when agencies neglect the true cost of compliance with regulations. It is another thing entirely when agencies ignore and refuse to listen to the regulated community. Under the RFA and subsequent amendments of the SBREFA, an agency may certify that a rule is not expected to have a significant economic impact on a substantial number of small entities. This allows the agency to skip the SBREFA requirements. Unfortunately, there is no check on whether the agency certification of no impact on small businesses is correct. Increasingly, agencies have improperly claimed that small businesses were not affected by their proposed rule, even when that clearly was not the case.

For example, in 2014, the Environmental Protection Agency (EPA) proposed a rule changing the definition of "Waters of the United States" under the Clean Water Act. The agency certified the rule and, in so doing, avoided the initial economic analysis and small business panel requirements which are so critical to the rulemaking process.

I was quite surprised the agency had certified this rule given what I knew about how it would affect my industry. And I was not alone. The Small Business Administration's Office of Advocacy publicly admonished EPA in a letter noting they had "improperly certified this rule" and stated the rule "will have a direct impact on small businesses."

I told EPA that given the vast impacts stemming from the revised definition of waters of the United States, it was clear they should have conducted an IRFA to truly assess the impact this rule will have on small business entities. A more thorough analysis of the proposal would have revealed the disproportionate burdens that this rule places on small entities, including small home builders, and would have triggered the requirement to convene a SBREFA panel.

Clearly, EPA was not interested in hearing from the regulated community. Their only objective was to move the rule over the finish line. For a rule of this magnitude, small businesses should have had a voice in the rulemaking process.

Something must be done to ensure agencies are complying with both the letter and intent of the SBREFA 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. NAHB believes that the RFA should be amended to include judicial review of

the panel requirement to ensure that the agencies adhere to the law. 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 process.

Solutions

In addition to improvements to the RFA and SBREFA I have recommended today, there are other solutions currently under consideration in Congress which are critical components to any comprehensive regulatory reform effort. Specifically, the Regulations from the Executive in Need of Scrutiny (REINS) Act and the Regulatory Accountability Act (RAA).

The REINS Act restores much-needed congressional oversight to the rulemaking process, a desperately needed improvement given the growth of the regulatory state over the past few decades. Without meaningful congressional oversight, poorly-crafted rules often go into place and businesses are forced to divert precious resources to lengthy and uncertain legal challenges.

While the REINS Act returns control of the regulatory process to the people, the RAA repairs the decades-old, badly-broken system. Taken together, and in concert with changes to the RFA and SBREFA discussed today, these reforms will add fuel to the engine of economic growth that America's small businesses represent.

Conclusion

While the original congressional intent and subsequent additions/enhancements to the Regulatory Flexibility Act 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. Agencies should seek to partner with small entities to help create more efficient, more effective regulations and, in so doing, reduce the compliance costs for small businesses. I am pleased that the Subcommittee has taken this opportunity to focus on the role of small businesses in shaping regulations and again thank you for the opportunity to testify today.

Chairman RISCH. Thank you very much.

Our second witness is Mr. Knapp. Mr. Knapp co-founded the South Carolina Small Business Chamber of Commerce in February of 2000, and serves as its President and CEO. He also serves as co-chair of the American Sustainable Business Council action fund and is the President of the Knapp Agency, an advertising and public relations firm.

Mr. Knapp, welcome, and the floor is yours.

STATEMENT OF FRANK KNAPP, JR., CO-CHAIRMAN, AMERICAN SUSTAINABLE BUSINESS COUNCIL (ASBC); PRESIDENT AND CEO, SOUTH CAROLINA SMALL BUSINESS CHAMBER OF COMMERCE

Mr. KNAPP. Thank you very much, Chairman Risch. Thank you, Chairman Risch, Ranking Member Shaheen, and members of the Committee.

Thank you for the opportunity to testify today. I would like to start with some facts. Most regulations affecting small businesses come from local and state governments. According to polling by the American Sustainable Business Council, 86 percent of small businesses believe that regulations are necessary, and 93 percent believe their business can live with fair and manageable regulations.

Regulations are not killing the economy. Tens of thousands of new jobs are being created every month. In February, South Carolina had the largest one-month increase in the number of people working. Regulations level the playing field with big business, and protect small businesses from unfair competition. Regulations create opportunity for entrepreneurs and small businesses to innovate and grow, by creating new products and services, requiring new jobs. And small business owners care about their families, neighbors, workings, communities and environment, which they want to keep safe and healthy—the goal of regulations.

So how are small businesses involved in the regulatory development process? Both the Regulatory Flexibility Act and the Small Business Regulatory Enforcement Fairness Act give small businesses impacted by proposed regulations the opportunity to weigh in on the regulation development process to let Federal agencies know how their businesses would be impacted, and encourage modifications to make the regulations less burdensome.

This process is not serving our small businesses very well. It takes years and years to promulgate a rule. Small businesses across this nation really are not having input into the regulatory decision-making process. The process has been taken over by power, often big business special interest groups with their own agenda, and have given us regulatory paralysis.

Now, how do small businesses confront Federal regulations that are of concern to them? They can personally contact the Federal agency to ask for clarification or help in compliance. The more effective approach would be to contact the Office of the National Ombudsman and ask for assistance in trying to resolve their regulatory issue with a Federal agency. Unfortunately, just as the regulatory decision-making process is not serving small businesses well, compliance assistance is also inadequate.

Here are my recommendations for a regulatory forum that will actually benefit our small businesses.

Balance the balance sheet. Why do we never see the benefits of regulations in any agency analysis? The positive side of the ledger is always blank when the potential impacts of regulations are analyzed. The economic, health, and social benefits of rules, put in terms of dollars, is not considered by the Office of Advocacy and the regulatory agencies.

We often hear critics say that government should run more like a business. Well, businesses weigh the benefits versus costs when making a business decision. No business would invest in new equipment if they only considered cost. Whether the absence of analyzing the benefits of a regulation in the formal process is by statute or custom, this must change if we are to get truly accurate data for rulemaking decisions, and give the public complete information about the value of regulations.

Invest in better outreach and analysis. We have essentially starved the regulatory agencies and advocacy, while, at the same time, wanting them to do more. But that cannot happen. Small business outreach is primarily to Washington insiders who want to clog up the regulatory process through heavy lobbying, litigation, creating public anxiety by quoting huge, bogus costs. Then the reform proposals that get the most attention fix the wrong problems, and would just make more problems.

The RFA process we have today simply needs more resources so it can run more effectively and efficiently, giving the agencies the resources to conduct a quality rulemaking analysis and outreach we all want.

Final point. Help small businesses understand the rules and provide compliance assistance. Once a rule has been finalized, the job of the Federal Government is not done. Small businesses need to be educated about the new rule and, when necessary, provided regulatory compliance assistance.

Congress has also set up a process for this, not only within every regulatory agency but also through the SBA Office of the National Ombudsman. Where the Office of Advocacy works on the front end of a development of a significant regulation, the Office of the National Ombudsman is charged with helping small businesses on the back end, with all regulation compliance. It serves as the conduit for small businesses to have their grievances about compliance problems, or other issues, with Federal agencies, heard directly by the agencies, in an effort for successful resolution. In this way, the Office of the National Ombudsman, and the agencies, can detect patterns of compliance problems so that the agencies can revisit rules for modification.

This important component of the rulemaking process is woefully underfunded. The Office of the National Ombudsman actually relies on volunteers to help get the message out about its vital small business services. It is, for the most part, unknown and underutilized. If Congress really wants to help small businesses with Federal regulations, invest more in the small business outreach, support, and feedback loop.

In conclusion, the current regulatory process can produce good rules while protecting small business from unnecessary burdens if

we provide the adequate resources for agencies to expeditiously carry out the requirements Congress has already put in place, on the front end and the back end of the process. Most regulatory reform proposals, while achieving the agenda of some seeking to delay and stop regulations, will inevitably fail to help the vast majority of small businesses.

Thank you for the opportunity to speak to you today and I welcome any questions the Committee might have.

[The prepared statement of Mr. Knapp follows:]

Statement by Frank Knapp, Jr.

Before the Committee on Small Business & Entrepreneurship
United States Senate

"Examining How Small Businesses Confront and Shape Regulations"

March 29, 2017

Thank you, Chairman Risch, Ranking Member Shaheen and members of the committee. My name is Frank Knapp Jr. I am the board co-chair of the American Sustainable Business Council which, through its network represents over 200,000 businesses and more than 325,000 business professionals, advocates for advancing policies that support a vibrant and sustainable economy. I am also the President, CEO and co-founder of the South Carolina Small Business Chamber of Commerce, a statewide, 5,000+ member advocacy organization working to make state government more small-business friendly. Finally, over the past 26 years I have started and operated my own small businesses as well as owning and managing commercial and residential investment properties.

Thank you for the opportunity to testify today. Regulations are an important part of owning and running a small business. While most of the government regulations that affect small businesses come from local and state government, there are federal regulations that either directly or indirectly impact small businesses.

Small businesses do not resent good, well thought out regulations. In fact, polling by the American Sustainable Business Council has found that 86% believe that regulations are necessary and 93% believe their business can live with fair and manageable regulations. In fact, small and big businesses alike are living with regulations and growing. The economy is booming creating tens of thousands of new jobs every month. In my home state this past February we had the largest one-month increase in the number of people working.

Small business owners know that regulations, the rules of the game, level the playing field with big businesses and protect small businesses from unfair competition from big businesses. Regulations create opportunity for entrepreneurs and small businesses to innovate and grow by creating new products and services requiring new jobs. Small business owners care about their families, neighbors, workers, communities and environment which they want to keep safe and healthy. They understand the purpose of regulations in helping achieve these objectives.

The American Sustainable Business Council asked its members to give examples of how federal regulations have helped their businesses.

For Vincent Siciliano, CEO of New Resource Bank in California, Dodd-Frank has helped his business be more competitive with larger banks because of the new rules that have changed the overdraft products and reduced ATM interchange fees.

Fire standards for residential mattresses that required that all newly manufactured mattresses in the United States meet an open flame requirement and similar federal regulations for commercial mattresses helped Harrison Murphy, founder of the innovative textile company Ventex, grow his Virginia mattress manufacturing business.

Stephen McDonnell, founder and CEO of Applegate Natural and Organic Meats, believes that his business benefited from FDA regulation on food safety.

Ben Cohen, co-founder of Ben & Jerry's Ice Cream, says that his business almost melted in 1984 due to illegal actions of a bigger competitor. He attributes much of the success of his business to government protection from unfair trade practices.

Ally LaTourelle of Bioamber, Inc. says that the renewable chemical industry has developed because of regulations to protect the public encouraged private investment and increased consumer demand due to public awareness.

However, today we are here to examine how small businesses confront and shape federal regulations.

Let's first start with the process of how small businesses are involved in the regulatory development process.

As I mentioned, regulations can benefit small businesses. But we want them to be the least burdensome as necessary to achieve their intended goal and use common sense.

That was the purpose of the 1980 Regulatory Flexibility Act—to have federal agencies determine if a rule will have a significant impact on small businesses and, if so, engage small businesses to comment before finalizing the rule to hopefully achieve the goal of creating the least burdens on small businesses.

Then in 1996 came the Small Business Regulatory Enforcement Fairness Act. This gave small businesses even more input into the regulatory process of the Occupational Safety and Health Administration, the Environmental Protection Agency and the Consumer Financial Protection Bureau through the outreach efforts of the Office of Advocacy. Affected small businesses of proposed regulations from these agencies are to be part of a SBREFA panel to obtain their advice and recommendations with a final report of findings provided to the promulgating federal agency for making needed modifications to the final rule.

This is the process small businesses have to shape federal regulations. So how is it working?

Unfortunately, not real well.

The process to promulgate a rule in order to implement a law passed by Congress can take years—2, 5, even 10 or more—to finalize. This isn't the fault of the RFA or SEBREFA.

South Carolina passed its own Small Business Regulatory Flexibility Act 13 years ago and it has worked well. We have an all-volunteer Review Committee that looks at every promulgated state regulation to see how it might be amended to be less burdensome on small businesses. Very few problems are found and when they are the Committee has worked well with state agencies to resolve the issues.

But at the federal level, small businesses across this nation really aren't having input into the regulatory decision-making process that has been taken over by powerful, often big-business special interest groups lobbying the agencies. In addition to their Washington clout, the special interests have used the courts successfully to give us regulatory paralysis.

These efforts for the most part aren't to simply lessen a burden on small businesses. Instead they are designed to help big businesses protect themselves by stalling the regulatory process so that even good, well-thought out and needed regulations can't be successfully promulgated or at least the process delayed until a different political reality happens in Washington.

Making matters worse is the fact that the whole beneficial purpose of regulations is almost completely left out of the evaluation process by the agencies responsible for considering the impact on small businesses. I will go more into why this is a problem later.

Unfortunately the regulatory reforms being offered are not designed to make the regulatory process produce fair, well-crafted regulations in a timely fashion.

Instead proposals for reform would result instead in even more regulatory chaos.

- Federal agencies will take even longer than the current years or even decades to promulgate regulations,
- There will be even more avenues for opponents of regulations to delay regulations through litigation,
- Businesses will face even more uncertainty due to the longer time needed to promulgate regulations and increased litigation.

Now, I've only been discussing the front end of the regulatory process that gets all the attention. But it's the back end of the process that is just as important to small businesses—how small businesses interact with the federal regulations that already exist.

When a real small business has a concern about compliance with a federal regulation, they have two options for trying to get help.

First, they can contact the federal agency to ask for clarification or help in compliance.

Second, they can contact the Office of the National Ombudsman and ask for assistance in trying to resolve their regulatory issue with the appropriate federal agency.

The problem with option one is that a small business owner doesn't stand much of a chance in working with a big federal agency to get personal attention even if that agency has an ombudsman.

The problem with option two is that even though it is the much better path, the Office of the National Ombudsman is almost virtually unknown outside of the Small Business Administration where it is housed and it is tiny in terms of a federal agency.

If Congress shares the belief that regulations are needed in today's fast-changing world and it truly wants to help small businesses, here would be my recommendations—none of which require changing the RFA or SBREFA.

Balance the Balance Sheet

We have created a public impression that all regulations are evil and if we would just get rid of them the economy will thrive. That's the message the public hears but everyone here knows that regulations are needed for the benefits they yield.

So why do we never see the benefits of regulations in any agency analysis? For example the EPA and the Corps estimate that permitting costs under the WOTUS rule will increase over $19 million annually and mitigation costs will rise over $59 million. These are direct costs and some believe that indirect costs should also be reported. But there is no analysis showing how these direct costs are also direct benefits to the local economy because most of this money will be go to local small businesses for goods and services. The money doesn't just disappear. It flows through the local economy directly and indirectly.

Even the U.S Chamber and NFIB in prior testimony to Congress acknowledged that agencies are to analyze costs and benefits in the rulemaking process

However, the positive side of the ledger is always blank when the potential impacts of regulations are analyzed. The economic, health and social benefits of rules put in terms of dollars is not considered by the Office of Advocacy and the regulatory agencies. We often hear critics say that government should run like a business. Well, businesses weigh the benefits versus expenses when making a business decision. No business would invest in new equipment if all they considered was cost. Whether the absence of analyzing the benefits of a regulation in the formal process is by statute or custom, this must change if we are to get a truly accurate data for rulemaking decisions and give the public complete information about the value of regulations.

Invest in Better Outreach and Analysis

Everyone, including the critics of the rulemaking process, wants more outreach and better analysis of regulatory impact in promulgating a rule. So let's invest in that. We have essentially starved the regulatory agencies and Advocacy while at the same time wanting both to do more. But they can't. Small business outreach is primarily to Washington insiders who want to clog up

the regulatory process through heavy lobbying, litigation and creating public anxiety by quoting huge bogus costs. Then the reform proposals that get the most attention fix the wrong problems and would just make more problems. The RFA process we have today simply needs more resources so it can run more effectively and efficiently. If you want agencies to cross every "T" and dot every "I" in the RFA process, give them the resources to do it so they can both perform their everyday tasks and conduct the quality rulemaking analysis and outreach we all want.

Help Small Businesses Understand the Rules and Provide Compliance Assistance

Once a rule has been promulgated and hopefully the burden on small businesses has been reduced as much as possible, the job of the federal government is not done. Small businesses need to be educated about the new rule and, when necessary, provided regulatory compliance assistance. Congress has also set up a process for this, not only within every regulatory agency, but also through the SBA Office of the National Ombudsman. Where the Office of Advocacy works on the front end of the development of significant regulations, the Office of the National Ombudsman is charged with helping small businesses on all regulation compliance on the back end. It serves as the conduit for small businesses to have their grievances about compliance problems or other issues with federal agencies heard directly by the agencies in question in an effort for successful resolution. In this way the Office of the National Ombudsman and the agencies can detect patterns of compliance problems so that the agencies can revisit rules for modifications.

This important component of the rulemaking process is woefully underfunded. The Office of the National Ombudsman relies on volunteers to help get the message out about its vital small business services. It is for the most part unknown and thus underutilized. If Congress really wants to help small businesses comply with needed federal regulations, invest more in this small business outreach, support and feedback loop.

In conclusion, the current regulatory process can produce good rules while protecting small businesses from unnecessary burdens if we provide the adequate resources for agencies to expeditiously carry out the requirements Congress has already put in place on the front end and back end of the process. Most of the regulatory reform proposals, while achieving the agenda of some seeking to delay and stop some regulations, will inevitably fail to help the vast majority of small businesses.

Thank you for the opportunity to speak before you today and I welcome any questions the committee may have.

Chairman RISCH. Thank you very much, Mr. Knapp.

What we are going to do now is do a five-minute round of questions, using the early bird rule, and I would ask everybody to keep it to five minutes and then we will do a second round if it is appropriate. People can make statements, comments, or render questions.

I am going to start very briefly and say, Mr. Knapp, thank you for coming here and providing your view of this. I have to say that your using the statistics you did at the beginning is impressive. It is the best face I have ever seen put on this disaster.

[Laughter.]

I have met morticians who could not do nearly as well as you did, so thank you very much.

Mr. KNAPP. Thank you, Mr. Chairman.

Chairman RISCH. With that I am going to yield to the Ranking Member. Thank you.

Senator SHAHEEN. Well, thank you, Mr. Chairman, and again, thank you both for being here.

Mr. Knapp, I want to follow up because you talked about the outreach by Federal agencies—it is not focused on small businesses but it is really focused on Washington insiders. How would you like to see us address that concern?

Mr. KNAPP. Well, the law does say that the agencies can get representation from whole organizations, trade associations, and they are in Washington.

It would be great if we could get them out into the outlying areas in each of your districts and to hold these types of meetings. I think often what will happen is small businesses, in a trade association or other organization, at the ground level, you know, may do things differently or have a different opinion, or even help solve the problem. But that is not necessarily the goal at the national level and in D.C. You know, often trade associations, especially big ones, have their own agenda, and that is not necessarily to help the people at the local level.

So I would like to see them out more, having more meetings, and actually engage in others, like Mr. Noel, at the local level.

Senator SHAHEEN. Thank you. Mr. Noel, do you have anything you would like to add to that?

Mr. NOEL. Yeah. Let me—the Department of Labor introduced an overtime rule and had a—I suppose it was a SBREFA panel in New Orleans, which I attended, and the room was filled with small business people discussing the impact of the—raising the limits on overtime pay. And there really was not anyone in the room, and it was all kinds of businesses—big banks, retail, you name it—and there really was not anyone in the room that thought it was a particularly good idea to go as high as they were going at the time. And it just was a little disconcerting to me that after going through that end of the—half of a day with them, that very little came, or was seen in the reports of what we said.

That is probably the most frustrating thing with rules and regulations, and small businesses' input. They get it, but it gets ignored, and there is not any way to make them account for that, and that, to me, seems to be the most frustrating thing.

So even while when we get out of Washington, D.C., and we take the message and the instructions back to our local areas where the small businesses are, it is still not working.

Senator SHAHEEN. Do you all think there is enough—are small businesses aware when there are changes being made, that they can weigh in on? Is there—are people getting that kind of information, do you think?

Mr. NOEL. I can tell you the National Association of Home Builders sends out, to its 140,000 members, an e-mail, letting them know what is coming, and we are pretty successful with getting responses and comments on the rules and regs in front of them. But again, over the years that I have been involved with them, some 25 years, even though we have had the comments and the concerns, a lot of the rules go into place without any—addressing any of those issues.

Senator SHAHEEN. But people are actually getting that information because they are part of that association?

Mr. NOEL. Association. Right.

Mr. KNAPP. Yeah, so, and they—home builders do a great job. I mean, do not get me wrong. I have known the home builders in South Carolina and they do a—they are very active and they do a good job of communicating with their members. Not all business organizations are like that, and certainly not every business—small business belongs to a trade association as powerful as the Home Builders Association.

I certainly would share Mr. Noel's concern that if information is not—is being conveyed at the local level and it is sort of not filtering or getting into the final—but again, I am not going to attribute motive to the people for doing that. I would also attribute it to the fact that they are short-staffed and there is not enough money to do it.

So I can appreciate what you are saying but there might be a different reason.

Senator SHAHEEN. I want to point out that according to Thumbtack's 2015 Small Business Friendliness Survey, New Hampshire ranked second, as the second-friendliest state in the country. Idaho was not far behind, at number six, for Senator Risch.

But you talked, Mr. Knapp, about the percentage of regulations that are done at the state and local level, and the challenges that they present. Are there ways in which we, at the Federal level, can try and work with our local and state partners to try and address regulations so that we are not overlapping on regulations, and so that we are maybe working together in a way that is more business friendly? And this is like Startup in a Day, that the National League of Cities has launched, as one of the things that may try and work through some of those regulations. But do you have other ideas?

Mr. KNAPP. Well, I do not know. Again, that is something that would have to be considered. But I will tell you that from having started small businesses, that the most regulations you run into are at the local level—local and state level. And that does not mean that there is not going to be a Federal regulation along the line——

Senator SHAHEEN. Sure.

Mr. KNAPP [continuing]. But the first obstacles are always at the local level.

Working with the states and their regulatory processes, I honestly do not know how that would work out. Everybody has got their own proprietary concerns, and that would really take a lot more effort to do that, and I do not know that the states would be interested.

Senator SHAHEEN. Thank you. Thank you, Mr. Chairman.

Chairman RISCH. Thank you, Jeanne.

Senator Kennedy, you are up.

Senator KENNEDY. Thank you, Mr. Chairman.

I want to thank both of you for coming. I enjoyed your presentations.

Mr. Knapp, could you—I am not quite sure I understood your point. This is probably my shortcoming, not yours. But in 30 seconds or less, could you tell me what you are advocating?

Mr. KNAPP. I am sorry. What am I advocating?

Senator KENNEDY. Yes.

Mr. KNAPP. I am advocating that our present regulatory process could work if it was properly funded. I really do not think that we are putting—giving enough resources to the agencies and to advocacy to do the job that they should—they are trying to do. And also on the back end. We need to set aside—if we had never had another regulation ever passed in this country, we have got a ton of them on the books, do we not?

Senator KENNEDY. I get it. I understand.

Mr. KNAPP. And that we need to be helping those who are experiencing the present regulations. If they have compliance assistance issues, we ought to be helping them.

Senator KENNEDY. So you think an ombudsman can cure all this?

Mr. KNAPP. Well, again, the national ombudsman in the SBA's office, that is what they are already charged with doing, is being that conduit if somebody contacts their office, saying, "I have an issue with this compliance—on this regulation." The ombudsman——

Senator KENNEDY. Mr. Knapp, excuse me for interrupting. I know what an ombudsman does. I did not mean to cut you off but I have only got five minutes.

Mr. KNAPP. Okay, sir. I apologize. But it is a different office. It is not the same as the agency's.

Senator KENNEDY. I want to be sure I understand what you are saying, that the answer to what I believe is the over-regulation of America, which is extraordinarily burdensome, the answer to too much government is more government.

Mr. KNAPP. Mm-hmm. In this case, if you want to help resolve the problem, let us make sure the system that you have in place is properly funded.

Senator KENNEDY. Okay. All right.

Mr. Noel, do you agree with that?

Mr. NOEL. Actually, not exactly. I will, to a comment that Ranking Member Shaheen said, that the closer—and Mr. Knapp is correct.

Senator KENNEDY. Mm-hmm.

Mr. NOEL. A lot of the regulations that we fool with in our industry is local.

Senator KENNEDY. Mm-hmm.

Mr. NOEL. Setbacks, building codes, et cetera, and some very good ones. I will tell you, from a personal experience, I find regulation coming from local government and from state government is a lot easier to comply with and have your voice heard, et cetera. Government closer to the people is a better government theory.

Senator KENNEDY. Is that because you have an ombudsman there, or——

Mr. NOEL. No. We do our own advocating there, and because we have the connection with the elected officials and they listen.

The thing—and there is some accountability in our State——

Senator KENNEDY. Mm-hmm.

Mr. NOEL [continuing]. For whether that rule or reg fits what the legislation meant it to. We have—you know how the process works there. It goes back to an oversight committee and the oversight committee approves the rule or not. That, to me, sounds like the perfect world, in doing rules and regs, and making sure they comply with the laws that were written by the elected officials. We do not have that at the Federal Government level. The rule goes in place and then someone has to sue them to make them comply with the law.

Senator KENNEDY. Mm-hmm.

Mr. NOEL. I just—it is part of the reason, I think, we have more congressional oversight on these rules and regulations. We will get better rules and regulations and we will not put something in place that will cause a small businessman to have to spend hundreds of thousands of dollars to sue to stop.

Senator KENNEDY. Well, it has also been my experience, it is not just—and I would like both of you to comment on it—it is not just the number of rules and regulations, and it is not just the complexity. I think that you will find this to be accurate, that the Federal rules generally are much more complex than state and local.

It is also an attitude. I mean, we need government workers who answer the telephone, and when they do answer the telephone, try to be helpful, which means making a decision. Now I know the safest way not to get in trouble is not to make a decision, but it kind of frustrates business. Businesswomen and businessmen are used to making a decision. It is government websites that a normal person can navigate.

I guess what I am talking about is not just the number of rules, which is breathtaking, particularly the amount added in the last eight years. It is not just their complexity. It is not just the extraordinary expense. It is the attitude of the agencies. I mean, not every time but too often you just encounter condescension and smugness and this unspoken understanding that if you complain too much, well, what goes around comes around.

Would you comment on that?

Mr. KNAPP. I will say that you have just simply made the perfect argument for having some entity like the National Ombudsman Office to be that conduit, to be the entity that goes to those Federal agencies and says, "You will talk with these people. You will try

to resolve this problem." That is what they are empowered to do, sir.

Senator KENNEDY. I am out of time. Thank you, Mr. Chairman.

Chairman RISCH. Thank you very much, Senator. You know, your argument is well taken. I think it even goes beyond that, that they should be much more results-oriented than what they are. This is the anecdote I tell. When I practiced law, a client called me and he said, "EPA guys are here and they want to inspect the business. What should I do?" And I said, "You tell them to get off the property, and never set foot on the property again unless they have a warrant from a judge, based on probable cause that there is something occurring, and if you do not, you are going to be really sorry. Because I went through a lot of those enforcement proceedings and all the agencies were interested in was money.

Now let me give you the other side of that. The fire marshal would come to my law office and say, "Jim, I am here to inspect and see if you guys are in compliance. And I would say, "Come on in and look it over and tell me where we are." And you know why I did that? Because I knew that guy was interested in seeing that my place would not catch on fire, and if it did, that they could put it out. He was not interested in raising money in fines. He would go through, he would look at it. If he got to the basement, there was always a problem; he would come up with a list and say, "Here. You need to take care of these half a dozen things and I will be back in a month to have a look at it."

That is the way it should work, not walking in and saying, "Okay, this is going to cost you this much, and this is going to cost you this much."

You are absolutely convinced after you go through some of those hearings that all agencies are interested in is dollars and cents, and for some reason, trying to slow down the business from what it is trying to do.

So if the regulatory agencies were there to help to accomplish things, like clean up the water, clean up the air, and actually be helpful to the businesses, there would be a whole different attitude about regulations.

So with that, Senator Ernst.

Senator ERNST. Thank you, Mr. Chair. Mr. Noel, thank you for being here today and testifying. Your testimony was spot-on when you spoke about Waters of the U.S. I appreciated that very much, and really had some interesting interactions through their rulemaking process, when EPA came up with that version of WOTUS, so thank you.

That rule gave the EPA the power to regulate 97 percent of Iowa. Not 97 percent of Iowa's waters—97 percent of Iowa. So that really hit home with me.

So you better believe that when that happened, when that rule was implemented, our small businesses were impacted at home, and it was EPA's failed rulemaking process, and its lack of consideration for those small businesses, that led me to work on legislation that I introduced last year called the Prove It Act. And we are currently working on what we consider a 2.0 version of the Prove It Act and we are requesting lots of feedback from different groups. But at its core, the bill seeks to strengthen the voice of small busi-

ness owners and improve the quality of agency certifications and analysis, which we felt was lacking as we went through WOTUS.

Last year we had the support of NFIB, the Chamber, and Women Impacting Public Policy. It is a good government bill that says if there is a difference in opinion between the Office of Advocacy and a Federal agency on the economic impact of the rule, such as a certification, then Advocacy should have the ability to request that the agency take a second look at its analysis, which we feel is reasonable. It would serve as a check on whether the agency certification of no impact on small businesses is correct, which is a need that you mentioned in your testimony, so thank you for highlighting that.

So my question to, Mr. Noel is this: do you think providing greater accountability for agency certification would improve the rulemaking process and outcomes for small businesses?

Mr. NOEL. Well, absolutely. I mean, if you have no accountability you can do anything you want to do, knowing there is no repercussion.

To tag on to the story about—we have builders on the north shore, in St. Tammany, that were making sure that the dirt did not go into the street, but had not had the right paperwork in their file to prove that they inspected it weekly, and 24 hours after the rain. Got fined $1,500. They were accomplishing the goal of the runoff but because the paperwork was not—the same thing happened on lead paint on a remodeling. Because he did not have a document saying he had given a pamphlet to a homeowner, he got fined. Now come on.

Senator ERNST. Mm-hmm. Mm-hmm.

Mr. NOEL. And there is nothing you can do about it, because the fine is not enough to justify hiring a lawyer and suing them, although Volks Construction did that in Baton Route and won. But this is not fair to the small American business.

Senator ERNST. Right. So we do think there should be a check and a balance——

Mr. NOEL. Absolutely.

Senator ERNST [continuing]. Available there, so that if there is question, go back and have them take a second look at it, and we are hoping to gain a little traction on that piece of legislation this year, or in this Congress. So thank you for that.

And then, second, in your experience and in your role with the National Association of Home Builders, how many proposed regulations would you say were either improperly certified by agencies or made it through the process without thoughtfully considering the comments of the small business community? Just an estimation on your part.

Mr. NOEL. How many rules came out in the last eight years?

[Laughter.]

Or the last 12 months. Hundreds?

Senator ERNST. Thousands. Yeah. Thousands.

Mr. NOEL. I know that we are dealing with, right now, at least five that we are spending court money on to stop.

Senator ERNST. Wow.

Mr. NOEL. That is not a very good use of our members' money, especially if we can stop the rule from going into place before it harms the small business.

Senator ERNST. Absolutely, and that is why I think the Prove It Act is necessary. If there is a discrepancy that can be shown, it can be re-evaluated before it is promulgated.

Mr. NOEL. That is wonderful.

Senator ERNST. Yeah, so, anyway, thank you very much, gentlemen, for being here today. I appreciate it.

Mr. NOEL. Thank you.

Chairman RISCH. Thank you. The last time I looked at statistics on the number of regulations, there were 80,000 pages of regulations passed in that year. Congress, on average, passes 800 pages of law. Now that is on average. That does not include a year when they pass ObamaCare, an extra 3,000 pages, or something. But on average it is 800 pages of law compared to 80,000 pages of regulatory work.

Senator Ernst, we are looking forward to your bills and looking forward to debating them.

Senator Rounds.

Senator ROUNDS. Thank you, Mr. Chairman.

Mr. Noel and Mr. Knapp, first of all, thank you both for being here today. In South Dakota, like in 41 other states, we have a rules review process. The Federal Government does not have one, at least not one that works. At the Federal level, the Congress will create a law, allow the Executive branch the administrative authority to write the rules, but there is no requirement, as Mr. Noel has indicated earlier, that that ever be reconciled with the actual law itself unless, at the cost of a small business person or a business person in some place, that agency is sued.

It seems to me that the best way to approach this is to have a rules review process in place at the Federal level, just like we have in 41 other states.

Can I ask each of you if you would agree that that would be an appropriate way to handle the rules processes in the future, and would that actually help us solve this problem?

Mr. NOEL. Well, I will answer it. Absolutely. It works well in my home state, and good rules and regulations and the people that participate in them, participate in the conversation, so it is not hard to enforce.

Mr. KNAPP. Yes, sir. In fact, in 2002, I was part of the group that promoted the South Carolina—passing the—their flexibility—Small Business Flexibility Act. But that is on the front end, though. So it is a volunteer group that looks at every rule promulgated by a state agency, and if they have got problems with it, they take it back to the state agency and say, you know, "Fix this." So that has worked exceptionally well in South Carolina.

Your proposal regarding having an independent entity look at a rule to make sure it complies with what the legislation said, I have not looked into that.

Senator ROUNDS. Actually, my legislation required that an agency, like in 41 states, would bring their proposed rule back to the appropriate committee at the congressional level for approval, before it becomes enacted, and while the agency could not—or while

the Congress would not be able to necessarily permanently stop the rule, they could delay it for a period of time.

Most bureaucrats want their rules to go into effect, and what you find is an interest in actually working through the issues to get an appropriate and fair rule in place, and that is after you have input from the public. The WOTUS is a great example of one which never, ever would have been allowed to move forward if it would have had a congressional oversight prior to the implementation.

I have another question as well. Do you think—would either one of you think that it is appropriate for the agency responsible for enforcement and action, do you think they should fund their agency using the fines that they collect?

Mr. NOEL. Absolutely not. I think it is a moral hazard. Education and—other things the money could be used for, other than funding the agency.

Mr. KNAPP. Certainly it creates a perverse incentive to finding problems when you do it that way, but I imagine those agencies have been told by Congress maybe they have to be self-funded.

Senator ROUNDS. The unfortunate part, CFPB is a good example, which is supposedly for consumers and yet it basically has the ability to go into a business that works for or markets to businesses, and basically they can fine a business, and they keep the money, and they actually operate the CFPB with those resources today. I find that very inappropriate. I do believe there is a moral hazard involved in that, and I disagree with the fact that it was ever done that way by Congress in the first place and should be one of the first things that we stop. We have legislation available now.

Let me ask another question very quickly. Right now we have—at the Federal level we have, as you have indicated and as the Chairman has indicated, probably 80,000 rules on the books today. We have 1 million—there is 80,000 a year—we have a million rules on the books today. The total cost to the American public today is about $1.9 trillion annually, just to comply with the rules, and if you compare that, put it in numbers that people could actually understand, personal income taxes actually cost the American public, on April 15th, about $1.4 trillion. So the actual cost to the American economy, on an annual basis, is a half a trillion dollars more than what personal income taxes are to the individuals who actually own those businesses.

It seems to me that if those rules were reviewed on a regular basis that we would have fewer of those, there would be more dollars to the bottom line, there would be more revenue generated on actual profits delivered, and you would actually have some happier businesspeople and you would have happier consumers as well. Your thoughts, gentlemen?

Mr. NOEL. I would say I would agree with that. Certainly our economy has been dragged by these regulations that we have, and the industry that is leaving our shores is clearly an indication of that.

Mr. KNAPP. My first comment about that $1.9 trillion figure, I think that was produced by a study for Advocacy, which later was disavowed by SBA, so I am not sure about the number.

Senator ROUNDS. It is probably higher.

Mr. KNAPP. But the look-back thing, there is nothing wrong with that. You know, in South Carolina that regulatory flexibility access, yes, they should go back and look at the rules to see if they are still appropriate or need to be modified. The problem with that is it takes money to do that, and again, I just do not think we are funding the process well enough to do that, which we may all agree with.

Senator ROUNDS. Thank you. Thank you, Mr. Chairman.

Chairman RISCH. Thank you, Senator Rounds.

I think one of the problems on this whole regulatory thing is that we have all forgotten, or were never taught in our basic civics classes in grammar school that with the regulatory structure, the regulatory enactment is not an inherent power of the second branch of government—that belongs to the first branch of government—yet somehow that has slipped away. The first branch of government, of course, from time to time, allows the second branch to enact those regulations, and has to because it cannot enact them all. For instance, a classic example is Fish and Game type things, shooting hours, bag limits and that sort of thing. Those are the rules and regs that should be sent out.

But we need to get back to an understanding that the second branch of government is merely the second branch of government. Their job is to execute the laws that the Congress—or in the states, the legislature—enacts. The legislative authority is not inherent in the second branch of government. It only exists because of what the first branch gave it.

Sometimes when you listen to courts and you listen to other people, they talk like rulemaking is an inherent part of the second branch of government, but it is not. When a rule or regulation is enacted, it has substantive effect of force of law, and it was never intended by the Founding Fathers to be part of the second branch of government. It was supposed to be such that the second branch would execute.

One of the strengths of this country is the fact that it gave us three branches of government that would be separate and equal, and each would have its own lane that it stayed in. We have really drifted away from that.

What we do in Idaho, I think is unique. When I came to the state legislature in 1975, rulemaking and rule review, et cetera, was the same as it is here right now. If the agencies enacted a rule pursuant to the rulemaking authority by the legislature, then that had the full force and effect of law. If the legislature wanted to change agency rules, it took a bill in each house and signature by the governor.

What we did, when I headed the State Senate, I negotiated and we changed that. What we have now is a situation where the bureaucracy can pass whatever rule and reg it wants, pursuant to authority from the legislature. But that rule only lasts until the last day of the next regular legislative session. When the session starts, all the rules and regs that have been enacted during the year are handed out to the appropriate committees. They review them and the only way that the rules last is if, on the last day of the session, when they pass an omnibus regulatory bill, that the rule or reg is in there. Some 90 percent of them do pass and they are in that bill,

but they always leave about a dozen of them on the table. This is done not by a statute, but by a resolution, so it does not go across the governor's desk. It is the first branch of government doing what the first branch of government should do, and that is dealing with legislation.

It is a good way to do it. I often thought that would work substantially better here, because the substance that is passed here is just breathtaking when you see the kinds of things that the bureaucracy does here. I mean, you look at that and you wonder why there is a first branch of government when the bureaucracy is doing what it does.

Senator ROUNDS. Would you yield for just a——

Chairman RISCH. Certainly.

Senator ROUNDS. I absolutely agree with your analysis on it, and I think if there was one thing that we, as a committee, could do, if there was a way to begin the process of an open dialog, and a rules review process that was more adept than the one which is currently here, which, you know, we are working through right now where it literally takes an act of Congress, signed by the President, on a rule, and you have still got limits on that in terms of what you can do, and it still runs through a time frame in which we have to be proactive in getting the thing done.

It seems to me that any rule at the Federal level should still be subject to some sort of a congressional oversight, and when you look back at the committees that are there, it seems to me that they are reasonable and it would not be an unreasonable approach to have those committees, with jurisdiction, to review those particular proposed rules, prior to the fact that they go into effect, if nothing else, just because, like in 40 states, or 41 of the states, you actually get better rulemaking process and you get a more open intake, because the bureaucrats learn real quick that if they want it to happen they are going to have to accept some input from the people that they are regulating.

And I think we have really fallen down on that, at the Federal level, and I think we could do marvelous things for our country, and for the businesses that are generating jobs, if we could get a hold of this regulatory morass that we have got today.

Thank you, Mr. Chairman.

Chairman RISCH. Well, there is no question about that, Senator. We appreciate that.

I would like to introduce Marty and Cindy France from Idaho. Could you stand up? They just came in. Mr. Knapp, they will be happy to sit down and tell you that their business was a casualty of government regulation. They came to see me today and it was fortuitous that we were having this hearing. Thank you for coming, we appreciate your issue, and we are going to try to see if we cannot do something about that.

With that, Senator Heitkamp is supposedly on the way. Is that right?

[Pause.]

Gentlemen, do either of you have anything else for the good of the order?

Mr. NOEL. Just other than thank you for giving me the opportunity to represent the 140,000 members of the association.

Chairman RISCH. We appreciate that, and Mr. Knapp, we also appreciate you. This is not a partisan issue. Admittedly, we have a little different issue as to the mass of the regulations. But on the other hand, I think we all agree that there are some regulations that are necessary, there are a whole lot more that are not, and we all need to be vigilant on that.

Senator Heitkamp, I have been stalling here. I have been filibustering. You know what a filibuster is?

Senator HEITKAMP. I do. You do too. Unfortunately, we do.

[Laughter.]

Chairman RISCH. Thank you so much for joining us.

Senator HEITKAMP. Mr. Chairman, thank you so much for giving me an opportunity to ask a few questions. I was just over at another committee, and so I think it is always important. Small business, obviously, is the cornerstone of American business, but it is particularly important in North Dakota. And so I take the role on this committee quite seriously and always appreciate the work that the chairman does in a very nonpartisan way——

Chairman RISCH. Thank you, Senator.

Senator HEITKAMP [continuing]. To——

Chairman RISCH. We have had a really good, robust discussion.

Senator HEITKAMP. Good. Well, I will have to watch it on YouTube. I am sure it was so interesting it will probably make the nightly news.

Chairman RISCH. It might have three views.

[Laughter.]

Senator HEITKAMP. When I talk to North Dakota small business I think they continue to be really concerned about regulatory burdens and how do we kind of overcome those. But I know that a lot of this ground has been covered, and so I want to say where I believe it is always important to consider actual consequences of proposed legislation. So I want to ask both of you if you worry that legislation which adds analytical requirements, which cause regulatory delay, whether that is going to be a problem for small business, because a lot of what we hear is not just the regulation itself but the uncertainty and the delay in finding out what the rules are going to be.

So I ask that question of both of you. Randy, maybe you could start.

Mr. KNAPP. Well, thank you, Senator, and welcome. Uncertainty is really, really an issue for any business, small or large. How can they make a decision on what they are going to do if they do not know what the rules are going to be two years from now, four years from now, five years from now? So anything that does not improve the system and simply adds more time, more delay, is not a way of addressing the problem that we all agree that there are problems.

So, yes, that would be my response. If you are going to do something that is going to actually help fix the problem, and it delays it a little bit, okay. But if it is simply going to delay, to stall, to wait for a new administration to do something, then we are not helping anybody.

Senator HEITKAMP. Randy.

Mr. NOEL. Okay. Regulations to keep water from flowing into the waters of the U.S. and polluting the water is a good regulation. When I build a home, I have to do a storm water prevention pollution plan. I have to figure out a way to keep the pollution from coming off my site, into the drainage system, into the waters of the U.S.

The Environmental Protection Agency oversees that with the state. They tell you not how to do that. They refuse to tell you how to do that. You have to figure that out on your own, with best practices, and research, et cetera, et cetera. But they do fine you if you do not have the paperwork, where you were supposed to make the inspection every week, or after a rain, or you happen to have a little bit of river sand in your street. They do fine you and fine you for that.

So when we do rules and regulations, you know, I think the American people get we want clean water and clean air and safety when it comes to building homes, et cetera, but, you know, let us get there with something that makes sense. The paperwork does not help us get there. Why are we fining them for that, you know. So when we do a rule or reg, if they will listen to the people that are involved in the rule or reg, on how to accomplish the goal, and actually put it in the rule or reg, we have a fighting chance. But if the agency just completely ignores what we tell them, there is no repercussion to the agency.

Senator HEITKAMP. Yeah. I think one of the challenges that we have is this seemingly adversarial relationship that should not exist, because we all have the same goal. And, you know, one of the things that we have been working on is doing something in a broader way with advanced notice of proposed rulemaking. I like to put it this way, that, you know, if you gave me a task and I sat down and thought about it hard, and, you know, I got some input from some people that work around me and I write the regulation, and then someone comes in and tells me I am full of it, I am going to be a little more defensive and protective of that regulation.

But if I open up the door, on the front end, and say, "Okay, we want to prevent runoff. What is the best way to do it, and how can we—what concerns would you have on this? Do we need to have paperwork every week? Do we need to have compliance checks every week? Can we do this in a way that we can trust each other a little bit, as long as we have common goals?" and I think that continues to be the challenge, this adversarial relationship that presupposes people do not have the same goals for clean air and clean water.

So we need a little common sense in all of this and we are working to try and make it happen, but I am particularly concerned with the impacts that all of this has on small business, because, you know, if you can hire an army of lobbyists here, you know, you are going to be well represented. They are going to knock on our door. But if you are just the contractor that is out there struggling, trying to make it work, and you just get it heaped on and heaped on and heaped on, eventually you are going to give up.

Mr. NOEL. Right.

Senator HEITKAMP. And so we are going to continue to examine this area. We have got a number of pieces of legislation I think we

need to work through, but I wanted to be here because regulatory reform is a big part of what I am trying to do, not just on this committee but also on the subcommittee that I serve on, on Homeland Security and Government Affairs. So stay tuned. We are hearing you and hopefully we will get you some relief.

Mr. NOEL. Thank you.

Chairman RISCH. Encouraging words. Thank you very much, Senator.

Gentlemen, thank you. I appreciate it. It has been a good hearing and I thank all of you who attended.

This meeting will be adjourned.

[Whereupon, at 4:02 p.m., the Committee was adjourned.]

APPENDIX MATERIAL SUBMITTED

Opening Statement
Senator Jeanne Shaheen, Ranking Member
Hearing: Examining How Small Businesses Confront and Shape Regulations
U.S. Senate Committee on Small Business and Entrepreneurship
March 29, 2017

Mr. Chairman, thank you for holding this hearing today, and I appreciate everyone being here to discuss ways to improve the regulatory process for small businesses.

As a former small business owner, I understand the challenges that small businesses face. They need to balance their budgets, meet payroll, find new customers, attract talented workers and keep pace with a rapidly changing, global economy. Small businesses have a lot to worry about, and our job on the Small Business Committee is to make their lives easier.

There is no question that poorly crafted regulations – whether at the local, state or federal level – can result in an excessive burden for small businesses. Unlike big companies, small firms often don't have the time and resources to devote to understanding new rules or to figure out how to comply.

That's why we need to ensure that federal agencies have a regulatory process that produces smart, common-sense and easy-to-understand rules.

One key to an effective regulatory process is to ensure that federal agencies comply with the Regulatory Flexibility Act (RFA), which requires them to work with the Small Business Administration (SBA) to conduct outreach and generate real input from small businesses.

Another meaningful way to help small businesses with regulations is to ensure that our federal agencies – including the SBA – are actively helping them comply with the rules. Enhancing federal outreach and assistance to small businesses will help level the playing field by making rules easier to understand and follow.

We also need to harmonize, streamline and repeal regulations that no longer make sense and unnecessarily add to the regulatory burden facing small businesses. That's why I cosponsored Senator King's Regulatory Improvement Act to identify antiquated, duplicative and unnecessary regulations and create an expedited process for Congress to review or repeal them.

At the same time, we need to be mindful that well-crafted regulations have the potential to encourage innovation and provide critical protections that small businesses need.

In anticipation of this hearing, I heard from several New Hampshire small businesses who expressed their support for well-crafted regulations that they rely on to succeed. I would like to enter their statements into the record, but let me give a couple examples.

I heard from Jesse Laflamme, who is the CEO of Pete and Gerry's Organics, a small business located in Monroe, NH that produces USDA certified organic eggs. Jesse's business has thrived over the last decade, with sales growing by more than 30 percent each year. Jesse now sells his organic eggs at more than 9,600 locations across the country. He writes, "the regulations on organic food and the labeling associated with adhering to these regulations give us an important competitive advantage in our market." He further adds that the organic label must "have real meaning or our products will lose their value added advantage."

Jameson ("Jamey") French is the CEO of Northland Forest Products, a family run business in Kingston, New Hampshire that produces lumber for markets throughout the United States. In his letter, he writes that "as a small family and employee owned business, we rely on a stable, consistent and fair regulatory environment to protect us from unfair market competition and to level the competitive playing field." He adds that "clean air, clean water and regulations that discourage mismanagement of the working landscape are key to our future."

Millions of American consumers, families and workers rely on smart regulations in their daily lives. We need good standards that ensure that our air and our water are clean. Parents need to know that the food they put on the table and the toys they buy for their children are safe. And American families and entrepreneurs need to know that their nest eggs aren't threatened by another financial crisis, like the one that decimated so many small businesses across the country.

I believe we can accomplish these goals while also improving the regulatory process for small businesses, and I am looking forward to hearing from our witnesses today.

Thank you.

Senate Committee on Small Business and Entrepreneurship Hearing
March 29, 2017
Follow-Up Questions for the Record for Randy Noel

Questions from Senator Inhofe

Question 1: Can you speak to the impact the WOTUS rule would have had on homebuilders?

Answer: The WOTUS rule in conjunction with the Modified Charleston Method of mitigation would have delayed development (which already takes 1 to 5 years in many places across the country), added significant costs to homes, and created uncertainty for small businesses. Small businesses need certainty before they risk resources developing property or building homes. The WOTUS Rule created such a broad definition that developers just ceased operations in many areas which has added to a persistent lot supply problem. The unintended consequences of this lower lot supply drives up prices on homes and limits housing affordability, denying Americans the dream of homeownership. Given all the benefits of homeownership to society - stability, community support, and retirement savings - the broader consequence of the WOTUS Rule would have been a great cost to America as the result of this flawed rule issued by an agency unaccountable to Congress.

The other consequence that is evident at NAHB is the loss of home builders across the nation. The home building industry creates jobs and has always led the nation out of recession. As I'm sure you understand, this recovery has been weak which may be attributable to loss of many of the nation's home builders that went out of business.

Had the agencies involved seen and acted on small business concerns on WOTUS, these consequences may have been averted.

Question 2: Will these bills help in regulatory reform and what other changes need to be made in the regulatory process to ensure that small businesses voices are heard?

Answer: These bills would represent a significant step in the right direction in reforming our broken regulatory process. Regulations the American small business community has to comply with have become a drag on business investment and productivity. The frustration from my community is the lack of accountability agencies have. Millions of dollars and significant productivity has been sucked out of the economy in recent decades due to regulations from agencies that have overstepped congressional authority. Congress passes laws and the administration administers those laws. It is critical that, in addition to these reforms, something

be done to restore agency accountability to the American people before regulations go into effect. Greater public input and transparency into the regulatory process are all valid checks on erroneous regulations, but they have been ignored repeatedly and have been proven ineffective in enforcing agency accountability. Congress needs to review every significant regulation before the regulation is enacted.

Question 3: If this rule were to go into effect, what would be the ramifications to the housing industry? Could we see costs of homes increase?

Answer: Department of Labor Overtime rule is a classic example of the agencies lack of accountability. I personally participated in a small business forum on this issue and heard no one in the room from many different small businesses who thought this rule was good for the country. Many small businesses and home builders do not have sufficient volume to justify full-time employees with required benefits. The unintended consequences of this rule would likely be layoffs of employees and increases in home costs. Why not let Congress give the rule an up or down vote before it goes into effect? Let Congress see and read the responses from small businesses on regulation before a rule goes into effect. Congress is after all the representative of these same small businesses.

THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

Public Interest Comment[1] to the

Commission on Evidence-Based Policymaking

Docket ID USBC-2016-0003; Docket No. 160907825–6825–01

"Commission on Evidence-Based Policymaking Comments"

November 8, 2016

Marcus C. Peacock[2]
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Daniel R. Perez[4]

The George Washington University Regulatory Studies Center (the Center) improves regulatory policy through research, education, and outreach. As part of its mission, the Center approaches regulatory problems from the perspective of the public interest and occasionally responds to government requests for input. The Center provides these comments regarding question numbers 1, 10, and 15-19 presented in the Supplementary Information section of the Commission on Evidence-Based Policymaking's (the Commission's) *Federal Register* notice issued on September 14, 2016. These comments are organized in six sections. The first section is an introduction. Each subsequent section corresponds to one or more of the Commission's questions. An additional section at the end proposes specific findings, conclusions and recommendations for legislation or administrative action that the Commission may want to include in its final report.

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[1] This comment reflects the views of the authors, and does not represent an official position of the GW Regulatory Studies Center or the George Washington University. The Center's policy on research integrity is available at http://regulatorystudies.columbian.gwu.edu/policy-research-integrity. The Center is located at 805 21st St. NW, Suite 612, Washington, DC 20052.

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Introduction: Evidence-Based Regulation (EBR)

Regulation may have a larger impact on society than any other single federal policymaking process. Regulations protect public health, promote economic growth, and help preserve our environment. Various estimates of regulation's impact on society vary from over $260 billion to over $2 trillion.[5] By comparison, the total of all federal funding for research and development, for instance, is less than $160 billion a year.[6]

The Regulatory Process Differs from Other Policymaking

As the Commission examines strategies to better build evidence-based programs and policies throughout government, it is vital to understand the regulatory policymaking process already incorporates significant requirements regarding the collection, use and accessibility of data that differ from other policymaking processes. For instance, the Administrative Procedure Act of 1946[7] (the APA) requires regulatory agencies to both disclose, as well as request from the public, data or other information pertinent to a rulemaking.[8] Likewise, the APA compels agencies to justify most regulatory decisions based on the data, analyses, and other information collected and made part of a publicly available record. If, for instance, a decision appears "arbitrary and capricious" compared to the evidence in the public record the resulting regulation may be vacated.[9]

The APA is not the only important mandate affecting the collection, dissemination, and analysis of data during regulatory policymaking. Other requirements unique to regulations include, but are not limited to:[10]

- The Regulatory Flexibility Act of 1980 which requires agencies collect and assess data regarding the effect of major proposed regulations on small businesses;
- The Unfunded Mandates Reform Act of 1995 which established a requirement to collect and analyze data regarding certain regulatory burdens on state and local governments;

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[5] Maeve P. Carey, "Methods of Estimating the Total Cost of Federal Regulations," Congressional Research Service, 21 January 2016, p. 2. See https://www.fas.org/sgp/crs/misc/R44348.pdf

[6] This estimate was produced by the American Association for the Advancement of Science in 2016. See http://www.aaas.org/sites/default/files/Function%3B.jpg

[7] Pub.L. 79–404, 60 Stat. 237.

[8] See, for instance, the requirements to disclose information at 5 U.S. Code § 552(a) and to request information at 5 U.S. Code § 553(c).

[9] 5 U.S. Code § 706(2)(A).

[10] This list adapted from Susan E. Dudley and Jerry Brito, *Regulation: A Primer*, Second Edition, Washington DC: The Mercatus Center and The George Washington Studies Center (2012), pp. 45-47.

- The Small Business Regulatory Enforcement Fairness Act of 1996 requiring *ex ante* evaluations of the impact of certain regulations on small businesses;
- The Congressional Review Act of 1996 requiring the submission of certain regulatory data and documentation to Congress;
- The Truth in Regulating Act of 2000 allowing Congress to request the Government Accountability Office evaluate certain proposed and final rules;
- Executive Orders 12866, 13563 and 13579, as well as OMB Circular A-4 regarding analyses that must be performed before certain rulemakings can be proposed or finalized; and
- These Executive Orders and Executive Order 13610 also encourage agencies to perform *ex post* reviews of the effectiveness of regulations.

In addition, there are other laws affecting data collection and use which, while not unique to the regulatory process, originated due to concerns regarding regulations. Such laws include the Paperwork Reduction Act of 1980 (affecting the government collection of information) and the Information Quality Act of 2000 (which established minimum requirements for the utility, integrity, and objectivity of information used by government).

The unique data constraints placed on regulatory policymaking makes evidence-based regulation a distinct subset of evidence-based policymaking. It means that in some situations a recommendation that may benefit most methods of policymaking may be undesirable, or even illegal, in the rulemaking process. For instance, the Commission could recommend agencies seek out particular types of data and experts in order to help determine where federal grants may have the greatest impact. Regulatory agencies who follow formal, or adjudicatory rulemaking procedures, however, may be subject to charges of inappropriate *ex parte* communication if they undertook the same action.[11] Even for informal, notice-and-comment rulemaking, final actions are often subject to litigation, which places additional constraints on the evidence in the record. The Commission may well need to make recommendations that are tailored to regulatory agencies or, at least, identify which recommendations do, or do not, apply to regulatory policymaking.

[11] Unlike designing a grant program, the prohibition of *ex parte* contact during certain rulemakings recognizes that making regulations can have the character of an adjudication with a decision 'on the record' by an impartial decision-maker. Because such contacts may not be monitored, they create a risk that the decision-maker's neutrality may be compromised. For more information see Edward Rubin, "It's Time to Make the Administrative Procedure Act Administrative," *Cornell L. Rev.* 89:95 (2003). See http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=2940&context=clr

In order to assist the Commission in making recommendations specific to regulatory policymaking, the following comments focus solely on the regulatory process. The Center is available to assist the Commission in determining whether other recommendations it wishes to consider may or may not improve regulatory policymaking.

A Framework for Evidence-Based Regulation

Regulators should be able to demonstrate they are benefitting peoples' lives by creating policies that address a "compelling public need," as directed by Executive Order 12866.[12] Increasing the use of evidence in making regulations will make agencies smarter, improve regulatory decisions, and, ultimately, result in better outcomes for society. Recognizing this, we offer the following integrated framework describing a system that produces evidence-based regulation (EBR) (see box below). *An EBR process plans for, collects, and uses evidence throughout the life of a regulation to predict, evaluate and improve outcomes.*

The framework is structured around the three main phases of regulating: design, decision-making, and retrospective review. It creates a feedback loop (through retrospective review) during implementation of the rule so that data are not only used in developing the regulation but also in periodically reassessing its value and modifying the rule as appropriate. Importantly, this framework incorporates important and current requirements of the federal rulemaking process pertinent to the collection and use of data.

While it is not necessary for the Commission to endorse the EBR Framework, the Framework provides a coherent integrated system for answering a number of the Commission's specific questions.

[12] E.O. 12866, *§1: Statement of Regulatory Philosophy and Principles.*

Evidence-Based Regulation Framework

I. Regulatory Design

A. Identify the problem (state the "compelling public need").

B. Evaluate whether modifications to existing rules can address the problem.

C. Identify and assess available alternatives to direct regulation.

D. If regulating, determine that the preferred alternative addresses the problem.

E. Set clear performance goals and metrics for outputs and outcomes.

F. Exploit opportunities for experimentation.

G. Plan and budget for retrospective review.

II. Regulatory Decision-making

A. Assess the expected benefits, costs, and other impacts.

B. Clearly separate scientific evidence from policy judgments.

C. Make relevant data, models and assumptions available to the public.

III. Retrospective Review

A. Reassess planned retrospective review and modify if necessary.

B. Gather necessary data on regulatory outputs and outcomes.

C. Implement retrospective review plan.

D. Compare measured outcomes to original performance goals.

E. Reassess the rule using new information and the factors in the regulatory design.

Questions 1 & 15 Regarding Challenges, Barriers, and Solutions

Question 1. Are there successful frameworks, policies, practices, and methods to overcome challenges related to evidence-building from state, local, and/ or international governments the Commission should consider when developing findings and recommendations regarding Federal evidence-based policymaking? If so, please describe.

Question 15. What barriers currently exist for using survey and administrative data to support program management and/or evaluation activities?

Questions 1 and 15 are combined since two of the barriers we identify in response to question 15 can be overcome by policies, practices and other methods that we also identify for question 1. Specifically, agency noncompliance with internal administrative requirements and inadequate funding of program evaluation are two barriers the regulatory system currently faces in collecting and using data to improve regulations and offers potential solutions to each one.

The Challenge of Noncompliance with Internal Directives

A barrier to evidence-based regulation is a lack of faithful compliance with internal administrative requirements. For instance, since 1981 presidents have required regulators who were considering a new regulation to identify and disclose the problem they intended to solve by regulating and assess different regulatory alternatives to solving that problem (these are items I.A. and I.C. under "Regulatory Design" in the EBR Framework shown above). In addition, each president since Jimmy Carter has required regulators to assess and disclose both the expected benefits and the expected costs of the regulatory alternatives (the estimation of both benefits and costs is shown in item II.A. in the EBR Framework).

Identifying the problem to be solved is a prerequisite for designing a regulation that provides net social benefits[13] and for evaluating the effectiveness of a rulemaking once it is in place. Absent a clearly identified market failure, regulation and other forms of government intervention can disrupt competition, and lead to misallocation of resources.[14] Thus, targeting a fundamental problem rather than relying on anecdotes to support regulation is important, not only for regulatory design but for knowing what data to collect. Likewise, laying out policy alternatives[15]

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[13] According to E.O. 12866, "Each agency shall identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action) as well as assess the significance of that problem." (Principles of Regulation, Sec.1(b)(1))

[14] Office of Management and Budget, "Circular A-4: Regulatory Analysis." September 17, 2003. https://www.whitehouse.gov/omb/circulars_a004_a-4

[15] E.O. 12866 states, "Each agency shall identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or

and using data to assess expected benefits and costs[16] is a fundamental method of informing decision-makers. Nonetheless, in 2014 the Government Accountability Office estimated that less than a fourth of new significant rules disclosed these four basic presidential requirements.[17]

A more recent example of agency noncompliance with internal administrative requirements entails the retrospective review of regulations (items I.G. and III. in the EBR Framework). Every president since Jimmy Carter has required the *ex post* evaluation of regulations (retrospective review). Most regulatory decisions rely on predictive models and assumptions, but rarely are those hypotheses evaluated based on real world evidence.[18] A requirement to evaluate whether predicted effects of regulations were realized would provide a powerful incentive to improve *ex ante* regulatory impact analyses, as well as improve regulations that are already in place.[19]

With this in mind, in 2011 and 2012 President Barack Obama signed three Executive Orders attempting to get agencies to more aggressively adopt the retrospective review of regulations: Executive Order 13563 "Improving Regulation and Regulatory Review,"[20] which reinforced the requirements of Executive Order 12866; Executive Order 13579,[21] which expanded the requirements to independent regulatory agencies; and Executive Order 13610, which emphasized that "further steps should be taken…to promote public participation in retrospective review."[22,23]

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providing information upon which choices can be made by the public." (Sec.1(b)(3))

[16] E.O. 12866 states, "Each agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs." (Sec.1(b)(6))

[17] Government Accountability Office, "Federal Rulemaking: Agencies Included Key Elements of Cost Benefit Analysis, but Explanations of Regulations' Significance Could Be More Transparent," September 2014, p. 18. See http://www.gao.gov/assets/670/665745.pdf

[18] See, for instance, a discussion of the assumptions and models used to establish the ozone national ambient air quality standard at Susan E. Dudley, *Regulatory Science and Policy: A Case Study of the National Ambient Air Quality Standards,* The George Wash. Univ. Reg. Studies Ctr. (September 2015), pp. 11-12. http://regulatorystudies.columbian.gwu.edu/regulatory-science-and-policy-case-study-national-ambient-air-quality-standards

[19] Susan E. Dudley, *A Retrospective Review of Retrospective Review*, The George Wash. University Regulatory Studies Center (May 2013), p.2. See http://regulatorystudies.columbian.gwu.edu/files/downloads/20130507-a-retrospective-review-of-retrospective-review.pdf

[20] Executive Order 13563 was followed by implementation guidance. See Memorandum from OIRA Administrator Cass Sunstein to the Heads of Executive Departments and Agencies, "Retrospective Analysis of Existing Significant Regulations," 25 April 2011 at https://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-19.pdf

[21] Executive Order 13579, "Regulation and Independent Regulatory Agencies." July 14, 2011. 76 FR 41587.

[22] It should be noted that, in addition to these Executive Orders, some laws require the retrospective review of certain regulations. For instance, section 812 of the Clean Air Act Amendments of 1990 requires the Environmental Protection Agency to periodically assess the benefits and costs of regulations promulgated under the Act.

However, an independent review of high-impact rules issued in 2014 found that the key requirements in these directives were seldom followed.[24] For example, the identification of measurable metrics that could be subsequently used to evaluate the impacts of rules were only identified in one-third of the regulations, and even fewer for rules issued by independent agencies. To be clear, this is not a recent problem. As a general matter, such levels of noncompliance with presidential Executive Orders and other internal Executive Branch guidance in modern times are not unusual.[25]

Solving Noncompliance through Independent Review, Codification, and Competition

In examining how to improve the performance of people working in government bureaucracies, management expert William Medina has laid out three ways to change behavior:[26]

- compel them (forced change);
- persuade them (through education); and/or
- change their incentives.

A recent review of a lack of faithful compliance with government-wide reforms in U.S. federal agencies over a period of fifty years found three possible ways to improve behavior: create independent organizations to help execute the rules; codify administrative requirements into law; and create competition.[27] The first two methods force change while the third attempts to change incentives.

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[23] Executive Order 13610, "Identifying and Reducing Regulatory Burdens." May 10, 2012. 77 FR 28469.

[24] Sofie E. Miller, "Learning from Experience: Retrospective Review of Regulations in 2014," Working Paper, The George Washington University Regulatory Studies Center, November 2015. As a general matter, other researchers have also concluded that there is generally a lack of compliance with retrospective review requirements. See Reeve T. Bull, "Building a Framework for Governance: Retrospective Review and Rulemaking Petitions," *Admin. L. Rev.*, 67:265 (2015).

[25] See, for instance, the lack of compliance with eight government-wide reforms since 1965 discussed in Marcus C. Peacock, "Improving the Accountability of Federal Regulatory Agencies Part II: Assessing Eight Government-wide Accountability Reforms," 28 June 2016. This can be accessed at https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/RegInsight_Peacock-Reforms-Improving-Accountability_pt2.pdf

[26] William A. Medina, *Changing Bureaucracies: Understanding the Organization Before Selecting the Approach*, Marcel Dekker, Inc: New York, NY (1982), pp. 118-119.

[27] See Marcus Peacock, "Improving the Accountability of Federal Regulatory Agencies Part III: What Reforms Work Best," Regulatory Insight, The George Washington University Regulatory Studies Center, 12 September 2016, p. 22. See http://bit.ly/2fvzFLg

Strengthening Independent Review

There are many examples of governments tackling the problem of internal noncompliance by creating independent organizations to either monitor compliance (such as the Inspectors General) or to faithfully execute the requirements themselves. A specific example of the latter strategy is in the European Union (EU).[28] Concerns regarding a lack of compliance with internal guidelines requiring the self-evaluation of the effectiveness of policies[29] resulted in the EU creating a separate *ex post* evaluation body. This new organization is completely independent from the member nations and reports directly to the European Parliament.[30]

Independent review does not necessarily entail creating a new entity. The Commission may wish to consider, for instance, enlisting the U.S. court system to improve compliance. Judicial review has been largely successful in achieving compliance with the public notice and evidentiary requirements codified in the APA (discussed above). Agencies know their regulations can be nullified unless they can convince a court that the standards of transparency and assessment set out in the APA have been met. Expanding the existing judicial review of regulations to include one or more elements of the EBR Framework, such as determining whether a final rule includes an adequate plan for retrospective review, would undoubtedly improve compliance with those elements. Relying on the courts would also avoid the cost of creating a new entity within the federal government.

Codification of Accepted Practices

Another approach to motivating agencies to comply with internal administrative requirements is to codify such requirements in law. For instance, the last section below includes a recommendation that elements of the EBR Framework that have been adopted by consecutive presidents over a long period of time be more firmly institutionalized by putting them in law. This would be an incremental step in improving compliance as it would increase their permanence and subject compliance to greater oversight, particularly by Congress.

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[28] Céline Kauffmann, "The OECD Perspective on Good Regulatory Practices and International Regulatory Cooperation," Commentary, The George Washington University Regulatory Studies Center, 19 December 2014. Available at https://regulatorystudies.columbian.gwu.edu/oecd-perspective-good-regulatory-practices-and-international-regulatory-cooperation

[29] See, in particular, Official Journal of the European Union, Court of Auditors, "Special Report No. 1/2006 on the contribution of the European Social Fund in combating early school leaving, together with the Commission's replies," 2006/C 99/01. This audit found that agencies allocating funding for the purpose of keeping students in school generally did not utilize readily available performance data.

[30] This is the Ex Post Impact Assessment Unit in the European Parliamentary Research Service. See European Parliament, "Evaluation and ex-post impact assessment at EU level," September 2016 available at http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/581415/EPRS_BRI(2016)581415_EN.pdf

For example, Senators Heidi Heitkamp (D-N.D.) and James Lankford (R-Okla.) have proposed the Smarter Regulations Act[31] which would require agencies to include in major rules a framework for reassessing the rule, including the timeframe for reassessment,[32] the metrics that should be used to gauge efficacy,[33] and a plan to gather relevant data to compile these metrics.[34] The framework established in this proposed legislation was approved by a Senate committee by voice vote in October 2015.[35] The bill is consistent with the EBR Framework and our recommendation below.

Changing Incentives by Creating Competition

It would be a mistake to assume that creating an independent organization or codifying best practices would completely solve the problem of unfaithful execution. For instance, the Office of Information and Regulatory Affairs (OIRA) was created in the U.S. Office of Management and Budget (OMB), in part, to better enforce administrative benefit-cost analysis requirements on regulatory agencies. Yet compliance with these standards remains far from perfect.[36]

In addition to relying on independent organizations and codification to help defeat unfaithful execution, it may be effective to change the incentives of federal agencies by making them compete with each other or other entities. Competition is long been recognized as an extremely powerful motivator of federal agencies.[37] While it may not seem obvious, federal agencies already compete with each other. For instance, they are in a constant and robust competition to maintain or increase their budgets. As proof of competition's effects, this long running competition for funding has resulted in a panoply of clever budget strategies.[38]

One way to create a healthy competition among federal agencies is to use comparison data. While their effects may vary, comparison data has been shown to be a strong motivator in state governments[39] particularly if the data are accessible and trustworthy. Indeed, federal agencies

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[31] Smarter Regs. Act of 2015, S. 1817, 114th Cong. (2015).

[32] S. 1817, § 2(f)(1)(D).

[33] S. 1817, § 2(f)(1)(B).

[34] S. 1817, § 2(f)(1)(C).

[35] For more information on S. 1817 see https://www.congress.gov/114/crpt/srpt282/CRPT-114srpt282.pdf

[36] Patrick McLaughlin, Jerry Ellig, John Morrall, "Continuity, Change, and Priorities: The Quality and Use of Regulatory Analysis Across U.S. Administrations," *Regulation and Governance*, June 1, 2013. See http://onlinelibrary.wiley.com/wol1/doi/10.1111/j.1748-5991.2012.01149.x/full

[37] See, for instance, William A. Niskanen, "Competition among Government Bureaus," in Carol H. Weiss and Allen H. Barton, editors, *Making Bureaucracies Work*, Sage Publications: Beverly Hills, CA (1980), pp. 167-174.

[38] Aaron Wildavsky, *The Politics of the Budgetary Process*, Fourth Edition, Little, Brown and Company: Boston, MA (1984), pp. 64 – 84.

[39] See E. Blaine Liner, Harry P. Hatry, Elisa Vinson, Ryan Allen, Pat Dusenbury, Scott Bryant, Ron Snell, "Making

themselves are increasingly using comparison data to change the incentives of the entities they regulate including everything from colleges[40] to nursing homes[41] to chemical manufacturers.[42] One idea would be to look for federal programs that have very similar goals but achieve them in different ways, such as through grants, regulations, tax credits, and/or loan guarantees.[43] A third party, the Government Accountability Office, for instance, could then collect data regarding the efficiency of each program and rank the various programs on this criterion. This may mean, for instance, estimating how many homeless families are provided long-term shelter for each dollar spent, or how many unemployed persons get and retain a job for each dollar spent.

One might initially expect large differences in the results agencies achieve. For instance, in 2003 a back of the envelope comparison of flood mitigation programs showed that for the same federal expenditure a Department of Agriculture grant program appeared to produce 40 percent more floodplain protection benefits than a Federal Emergency Management Agency grant program.[44] The periodic publication of such data from a reliable source could result in agencies having strong incentives to collect, analyze, and act on evidence so as to improve their program and achieve a better ranking.[45] Evidence-based policymaking could become the method by which agencies in compete in a "race to the top."

The Problem of Inadequate Funding

Another barrier to evidence-based regulation is funding for *ex ante* and *ex post* analysis and evaluation. Like the barrier of noncompliance, this problem is not unique to EBR but can block the collection and evaluation of data regardless of program. It may be that some of the substantial resources currently spent on *ex ante* regulatory review could be more prudently shifted to conducting a retrospective review of federal rules.[46] Such a reallocation could in turn

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Results-based Government Work," The Urban Institute, April 2001, p. 18. Available at http://www.urban.org/sites/default/files/alfresco/publication-pdfs/310069-Making-Results-Based-GovernmentWork.PDF

[40] The U.S. Department of Education's "College Scorecard" at https://collegescorecard.ed.gov/

[41] The Medicare program's "Nursing Home Compare" ratings at https://www.medicare.gov/NursingHomeCompare/About/Ratings.html

[42] Jason Scorse, 2003, "Do Pollution Rankings Affect Facility Emissions Reductions?: Evidence From The Toxic Release Inventory," dissertation retrieved from http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.511.173&rep=rep1&type=pdf

[43] Budget subfunctions may be a method for narrowing these programs down. See https://www.whitehouse.gov/tax-receipt/functions

[44] U.S. Office of Management and Budget, *Addendum to the Fiscal Year 2006 Budget*. See https://www.whitehouse.gov/omb/memoranda_m02_06_addendum

[45] In some respects, the "Best Places to Work in the Federal Government" rankings released by the Partnership for Public Service provide a model for such a system of comparison. See http://bestplacestowork.org/BPTW/

[46] See Susan E. Dudley, A Retrospective Review of Retrospective Review, The George Wash. University

strengthen *ex ante* analyses by providing direct information on the causal outcomes one would expect as the result of regulatory policy.[47]

Three Possible Solutions to the Problem of Inadequate Funding

One means of accomplishing this goal without significantly altering the federal budget is for Congress and OMB to more readily allow the reallocation of resources from current *ex ante* regulatory impact analyses to gathering the data and evaluation tools necessary to subsequently test *ex ante* predictions. This may simply require the appropriation of less "one-year money" and more "multi-year money" to allow agencies greater flexibility in when they use their budget authority.[48] Right now the vast majority of funding for analyses is spent upfront and very little is used after rules are promulgated. It seems extremely unlikely this is an optimal balance.

Another possible solution is to allow, or require, a small percentage of funds be set aside for program evaluation or for policies based on program evaluation. This is not unprecedented. In 1978 Congress allowed the U.S. Department of Agriculture (USDA) to set aside up to 0.5 percent of the program funds allocated for its Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) to evaluate the program's performance, including experimenting with different pilot projects.[49] More recently, the Senate Appropriations Bill for FY 2014 allowed five percent of mental health block grants to states be used for "evidence-based programs that address the needs of individuals with early serious mental illness, including psychotic disorders."[50]

Constrained budgets tend to result in agencies "curtailing the funds needed for evaluation studies and performance monitoring systems."[51] However, there is considerable evidence that the use of evaluation not only leads to improved regulatory outcomes, but also provides additional benefits for nonregulatory agencies—particularly those operating in an environment of stagnant or decreasing budgets. For example, Newcomer et al. detail several instances where the results of

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Regulatory Studies Center (May 2013), p.2 at http://regulatorystudies.columbian.gwu.edu/files/downloads/20130507-a-retrospective-review-of-retrospective-review.pdf . We also recommend the Commission examine recommendations from the Administrative Conference of the United States regarding the use of resources in conducting retrospective reviews, which can be found at https://www.acus.gov/sites/default/files/documents/Recommendation%25202014-5%2520%2528Retrospective%2520Review%2529_1.pdf

[47] Susan E. Dudley, "Quantifying Regulatory Efficacy," background paper for OECD Workshop on Socioeconomic Impact Assessment of Chemicals Management. Forthcoming.

[48] "One-year money" is budget authority that expires at the end of the fiscal year in which it was appropriated.

[49] Newcomer, Kathryn E., Harry P. Hatry editor, and Joseph S. Wholey editor. 2015. *Handbook of Practical Program Evaluation.* Hoboken, NJ: Jossey-Bass p. 807

[50] S. 1284, Report No. 113--71, p. 114.

[51] Newcomer et al., p. 807.

evaluation data on program performance caused agencies to shift funding and effort away from less successful programs towards better-performing initiatives. The data made available to Congress regarding success in achieving outcomes allowed agencies to maintain or even expand their programs during periods of significant cuts in federal domestic spending during the 1980s. These programs included: the Department of Labor's Job Corps program and the aforementioned WIC program at USDA.[52]

Finally, it is important to note that the cost of both *ex ante* and *ex post* analyses and evaluation need not be high. An important principle is that the cost of conducting a regulatory analysis should reflect the potential value of such analysis and, if necessary, can be quite inexpensive.[53] Joseph Wholey proposes that evaluators use "a sequential purchase of information" approach such that "resources are invested in further evaluation only when the likely usefulness of the new information outweighs the costs of acquiring it."[54] EBR would benefit from such flexible standards regarding what constitutes useful analysis and evaluation.

Questions 10 & 16: Access and Use of Evidence

> *Question 10. How should the Commission define "qualified researchers and institutions?" To what extent should administrative and survey data held by government agencies be made available to "qualified researchers and institutions?"*
>
> *Question 16. How can data, statistics, results of research, and findings from evaluation, be best used to improve policies and programs?*

This response addresses questions 10 and 16 regarding access and use of evidence. In regulatory processes agencies are compelled, with narrow exceptions, to make data, analysis and other evidence used by decision-makers available to the public. As noted above, agencies must place information they use in decision-making in a public record and be able to justify their decisions based on the evidence in that record.

We support the bedrock regulatory principle of openness and this is reflected in item II.C. in the EBR Framework under Regulatory Decision-making. Thus, in answer to question 10, with regards to information that will be used to make regulatory decisions, as much information as

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[52] *Ibid*, p. 829.

[53] Christopher Carrigan and Stuart Shapiro, "What's wrong with the back of the envelope? A call for simple (and timely) benefit–cost analysis," *Regulation and Governance*, 26 April 2016.

[54] Newcomer et al., p. 89. This approach is one of several suggestions contained within Wholey's framework of Evaluability Assessment which proposes several techniques for evaluators to leverage low cost information significant program improvement.

possible should be made available and it should be made available to everyone. The public has a right to know what evidence policy officials consider in making decisions that affect them.

We offer two answers to question 16, regarding the "best use" of "data, statistics, result of research, and findings from evaluation." The first relates to the need for transparency in regulatory decision-making. The second answer regards how evidence may be best organized to promote its best use.

Data and Findings Must be Separated from Policy

Regulatory agencies are generally compelled to request information and other data from the public. However, the opportunity for public comment should include access to the various data, statistics, findings and other information the agency is using to make a regulatory decision. The "best use" of information will likely occur only after it is scrubbed by public review.

The EBR Framework addresses important guidance on how data and other evidence should be used and communicated. In particular, in regulatory decision-making the presentation of evidence must be separated from policy decisions so that the public understands what is a fact (what *is*) and what is a policy judgment (what *ought to be*). This has important implications for public access to the data, models and assumptions used to make regulatory decisions, particularly when it comes to scientific information.

The boundary between objective science and policymaking is inherently fuzzy.[55] Creating clarity regarding where this boundary is and the role of scientists at this boundary is important.[56] In our democracy, the public must be able to hold regulatory policymakers, typically the president and his or her appointees, accountable for their decisions. It is for this reason the regulatory process already mandates requirements for policymakers to reveal and explain how they reached a regulatory decision based on publicly available evidence. This process assumes the public is able to separate the evidence the decision-maker considered from the judgments they made. Evidence-based policy expert Ray Pawson explains:

> Evidence does not deliver decisions; its function is to deliver decision support. When evidence is called into play in policy formation, it is never a case of simply 'following the evidence' but rather one of 'interpreting the evidence' and then

[55] See, for instance, the discussion in Susan E. Dudley and George M. Gray, "Improving the Use of Science to Inform Environmental Regulation," in Jason S. Johnson (ed.), *Institutions and Incentives in Regulatory Science,* New York, NY: Lexington Books (2012), pp. 165-198.

[56] See Ann Campbell Keller, *Science in Environmental Policy: The Politics of Objective Advice,* MIT Press: Cambridge, MA (2009).

> 'adapting the evidence' to local circumstances. No method of synthesis can tell the policy maker what to do.[57]

Given both the fuzzy boundary between evidence and policy and the need to keep scientific and policy judgments as separate as possible for reasons of accountability, the solution is for regulatory agencies to be as open as possible regarding the decisions they make. Recounting his experience as the Administrator of the EPA from 1977 to 1980, Doug Costle has explained:

> People tend to think science is hard and numerical and precise. It's not, particularly in the environmental area. But there is one way, and only one way, to deal with that, and that is just to be absolutely open and honest about the gray areas. Anyway you cut it, we're making judgments, social policy judgment calls...[58]

An example of conflating evidence and policy is application of the precautionary principle. In short, the precautionary principle advocates for the use of preemptive regulation in the face of scientific uncertainty regarding possible threats to the health of humans or ecosystems.[59] The application of the precautionary principle is not a purely scientific decision. Indeed, it confuses scientific uncertainty with scientific ignorance and is squarely inconsistent with an approach built on a foundation of evidence. As Ray Pawson has pointed out:

> The precautionary principle betokens a move from evidence to advocacy. It forecloses debate and stifles the search for further evidence. By definition the zero emission, zero concentration, zero tolerance standards are not empirically derived—they concede that the evidence is not yet in.[60]

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[57] Ray Pawson, *Science of Evaluation: A Realist Manifesto*, Thousand Oaks, Calif.: SAGE (2003), p. 190.

[58] As quoted in Ronald Brand, Thomas Kelly, A. Stanley Meiburg, Robert Wayland, Susan Wayland, David Ziegele, *True Green: Executive Effectiveness in the U.S. Environmental Protection Agency*, Gerald A. Emison and John C. Morris, eds., Lexington Books: Lanham, MD (2012), p. 77. In his seminal work on the fuzzy boundary between scientific evidence and policy ("Science and Trans Science," *Minerva*,10(2): 209-222, 1972), Alvin Weinberg put it another way, "Though the scientist cannot provide definite answers to trans-scientific questions any more than can the lawyer, the politician or a member of the lay public, he does have one crucially important role: to make clear where science ends and trans-science begins."

[59] Martuzzi, M. and Tickner, J. (eds) (2004) The precautionary principle: Protecting public health, the environment and the future of our children. Copenhagen, Denmark: World Health Organization, Europe.

[60] Pawson, p. 174.

Muddled Fact and Policy Causes Problems

Despite the necessity of separating what *is* from a decision regarding what *ought to be*, scientific evidence and policy decisions have become increasingly muddled.[61] This results in a host of significant problems including degrading the perceived integrity of evidence-based policymaking. As the Bipartisan Policy Center notes:

> Policy makers often claim that particular regulatory decisions have been driven by, or even required by science; their critics, in turn, have attacked the quality or the interpretation of that science. Such conflict has left the U.S. with a system that is plagued by charges that science is being "politicized" and that regulation lacks a solid scientific basis. As a result, needed regulation may be stymied, dubious regulations may be adopted, issues can drag on without conclusion and policy debate is degraded. Moreover, the morale of scientists is weakened, and public faith in both government and science is undermined.[62]

The Bipartisan Policy Center concludes that "a tendency to frame regulatory issues as debates solely about science, regardless of the actual subject in dispute, is at the root of the stalemate and acrimony all too present in the regulatory system today."[63]

Clear Separation and Broad Access Solves This Problem

The EBR Framework calls for the separation of these elements during regulatory decision-making (see item II.B.). If not clearly separated, the increased use of evidence may ironically harm, rather than improve, the integrity of the regulatory process. As the Bipartisan Policy Center concluded, "the Administration needs to devise regulatory processes that, in as many situations as possible, could help clarify for both officials and the general public which aspects of disputes are truly about scientific results and which concern policy."[64] "This transparency would both help force values debates into the open and could limit spurious claims about, and attacks on science."[65]

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[61] The scientific community increasingly wrestles with fact more and more scientists are being encouraged to become engaged with the public policy process. See, for instance, Deborah Runkle, Mark S. Frankel ed., "Advocacy in Science: Summary of a Workshop convened by the American Association for the Advancement of Science," 1 May 2012, pp. 2-3.

[62] Bipartisan Policy Center, *Improving the Use of Science in Regulatory Policy*, Washington (DC): Bipartisan Policy Center; 2009;10. Available at: http://www.bipartisanpolicy.org/sites/default/files/BPC%20Science%20Report%20fnl.pdf

[63] *Ibid.*, p. 11.

[64] *Ibid.*, p. 4.

[65] *Ibid.*, p. 5.

Given the need to make it clear what the data show vs. what policymakers decide, the public should have as broad an access to data, statistics, results of research, and findings from evaluation as possible so that people have the ability to make their own judgments regarding the interpretation of data. President Obama's March 2009 Scientific Integrity Memo supports this goal, stating that "[t]o the extent permitted by law, there should be transparency in the preparation, identification, and use of scientific and technological information in policymaking."[66]

Access to the "results of research" should include risk assessments, models, and the assumptions that were used to synthesize data for the purpose of making regulatory decisions. The National Research Council has concluded that there should be "unrestricted access" to public-use data that pose no confidentiality problems.[67] This category should also include any models and other analytic tools used to assess data that, by their nature, do not pose concerns about the breach of individual, household or other confidential personal information. If such a tool was used to materially inform a regulatory decision, the public should have access to that tool. As is being shown in the case of opening up competing proprietary climate change models, scrutiny from others will very likely improve the models' credibility and accuracy and result in the data's "best use."[68]

Access to Evidence Organized by 'Program Theory' Could Benefit Regulators

The "best use" of evidence can also be improved by how evidence is organized. Regulatory evaluations are often categorized under their substantive program area (e.g., environment, health, or education). As a practical matter this can limit the amount of data that is consulted during regulatory design and decision-making, such as during the consideration of alternatives (see item I.C. in the EBR Framework). Categorizing evaluation data under the additional criteria of similar program theory domains (e.g., incentives, target setting, or behavior change) could greatly improve rulemaking. Consulting the widest possible range of evaluation data for similar program theory domains allows regulators to survey a broader knowledge base and help discover more constraints or barriers that might, for instance, limit the expected benefits or reduce the expected costs of regulations.

Theoretically, the efforts to make evaluation data available across agencies, such as in a clearinghouse, will help create a wider distribution of evidence going forward. However,

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[66] Memorandum for the Heads of Executive Departments and Agencies from Barack Obama, "Scientific Integrity," March 9, 2009 at 74 *FR* 10671. See https://www.gpo.gov/fdsys/pkg/FR-2009-03-11/pdf/E9-5443.pdf

[67] National Research Council Panel on Data Access for Research Purposes, *Expanding access to research data: reconciling risks and opportunities*, Washington, DC: National Academies Press (2005), p. 3.

[68] Paul Voosen, "Climate scientists open up their black boxes to scrutiny," *Science*, 354:6311 (28 October 2016), pp. 401-402.

grouping evidence by program theory can tie together seemingly different interventions and help regulators identify unintended consequences or important contexts to consider during their early design of potential regulatory approaches.[69] For example, Ray Pawson's organizing principles of evaluation science suggest that such a level of abstraction "provides the means of establishing a common language to draw out the similarities between different interventions...to link their evaluations" and increase learning.[70]

An example of this is evaluations from state/local "ban the box" legislation, which prevents employers from asking prospective applicants about their criminal record with the intention of decreasing discrimination against those with a criminal record. Evaluations of these programs indicate that they have the unintended/perverse effect of increasing discrimination against minorities, particularly African Americans.[71] Rather than thinking of this, conceptually, as a "lesson learned" for officials at the Department of Labor, there is a broader finding that could be applicable to other federal agencies: namely, the unintended consequence of trying to incentivize certain behavior by limiting data. Additionally, this framework helps shift evaluation thinking from simply inquiring whether a program "works" to the more nuanced "what works for whom in what contexts."[72]

Questions 17 & 18: Address Retrospective Review in Regulatory design

> *Question 17. To what extent can or should program and policy evaluation be addressed in program designs?*
>
> *Question 18. How can or should program evaluation be incorporated into program designs? What specific examples demonstrate where evaluation has been successfully incorporated into program designs?*

Ex post regulatory evaluation (retrospective review) is a vital and integral element of the EBR Framework (see items I.G. and III). Retrospective review advances knowledge over the mere hope that regulations are delivering the benefits society expects. However, it must be incorporated into regulatory design in order to facilitate this evaluation. Similar to other federal

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[69] For examples of this see R. Merton, *On Theoretical Sociology: Five essays old and new*. New York: Free Press (1967)

[70] Pawson, p. 190.

[71] Amanda Agan and Sonja Starr, "Ban the Box, Criminal Records, and Statistical Discrimination: A Field Experiment," *U of Michigan Law & Econ Research Paper No. 16-012*, 2016. See also: Jennifer Doleac, "'Ban the Box' does more harm than good," May 2016, Brookings Institute. Available at: https://www.brookings.edu/opinions/ban-the-box-does-more-harm-than-good/

[72] Pawson, p. xiii.

programs, waiting until after a regulation is implemented to plan *ex post* measurement can greatly hamper retrospective review.[73]

Both OMB[74] and the Administrative Conference of the United States (ACUS) have recommended that agencies design their rules prospectively for retrospective analysis. For instance, in his report to ACUS, Joseph Aldy concludes:

> Well-designed regulations should enable retrospective analysis to identify the impacts caused by the implementation of the regulation. For a given select, economically significant rule, agencies should present in the rule's preamble a framework for reassessing the regulation at a later date. Agencies should describe the methods that they intend to employ to evaluate the efficacy of and impacts caused by the regulation, using data-driven experimental or quasi-experimental designs where appropriate.[75]

These recommendations echo a larger body of research. For instance, in a study for the World Bank, Paul Gertler et al. conclude that the appropriate methods for conducting program evaluation, or retrospective review, should be identified "at the outset of a program, through the design of prospective impact evaluations that are built into the project's implementation."[76] This allows evaluators to fit their evaluation methods to the program being reviewed, and to plan for review itself through the design and implementation of the program (or regulation).

For these reasons we have prominently included retrospective review as a necessary element of regulatory design in the EBR Framework, and we recommend this design requirement be codified in law to emphasize its importance.

It should be noted that the strong connection between regulatory design and retrospective review also strengthens the need to complete other elements of the regulatory process in the design stage. For instance, in addition to planning for retrospective review, the EBR Framework requires regulators to:[77]

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[73] Other reasons to plan evaluations in advance include compliance with the Paperwork Reduction Act which requires the prior approval of the U.S. Office of Management and Budget before collecting information from 10 or more members of the public. See 5 C.F.R. Part 1320.8(b)(3)(iii) (2015).

[74] U.S. Office of Management and Budget. *2015 Draft Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities*, p. 7.

[75] Joseph E. Aldy. "Learning from Experience: An Assessment of the Retrospective Reviews of Agency Rules and the Evidence for Improving the Design and Implementation of Regulatory Policy," a report for the Administrative Conference of the United States. 2014, p. 6.

[76] Paul J. Gertler, Sebastian Martinez, Patrick Premand, Laura B. Rawlings, and Christel M. J. Vermeersch, *Impact Evaluation in Practice*, The World Bank, 2011, pp. xiii–xiv.

[77] These components are adapted from Miller, p. 10.

- Identify the problem they are trying to solve.
- Evaluate whether modifications to existing rules can address the problem.
- Identify and assess available alternatives to direct regulation.
- If regulating, determine that the rule addresses the problem.
- Set clear performance goals and metrics for outputs and outcomes.
- Exploit opportunities for experimentation.

All six of these design components directly relate to retrospective review. One purpose for incorporating these components into rules at the outset is to plan for review well before much of the crucial information necessary for an effective evaluation has been generated. Otherwise agencies may not have identified the goal(s) of the regulation much less how to collect data on the regulation's impacts. This information is crucial for assessing how well a rule has met its intended target and the extent to which there may be other, unintended, consequences. Independent regulatory agencies especially should make greater efforts to outline what they intend for their rules to accomplish.[78] This transparency allows the public to know what to expect from new regulations and what observers should strive to measure to assess the success of a rule.

Although few regulations have been designed to facilitate *ex post* review, the recent driverless cars policy guidance is an example of what may be possible. In September 2016 the National Highway Traffic Safety Administration (NHTSA) released its Federal Automated Vehicles Policy[79] establishing how the agency will address driverless car technology through its current regulatory structure and identified new regulatory tools that could be used in the future. Given the state of change in automated vehicle technology, NHTSA plans to update this policy in an iterative process so as to respond to new data and technologies as they emerge. For instance, the agency has already noted it will consider the option of implementing a sunset on federal motor vehicle safety standards so that the agency can reconsider whether the standards are still effective as driverless car technology continues to develop. This iterative approach combined with a commitment to collect and synthesize evidence as it comes in appears to reflect the right approach to regulating a new and promising technology.[80]

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[78] Independent agencies are less likely than executive branch agencies to write rules that identify the problem they are intended to solve, provide metrics for assessing whether a problem has been solved, and link the proposed rule to intended outcomes. See Sofie E. Miller, "Learning from Experience: Retrospective Review of Regulations in 2014," *Working Paper*, The George Washington University Regulatory Studies Center, November 2015, p. 18.

[79] National Highway Traffic Safety Administration, the U.S. Department of Transportation. *Federal Automated Vehicles Policy: Accelerating the Next Revolution In Roadway Safety*. September 2016. See https://www.transportation.gov/sites/dot.gov/files/docs/AV%20policy%20guidance%20PDF.pdf

[80] Although NHTSA's approach to review and iteration is well-aligned with the principles of the EBR Framework, the agency does discourage state-level competition which would be aligned with the principles explored in the section immediately below: *Keep Evaluation Options Flexible.*

Question 19: Keep Evaluation Options Flexible

Question 19. To what extent should evaluations specifically with either experimental (sometimes referred to as "randomized control trials") or quasi-experimental designs be institutionalized in programs? What specific examples demonstrate where such institutionalization has been successful and what best practices exist for doing so?

The EBR Framework does not specify what types of experimental designs should be used in analyzing or evaluating regulations. Rather, the rigor of the analysis should match the regulatory situation and the value such analysis may offer decision-makers.[81]

Randomized controlled trials are well-regarded tools used by program evaluators to understand the effect of different treatments on outcomes.[82] However, where randomized trials are not feasible, pilot studies or approaches that allow for variation in regulatory treatments can serve as "quasi-experiments" (QEs) that provide valuable information for evaluating outcomes and their causal links.[83] According to Coglianese:

> Variation in observational studies can arise in one of two ways: either over time or across jurisdictions. When regulations vary over time within a single jurisdiction, researchers can compare outcomes longitudinally, that is, before and after the adoption of the regulation. When the variation exists across jurisdictions, researchers can compare outcomes cross-sectionally, that is, comparing outcomes in jurisdictions with the regulation being evaluated with those in jurisdictions without that regulation.[84]

Designing regulations from the outset in ways that identify and exploit variations in compliance could be a valuable way to understand the relationship between regulatory actions and outcomes. A pilot study or "an experiment in which certain regulations would be imposed on some factories and not on others offers the real prospect of determining whether those regulations are useful."[85]

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[81] See *supra* note 45.

[82] *See* Angela Ambroz and Marc Shotland, *Randomized Controlled Trial (RCT)*, Better Evaluation: Sharing information to improve evaluation at http://betterevaluation.org/plan/approach/rct

[83] Sofie E. Miller & Susan E. Dudley. "Regulatory Accretion: Causes and Possible Remedies." *Administrative Law Review Accord Vol. 67 Issue 2.*

[84] Coglianese, Cary (2012), "Evaluating The Impact of Regulation and Regulatory Policy," in Measuring Regulatory Performance, OECD, available at *https://www. oecd.org/gov/regulatory-policy/1_coglianese%20web.pdf*

[85] John O. McGinnis, *Accelerating Democracy: Transforming Governance through Technology*, Princeton, NJ: Princeton University Press (2013), p. 112.

In the U.S. federalist system, the states provide a particularly valuable opportunity for experimentation. For example, Oates suggests that "the introduction in the 1970s and 1980s of a variety of emissions trading systems at the state level demonstrated the feasibility of such systems and some of their very appealing properties—as well as certain pitfalls." He suggests that this state-level experimentation with innovative solutions to emissions problems led to the successful introduction of the national system of tradable sulfur allowances under the 1990 Clean Air Act Amendments.[86] Such quasi-experimental approaches facilitate learning from experience in a way that implementing large-scale, irreversible regulatory programs do not.[87]

The EBR Framework calls on regulators to look for and exploit opportunities for experimentation during regulatory design. For instance, researchers have suggested how the statutorily required five-year National Ambient Air Quality Standards reviews could incorporate QE techniques to gather and analyze epidemiology data and health outcome trends in different regions of the country and compare them against predictions.[88] Unfortunately, the U.S. Environmental Protection Agency has not pursued this idea.

The EBR Framework also requires agencies plan and budget for retrospective review as part of their regulatory design. This means agencies should lay out a program for empirical testing of assumptions and hypothesized outcomes. To incentivize more robust evaluation, they could also be required to test the validity of risk-reduction predictions before commencing new regulation that relies on models. For example, for regulations aimed at reducing health risks from environmental factors, QE techniques should be used to gather and analyze epidemiology data and health outcome trends in different regions of the country and compare them against predictions.[89]

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[86] Oates, W.E. Environmental Federalism. Resources for the Future (RFF); 2009. Available at: http://www.rff.org/Publications/WPC/Pages/Environmental-Federalism-Wallace-E-Oates.aspx

[87] Sofie E. Miller & Susan E. Dudley. "Regulatory Accretion: Causes and Possible Remedies." *Administrative Law Review Accord Vol. 67 Issue 2.*

[88] Francesca Dominici, Michael Greenstone and Cass R. Sunstein, "Particulate Matter Matters." *Science* 344:257 (2014).

[89] Sofie E. Miller & Susan E. Dudley. "Regulatory Accretion: Causes and Possible Remedies." *Administrative Law Review Accord Vol. 67 Issue 2.*

Suggested Recommendations for Findings, Conclusions and Legislation or Administrative Actions

We suggest the Commission consider including the following findings, conclusions and recommendation for legislation or administrative actions in its report to the President and Congress.

Suggested Finding	Suggested Conclusion	Suggested Recommended Action
REGULATORY POLICY Regulatory policymaking is already subject to significantly different information requirements compared to other policymaking processes. The increased use of evidence will result in better regulatory decisions.	Actions to improve evidence-based policymaking should be tailored to the regulatory process. It would be beneficial to identify a model process for creating evidence-based regulations.	"OMB should integrate evidence more effectively in its…regulatory decisions by tracking and evaluating the results of the policies it issues."[90] The president should consider commissioning a set of experts to describe an ideal evidence-based regulatory process and identify specific steps necessary to move to such a system.
ACCOUNTABILITY Regulatory decision-makers need to be held publicly accountable for the decisions they make.	The interpretive models, analyses and other tools used by regulators to make decisions should be accessible to the public.	The president should provide unrestricted access to all interpretive data tools used by regulators to make decisions.
COMPLIANCE Federal regulatory agencies do not always faithfully comply with presidential executive orders and other internal administrative guidance.	Compliance with presidential directives and administrative guidance should be improved. Codification of a requirement in law results in greater compliance than administrative guidance.	Regulatory principles accepted by the last five presidents[91] should be codified in law and subject to judicial review. Regulatory requirements in Executive Orders 13563, 13579 and 13610 regarding retrospective review should be codified in law and subject to judicial review.[92]

[90] Recommendation of the Partnership for Public Service, "From Decisions to Results: Building a More Effective Government Through a Transformed Office of Management and Budget," Washington DC, October 2016, p. 24. Available at https://ourpublicservice.org/publications/viewcontentdetails.php?id=1349

[91] These principles will be found in Section 1 of Executive Order 12866 issued by President William Clinton on October 4, 1993. Available at https://www.whitehouse.gov/sites/default/files/omb/inforeg/eo12866/eo12866_10041993.pdf

[92] See Recommendation 2014-5, "Retrospective Review of Agency Rules" issued by the Administrative Conference of the United States. See https://www.acus.gov/recommendation/retrospective-review-agency-rules

Suggested Finding	Suggested Conclusion	Suggested Recommended Action
COMPETITION Competition can change the incentives and behavior of government organizations in positive ways.	The president and Congress should encourage methods of having programs with similar goals compete on the basis of program efficiency (e.g., desirable outcomes achieved per dollar spent by society).	The president and congress should commission experts to categorize federal programs with similar goals and identify metrics that could be used to compare their efficiency.[93] A limited set of comparisons should be implemented within two years.
FUNDING Federal discretionary spending is likely to be flat or decreasing in the future while entitlement program spending will continue to increase. Lack of funding is a barrier to collecting and using evidence. The cost and depth of evaluations and their value to decision-making can greatly vary.	The collection and use of evidence will need to be funded by shifting discretionary funding from lower priorities. The type of evaluation performed should reflect its potential value to improving federal policy.	Congress should provide greater flexibility to reallocate discretionary funding from lower priority uses to the greater collection and use of evidence. The president and congress should refrain from institutionalizing any particular type of evaluation method.
EVIDENCE AND POLICY Government officials sometimes muddle a description of "what is" with "what ought to be."	The use of evidence needs to better separate scientific descriptions from policy judgments. This confusion masks policy decisions. This degrades political accountability and harms the integrity of evidence-based policymaking.	The president should "promulgate guidelines (through executive orders or other instruments) to ensure that when federal agencies are developing regulatory policies, they explicitly differentiate, to the extent possible, between questions that involve scientific judgments and questions that involve judgments about economics, ethics and other matters of policy."[94]

[93] Such an effort could greatly benefit from the experience of the Council of State Governments' State Comparative Performance Measurement Project. See http://www.csg.org/programs/policyprograms/CPM.aspx

[94] See Recommendation One at Bipartisan Policy Center, *Improving the Use of Science in Regulatory Policy*, Washington (DC): Bipartisan Policy Center; 2009; p. 4.

Suggested Finding	Suggested Conclusion	Suggested Recommended Action
RETROSPECTIVE REVIEW Regulatory retrospective review is best planned out when a regulation is initially designed. Regulatory retrospective review relies on other elements of regulatory design, such as defining the problem to be solved and identifying alternatives for comparison.	Regulatory design must include retrospective review and its supporting elements.	Regulatory requirements in Executive Orders 13563, 13579 and 13610 regarding retrospective review should be codified in law and subject to judicial review.[95] Regulatory principles accepted by the last five presidents that support retrospective review should be codified in law and subject to judicial review.[96]
CATEGORIZATION OF EVIDENCE Regulators can benefit from learning lessons from programs not in their substantive expertise.	The best use of evidence may require it be organized by program theory (e.g., behavioral change) rather than issue area (e.g. transportation)	To the extent evidence of evaluations are consolidated, require "type of program theory" to be a characteristic that can be used to find evidence of federal program impacts.
EXPERIMENTATION The increased collection and use of evidence from regulatory evaluations will result in better regulatory decisions.	Randomized controlled trials to evaluate regulations are not always feasible. Pilot studies or approaches that allow for variation in regulatory treatments ("quasi-experiments" or QEs) can provide valuable information at less cost.	The president should encourage regulators to adopt QE techniques where more expensive evaluations may be infeasible or of less value. If necessary, Congress should amend regulatory authorities to allow agencies greater flexibility to design regulations to facilitate differences in implementation that allow quasi-experimentation. For instance, laws should allow limited pilot studies, or defer more to the natural experimentation possible at the state level.

[95] This repeats a recommendation shown in the "Compliance" section above.
[96] This closely matches a recommendation shown in the "Compliance" section above.

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WASHINGTON, DC

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The George Washington University Regulatory Studies Center

Hearing on

Examining How Small Businesses Confront and Shape Regulations

Small Business & Entrepreneurship Committee

United States Senate

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Introduction

Thank you Chairman Risch, Ranking Member Shaheen, and Members of the Committee for inviting us to submit for the record our research on the effects of regulation on small businesses and potential prospects for regulatory reform. Sofie E. Miller[1] and Daniel R. Pérez[2] are Senior Policy Analyst and Policy Analyst, respectively, at the George Washington University Regulatory Studies Center,[3] where we analyze the effects of regulation on public welfare.

We appreciate the Committee's interest in regulatory reform, including its effects on small businesses. The focus of our work at the George Washington University Regulatory Studies Center is on federal regulatory policies, processes, and reforms. While we do not focus exclusively on the effects of regulation on small businesses, our research on regulatory best practices and process is directly related to several of the provisions of the legislation being considered here today. With that in mind, our prepared statement includes the following points:

- Small businesses are often indirectly burdened by federal regulation, and these indirect costs are not accounted for in the current regulatory flexibility analysis framework. While exploring opportunities to remedy this oversight, the Committee should be careful to avoid measures of indirect costs that would include double-counting, and may want to consider legislative language that ensures the indirect costs of implementing regulations (such as state implementation plans) are duly considered.
- Regulatory review is an important component of a healthy regulatory process. An evidence-based regulation framework can be helpful for conceptualizing such a review process, and may assist in informing the Committee's efforts to enhance review of rules that impact small entities.
- To the extent that any legislative changes codify regulatory best practices, such as those found within Executive Order 12866, this may successfully strengthen Congress' oversight of agency compliance.
- Efforts to increase the opportunities for small businesses to participate early in the rulemaking process could be valuable in improving regulatory outcomes. However, the Committee should consider potential tradeoffs associated with doing so—with particular attention on possible unintended effects that reduce the efficacy of the existing SBAR process.

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[3] This testimony reflects the views of the author, and does not represent an official position of the GW Regulatory Studies Center or the George Washington University. The Center's policy on research integrity is available at http://regulatorystudies.columbian.gwu.edu/policy-research-integrity.

The Effects of Regulation on Small Business

Considering the effects of regulation on small businesses is important for at least three reasons. First, as a subsection of regulated industry, they often bear a disproportionate share of regulatory and paperwork burdens relative to larger entities.[4] Second, these larger entities often support agency efforts to regulate since the costs they face from increased levels of regulation can be spread over more employees and capital, and often are outweighed by the benefits created from reduced competition as barriers to entry in the market are increased.[5] Finally, research indicates that the entry of new, often small, firms into the market is an important driver of an economy's aggregate productivity via increased innovation.[6] It is therefore important for agencies to consider the likely effects of their proposed regulations on small businesses to better account for the full costs and benefits of regulation on the public.

Ensuring Reforms are Evidence-Based

Historically, both presidents and members of Congress have recognized the importance of considering the effects of regulation on small businesses and have instituted various executive and legislative requirements, respectively, on the regulatory process for collecting data and assessing input from small businesses during the rulemaking process. More recently, bipartisan effort to create the Commission on Evidence-Based Policymaking (CEP) via passage of the Evidence-Based Policymaking Commission Act of 2016 indicates Congress' commitment to improving the results of government programs by strengthening evidence-based approaches.

Since regulation is a distinct subset of federal policymaking with many existing legal requirements governing the rulemaking process, the George Washington University Regulatory Studies Center submitted a public interest comment to the Commission offering an integrated framework for a system that produces evidence-based regulation (EBR). This process is summarized in the appendix on page 11 of this statement. As we submitted to CEP: "an EBR process plans for, collects, and uses evidence throughout the life of a regulation to predict, evaluate and improve outcomes."

Congressional efforts to advance legislation that expands the use of evidence and improves agency performance in analyzing the impacts of regulation on small businesses can lead to improved regulatory decisions and better outcomes. The following submission outlines several

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[4] Nicole V. Crain and Mark Crain. "The Impact of Regulatory Costs on Small Firms" Prepared for Small Business Administration Office of Advocacy, September 2010. Available at: https://www.sba.gov/sites/default/files/The%20Impact%20of%20Regulatory%20Costs%20on%20Small%20Firms%20(Full).pdf

[5] Bruce Yandle, Bootleggers and Baptists, REGULATION, May/June 1983.

[6] Davis, S. J., Haltiwanger, J. C., & Schuh, S. (1996). Job Creation and Destruction. Cambridge, Mass.: MIT Press.

aspects of the regulatory process that may be useful to consider in designing legislative reforms focused on small businesses.

Small Business Regulatory Flexibility Improvements Act

The Small Business Regulatory Flexibility Improvements Act (S. 584) would make a number of amendments to the Regulatory Flexibility Act (RFA), which directs federal regulatory agencies to identify regulations that affect small businesses. Below we discuss three proposed amendments and their potential impacts on the regulatory process and the regulated community.

Consideration of Indirect Costs to Small Businesses

S. 584 would provide a definition of the "economic impact" that agencies are charged with assessing to include "any indirect economic effect (including compliance costs and effects on revenue) 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)." This change would have a profound effect on which rules are included in the regulatory flexibility agenda and subject to regulatory flexibility analysis and §610 review, and would bring the standards for such analyses into closer alignment with existing best practices on agency benefit-cost analysis.

The Office of Management and Budget's Circular A-4, "Regulatory Analysis," instructs agencies to look beyond the direct costs and benefits of regulation and identify the indirect effects of regulation as well (i.e. the "expected undesirable side-effects and ancillary benefits").[7] According to Circular A-4:

> Your analysis should look beyond the direct benefits and direct costs of your rulemaking and consider any important ancillary benefits and countervailing risks. An ancillary benefit is a favorable impact of the rule that is typically unrelated or secondary to the statutory purpose of the rulemaking (e.g., reduced refinery emissions due to more stringent fuel economy standards for light trucks) while a countervailing risk is an adverse economic, health, safety, or environmental consequence that occurs due to a rule and is not already accounted for in the direct cost of the rule (e.g., adverse safety impacts from more stringent fuel-economy standards for light trucks).[8]

Despite these articulated best practices, courts have not interpreted the RFA's economic impact assessment requirements to include indirect costs to small businesses. According to former Small

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[7] Office of Management and Budget. *Circular A-4 to the Heads of Executive Agencies and Establishments: Regulatory Analysis*. September 17, 2003. Available at https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/omb/circulars/a004/a-4.pdf

[8] Ibid, Page 26.

Business Administration Chief Counsel for Advocacy Thomas Sullivan, this interpretation is "[the] biggest loophole in the RFA" because the limited analysis "deprives policymakers of a full understanding of a rule's likely impact on small entities."[9]

A classic example of the shortcoming of the current definition of "economic impact" is the National Ambient Air Quality Standards (NAAQS). Pursuant to the Clean Air Act, the Environmental Protection Agency (EPA) issues recurring NAAQS rulemakings restricting the emissions of six criteria air pollutants: ozone, particulate matter (PM), carbon monoxide, nitrogen dioxide, sulfur dioxide, and lead.[10] In these rulemakings, EPA sets an emissions threshold, compliance with which state and local environmental protection agencies are responsible by instituting "state implementation plans." Despite the very significant costs of EPA's NAAQS regulations,[11] they are not considered to have a direct economic impact on small businesses because the ultimate enforcement and implementation falls to the states. Such an approach disregards the significant indirect costs that small businesses bear as a result of federal regulation.[12]

Bounding "Indirect Costs"

In broadening the definition of "economic impact," Congress and agencies should be cautious of using a definition that is so broad it may lead to double-counting the costs of regulation. For example, a regulation that requires an expensive manufacturing retrofit has upfront costs to the manufacturer that are accounted for in a traditional benefit-cost analysis. This upfront cost may also have downstream effects, such as higher consumer costs or a loss of jobs. Counting the direct cost of retrofitting (upstream) and the indirect costs of job loss (downstream) would be counting the same costs both upstream and downstream, and as a result would be double-counting.[13] Congress and regulatory agencies should be cautious about using a definition that is

[9] Hearing on Legislation to Improve the Regulatory Flexibility Act Before the H. Comm. on Small Business, 110th Cong. (2007) (testimony of Thomas Sullivan, Chief Counsel for Advocacy, Small Business Administration), available at https://archive.org/stream/gov.gpo.fdsys.CHRG-110hhrg39383/CHRG-110hhrg39383#page/n45/mode/1up

[10] U.S. Environmental Protection Agency. "NAAQS Table," available at https://www.epa.gov/criteria-air-pollutants/naaqs-table%20

[11] See, for example: U.S. Environmental Protection Agency. "Regulatory Impact Analysis for the Final Revisions to the National Ambient Air Quality Standards for Particulate Matter." EPA-452/R-12-005. December 2012. U.S. Environmental Protection Agency. "Final Ozone NAAQS Regulatory Impact Analysis." EPA-452/R-08-003. March 2008.

[12] Keith Holman. "The Regulatory Flexibility Act at 25: Is the Law Achieving Its Goal?" *33 Fordham Urban Law Journal* 1119 (May 2006).

[13] Brian F. Mannix discusses the problems with counting both upstream and downstream costs of regulation as they pertain to changes in employment. See Brian F. Mannix, "Employment and Human Welfare: Why Does Benefit-Cost Analysis Seem Blind to Job Impacts?" in *Does Regulation Kill Jobs?* edited by Coglianese Cary, Finkel Adam M., and Carrigan Christopher, 190. University of Pennsylvania Press, 2013.

broad enough to include double-counting while considering how to expand the scope of the "economic impacts" that are relevant for agencies to assess.

In addition, S. 584§2(b)9(B) specifies that consideration of "indirect economic impact" extends to impacts that are "reasonably foreseeable" from the rule at hand. The Committee may want to consider language that specifically denotes the consideration of the impacts on small businesses of state implementation of federal rules (see the NAAQS example above). For example, in the 112th Congress, Senator Snowe offered Senate Amendment 299 to S.493, the SBIR/STTR Reauthorization Act of 2011, which addressed this consideration using the following language:[14]

> Section 601 of title 5, United States Code, is amended by adding at the end the following:
>
> (9) the term 'economic impact' means, with respect to a proposed or final rule—
>
> (A) the economic effects on small entities directly regulated by the rule; and
>
> (B) the reasonably foreseeable economic effects of the rule on small entities that—
>
> ...(ii) are directly regulated by other governmental entities as a result of the rule...

The language in (9)B(ii) above addresses indirect costs borne by small entities as a result of state regulations that implement federal rules to ensure that important economic effects are not excluded.

Modifying Requirements for Agency Regulatory Flexibility Analysis

S. 584 would expand the requirements for agencies' regulatory flexibility analyses to include detailed statements that include 1) describing the reasons why action by the agency is being considered; 2) describing the objectives of, and legal basis for, the proposed rule; and 3) estimating the number and type of small entities to which the proposed rule will apply. To the extent that the requirements contain similar language to Executive Order (EO) 12866, codifying these requirements may make agencies more responsive to them, encourage accountability, increase transparency, and encourage an evidence-based regulatory approach.[15]

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[14] Legislative text available here: https://www.congress.gov/amendment/112th-congress/senate-amendment/299/text

[15] Marcus Peacock, Sofie E. Miller, and Daniel R. Pérez. "Public Comment to the Commission on Evidence-Based Policymaking. The George Washington University Regulatory Studies Center. November 08, 2016. Available at https://regulatorystudies.columbian.gwu.edu/public-comment-commission-evidence-based-policymaking

Executive Order (EO) 12866 has underpinned federal regulatory policy and processes since it was signed by President Clinton in 1993, and it has been upheld by both Republican and Democratic presidents in the intervening 24 years. EO 12866 established both a regulatory philosophy and 12 principles of regulation to guide federal regulatory agencies as they write, analyze, and review their regulations. This EO provides agencies with important, nonpartisan standards to improve regulatory process, regulatory analysis, and regulatory outcomes. While President Trump has issued new cross-cutting regulatory executive orders, they appear to supplement, rather than replace, EO 12866.[16]

Effects on the Role of the Chief Counsel for Advocacy

S. 584 proposes changes regarding both the procedure and scope pertinent to preparing an initial regulatory flexibility analysis required under §603. Several of these revisions—including both the definition of what constitutes a "rule" and which agencies are required to comply with the statute—would significantly broaden the participation of the Chief Counsel for Advocacy of the Small Business Administration (SBA).

As currently worded, the bill would change the definition of what is considered a "rule" to the broadest definition contained within the Administrative Procedure Act.[17] The new definition would include: amendments to previously issued rules, general statements of agency policy, agency guidance, and interpretive rules. Additionally, this bill removes the current designation of a "covered agency," currently defined in §609(d) to mean only (1) the Environmental Protection Agency; (2) the Consumer Financial Protection Bureau of the Federal Reserve System; and (3) the Occupational Safety and Health Administration of the Department of Labor.

While it is difficult to quantify the number of additional small business advocacy review (SBAR) panels this would create, it is reasonable to assume that this would require significantly more analyses and coordination of comments from the small business community by the Chief Counsel for Advocacy and the Office of Information and Regulatory Affairs. S. 584 seems to explicitly recognize this in Sec. 13. Comptroller General Report:

> Not later than 90 days after the date of enactment of this Act, the Comptroller General of the United States shall complete and publish a study that examines whether the Chief Counsel for Advocacy of the Small Business Administration has the capacity and resources to carry out the duties of the Chief Counsel under this Act and the amendments made by this Act.

[16] Susan E. Dudley. "Latest Trump Executive Order Provides Guidance on 'Enforcing the Regulatory Reform Agenda'." The George Washington University Regulatory Studies Center. February 27, 2017. Available at https://regulatorystudies.columbian.gwu.edu/latest-trump-executive-order-provides-guidance-%E2%80%9Cenforcing-regulatory-reform-agenda%E2%80%9D

[17] 5 U.S.C. §551(4).

As the Center has previously suggested, the problem of inadequate funding can often be addressed by the reallocation of resources within an agency.[18]

Affecting the Timing of SBAR Panels

Part of the value of an agency consultation with an SBAR panels derives from the timing of this practice within the rulemaking process. Currently, EPA, CFPB, and OSHA are required to "assure that small entities have been given an opportunity to participate in the rulemaking process"[19] for any rule "which will have a significant economic impact on a substantial number of small entities."[20] Small business panel members have a chance to meet with agency officials to exchange data and talk through potential regulatory alternatives early in the process—before an agency has already decided on a particular regulatory approach. Research indicates that considering alternatives early in the rulemaking process is a particularly valuable best practice.[21] This essentially allows small business to have "a voice" earlier in the process relative to the general public, which only provides public comment during normal notice and comment periods.

It may be valuable for Congress to consider the effect of its proposed revision to §609, which may create the unintended consequence of reducing the value of the SBAR process. S. 584 proposes striking subsection (b) of §609 which currently states: "Prior to publication of an initial regulatory flexibility analysis…a covered agency shall…" and replacing it with: "(b)(1) Prior to publication of any proposed rule…an agency shall…" The Committee should ensure that this does not inadvertently relax statutory requirements for agencies to include SBAR review early in their regulatory process.

Expanding Requirements for Periodic Review of Rules

Various Executive Orders and Congressional statutes require agencies to conduct analyses prior to issuing regulations; these requirements create incentives for agencies to focus significant resources on their *ex ante* predictions of the future effects of proposed rules. These expert predictions, however, rely on several assumptions about uncertain future market conditions, prices, and consumer behavior.[22] Retrospective review (*ex post* analysis) provides a valuable opportunity for agencies to measure the actual impacts of their regulations and compare them

[18] Peacock, Miller, and Pérez. 2016

[19] 5 U.S.C. §609(a).

[20] 5 U.S.C. §602(a)(1).

[21] Carrigan, C., and Shapiro, S. (2016) What's wrong with the back of the envelope? A call for simple (and timely) benefit–cost analysis. Regulation & Governance, doi: 10.1111/rego.12120.

[22] Susan E. Dudley, Brian F. Mannix, Sofie E. Miller, and Daniel R. Pérez. "Public Comment on OMB's Interim Guidance Implementing Section 2 of the Executive Order Title 'Reducing Regulation and Controlling Regulatory Costs,'" The George Washington University Regulatory Studies Center. February 10, 2017. Available at https://regulatorystudies.columbian.gwu.edu/public-comment-omb%E2%80%99s-interim-guidance-implementing-section-2-executive-order-titled-%E2%80%9Creducing

with *ex ante* predictions. These *ex post* analyses not only improve future agency ex ante predictions but can also help agencies fulfill existing requirements to "modify, streamline, expand, or repeal [existing rules] in accordance with what has been learned."[23] Unfortunately, although regulatory agencies are required to comply with the practice of regularly conducting retrospective review, agencies seldom conduct rigorous, routine review of their regulations.[24]

S. 584 modifies the statutory requirements under §610 of the RFA, which requires agencies to review each rule estimated to have a significant economic impact on a substantial number of small entities within ten years of a final rule's publication.[25] Notable additions include: changes that broaden the list of rules under review (where the head of an agency could determine that a rule should be included for review regardless of whether the agency originally conducted a RFA), a decrease in the maximum amount of time that the head of an agency can extend such reviews (from 5 years to 2), and a requirement that each agency submit an annual report of the results of its review to Congress. Researchers find that agencies exhibit historically low review rates in complying with §610.[26]

Enhancing codified requirements to conduct retrospective review such as §610 can serve as an incremental step in subjecting compliance to greater oversight by Congress. Designing regulations with a transparent plan for conducting retrospective review can provide a better framework for agencies to successfully conduct valuable *ex post* analysis.[27]

For instance, Senators Heitkamp and Lankford have proposed S. 1817, the Smarter Regulations Act, which is consistent with the Center's EBR framework (see appendix). This bill would require agencies to include a framework within major rules for conducting retrospective review which involves writing into the rule: the timeframe for reassessment, the metrics that will be used to gauge efficacy, and a plan for gathering the necessary data.[28] Such provisions would provide agencies with an incentive to think prospectively about how to retrospectively review their rules, and allow them to design their regulations in advance to improve the prospects for

[23] Executive Order 13563, "Improving Regulation and Regulatory Review" January 18, 2011.

[24] Sofie E. Miller, "Learning from Experience: Retrospective Review of Regulations in 2014," Working Paper, The George Washington University Regulatory Studies Center, November 2015. See also: Reeve T. Bull, "Building a Framework for Governance: Retrospective Review and Rulemaking Petitions," Admin. L. Rev., 67:265 (2015).

[25] 5 U.S.C. §610(a).

[26] Michael R. See. "Willful Blindness: Federal Agencies' Failure to Comply with the Regulatory Flexibility Act's Periodic Review Requirement- And Current Proposals to Invigorate the Act," Fordham Urban Law Journal. Vol. 33, No. 4 (2005). See provides three reasons why compliance rates are likely low: 1) agencies "restart the clock" by amending regulations, 2) agencies often make determinations that rules are not actually affecting small entities, and 3) some agencies may simply be neglecting to comply. p. 121

[27] Susan E. Dudley. "Retrospective Evaluation of Chemical Regulations," OECD Environment Working Papers, No. 118. March 2017. Available at http://www.oecd-ilibrary.org/environment/retrospective-evaluation-of-chemical-regulations_368e41d7-en;jsessionid=nalggmwk9wyy.x-oecd-live-02

[28] Smarter Regs. Act of 2015, S. 1817, 114th Cong. (2015).

review. This approach could both institutionalize review and improve regulatory outcomes by helping agencies to think proactively about how to measure the success of their rules.

Closing Thoughts

The Committee is undertaking an important effort by considering the effects of federal regulation on small businesses. In particular, the consideration of indirect costs would have a significant effect on which rules are considered to have an impact on small businesses. The omission of these costs from previous analyses has disadvantaged small businesses, and as the Committee considers how to address these costs in future rulemakings it should be careful to clearly define which costs are being measured to avoid double-counting. The Committee may also consider statutory language clarifying that indirect costs incurred via implementing regulations (such as NAAQS state implementation plans) are included in this definition.

Efforts to increase the opportunities for small businesses to participate early in the rulemaking process and broaden the scope of rules that agencies can consider in their retrospective reviews could be valuable in improving both outcomes and predictions of future regulatory costs and benefits. Congress should consider any possible tradeoffs associated with doing so—with particular attention on not inadvertently reducing the value or effectiveness of the existing SBAR process. Additionally, to the extent that any legislative changes codify regulatory best practices, such as those found within Executive Order 12866, this may successfully strengthen Congress' oversight of agency compliance.

Finally, the Committee may be well served by delaying action on the legislation under discussion today until the Small Business Administration Office of Advocacy is staffed with a Chief Counsel. Congress could benefit greatly from the expertise of SBA Advocacy, and allowing time for this important position to be filled could provide the Committee with a useful perspective on the current process and how the proposed bills may change it.

APPENDIX[29]

Regulatory
Studies Center
THE GEORGE WASHINGTON UNIVERSITY

Evidence-Based Regulation Framework

I. Regulatory Design

A. Identify the problem (state the "compelling public need").

B. Evaluate whether modifications to existing rules can address the problem.

C. Identify and assess available alternatives to direct regulation.

D. If regulating, determine that the preferred alternative addresses the problem.

E. Set clear performance goals and metrics for outputs and outcomes.

F. Exploit opportunities for experimentation.

G. Plan and budget for retrospective review.

II. Regulatory Decision-making

A. Assess the expected benefits, costs, and other impacts.

B. Clearly separate scientific evidence from policy judgments.

C. Make relevant data, models and assumptions available to the public.

III. Retrospective Review

A. Reassess planned retrospective review and modify if necessary.

B. Gather necessary data on regulatory outputs and outcomes.

C. Implement retrospective review plan.

D. Compare measured outcomes to original performance goals.

E. Reassess the rule using new information and the factors in the regulatory design.

[29] We have separately submitted our full public comment on Evidence-Based Regulation for the Congressional record; the full comment can be accessed on our website here: https://regulatorystudies.columbian.gwu.edu/public-comment-commission-evidence-based-policymaking

Statement for the Record

Submitted to the U.S. Senate Committee on Small Business

and Entrepreneurship

From Senator James Lankford

Thank you Chairman Risch and Ranking Member Shaheen for holding this hearing on how regulations affect small businesses.

The annual federal regulatory burden is huge – nearly $2 trillion dollars – and has hindered our economy for decades. A recent study by the Mercatus Center at George Mason University found that the cumulative regulatory burden has slowed economic growth by 0.8 percent per year between 1980 and 2012. And this burden falls disproportionally on small businesses.

As Chairman of the Regulatory Affairs and Federal Management Subcommittee, I have had the opportunity to hear from small business owners both in Oklahoma and across the country who tell me that they are being left out of the regulatory process, that their voice is not heard in Washington.

According to the Small Business Administration, there are 28 million small businesses in the United States which account for 55 percent of all jobs and 66 percent of all new jobs since the 1970s. This is a vital sector of the economy that received a lot of attention during campaigns but once candidates become elected officials and return to Washington, small businesses are ignored.

Currently, agencies are required to consider the regulatory impact on and consult with small entities pursuant to the Regulatory Flexibility Act (RFA) and the Small Business Regulatory Enforcement Fairness Act (SBREFA). However, in reality, agencies do not genuinely take into account the views of small businesses and these statutes are not as effective as Congress intended.

To address these shortcomings I, along with Chairmen Risch and Grassley, introduced the Small Business Regulatory Flexibility Improvements Act. This bill amends the RFA and SBREFA by requiring agencies to account for all costs, direct and indirect, as well as to estimate the cumulative economic impact of a rule, and if a rule will have a disproportionate economic impact on small businesses.

One way to avoid unnecessary burdens on small businesses is to require agencies to have real, meaningful consultation with stakeholders. This legislation requires that when any agency is considering a rule that would have a significant economic effect on small businesses they hold public panels to hear from those businesses that may be affected. Currently, only the EPA, OSHA, and the CFPB have this requirement.

Finally, this legislation eliminates fines for first time paperwork violations. While large businesses have legal departments, accountants, and compliance officers, small business owners must perform all those jobs simultaneously. There are so many regulatory requirements that if a small business makes a harmless paperwork error, agencies should not rush to issue a fine.

This past January, the Subcommittee on Regulatory Affairs and Federal Management held a similar hearing where we heard reports about this significant spike in small business optimism. With the change of Administrations, we have the opportunity to make meaningful changes to help our small business owners and reduce regulatory burden that is often unnecessary and duplicative.

It is time to stop talking about regulatory reform and actually do something about it.

STATEMENT OF

THE NATIONAL ASSOCIATION OF CONVENIENCE STORES

FOR THE

HEARING OF THE SENATE COMMITTEE ON SMALL

BUSINESS & ENTREPRENEURSHIP

MARCH 29, 2017

"EXAMINING HOW SMALL BUSINESSES

CONFRONT AND SHAPE REGULATIONS"

NACS

The National Association of Convenience Stores ("NACS") appreciates the opportunity to submit this statement regarding the importance of the Regulatory Flexibility Act ("RFA") and the Small Business Regulatory Enforcement Act of 1996 ("SBREFA") and why legislation to improve RFA and SBREFA is needed.[1]

In enacting both RFA and SBREFA, Congress recognized that although businesses of all sizes face increasingly onerous regulatory burdens, small businesses are often disproportionately burdened by these regulations. Many times, small businesses do not have in-house counsel or regulatory compliance personnel. Thus, the regulatory burdens that may impose a cost – albeit a "manageable" one – on larger businesses, are magnified for smaller entities. This is particularly true in the convenience store industry where single-store operators often double as cashiers at their stores and work behind the counter many hours per week.[2]

By requiring agencies to (1) consider the impact of their regulatory proposals on small entities, (2) examine effective alternatives that would minimize the impact of a rule on small businesses, and (3) provide their analyses to the public for comment, RFA and SBREFA provide important protections for small businesses.[3] Unfortunately, however, agencies routinely fail to comply with their regulatory obligations imposed by these laws. Instead, they treat these requirements as mere procedural requirements without any policy or substantive content to them. To prevent agencies from merely "checking the box" for RFA and SBREFA requirements, legislation, such as the Prove It Act[4] and the Small Business Regulatory Flexibility Improvement Act,[5] should be enacted.

In the statement below, NACS provides an overview of the convenience stores industry, describes the benefits of passing legislation to restore RFA and SBREFA, and describes a case-study where RFA and SBREFA failed.

I. THE CONVENIENCE STORE INDUSTRY IS A SMALL BUSINESS INDUSTRY.

NACS is an international trade association representing the convenience store and fuel retailing industry with more than 2,200 retail and 1,800 supplier company members, the majority of whom are based in the United States. In 2015, the industry employed more than two and a half

[1] The Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121 (1996), amended the Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq.*, in a number of important ways.

[2] In addition to the general difficulties tied to small business ownership, many convenience store owners and operators are first generation immigrants, who do not speak English as a first language. Thus, even language can present an obstacle to compliance.

[3] Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (codified at 5 U.S.C. § 601). 5 U.S.C. §§ 603(c) (Initial Regulatory Flexibility Analysis), 604(a)(6) (Final Regulatory Flexibility Analysis), 610(b) (Periodic Review of Rules).

[4] Prove It Act of 2016, S. 2847, 114th Cong. (2016).

[5] Small Business Regulatory Flexibility Improvement Act, S. 584, 115th Cong. (2017).

million workers and generated $574.8 billion in total sales, representing approximately 3.2 percent of the United States' GDP. Our members serve approximately 160 million people per day – around half of the U.S. population –and our industry processes over 81 billion payment transactions per year.

Despite the fact that one in every 30 dollars spent in the American economy is spent in our members' channel of trade, the convenience and fuel retailing industry is an industry of small businesses. 63 percent of the 154,195 convenience stores in the U.S. are owned and operated by an individual with only one store. Moreover, under five percent of the retail motor fuel outlets in the United States are owned and operated by the integrated oil companies—the vast majority of branded outlets are locally owned. This small business nature of the industry is reflected in the association's membership where approximately 75 percent of NACS' total membership is composed of companies that operate ten stores or fewer.

The convenience store and retail fuel market is one of the most competitive in the United States. NACS' members operate on tiny margins (around 2 percent or less) and the average annual pretax profit per store is approximately $68,744. NACS' members are unable to absorb incremental cost increases without passing them on to consumers. Thus, every regulatory compliance cost (no matter how small) that a store owner accrues is a cost that must be passed along to consumers.

II. OVER TIME, RFA AND SBREFA REQUIREMENTS HAVE BECOME MERE "CHECK THE BOX" EXERCISES FOR MANY FEDERAL AGENCIES.

Despite the initial momentum behind RFA and SBREFA, and the hope that these statutes would lead to positive changes for small businesses in the regulatory space, RFA and SBREFA have become mere procedural requirements without any substantive meaning.[6] As Thomas Sullivan, Chief Counsel for Advocacy at the Small Business Administration under President George W. Bush, explained at a 2002 congressional hearing, "One of the largest hurdles to be overcome remains resistance in some agencies to the concept that less burdensome regulatory alternatives may be equally effective in achieving their public policy objectives."[7] Agencies, he explained, routinely find loopholes for not complying with RFA and SBREFA.

Legislation, such as the Prove It Act of 2016 and S. 584: the Small Business Regulatory Flexibility Improvement Act, is critical to ensuring that RFA and SBREFA serve as proper checks on agency actions and effectively work to protect small businesses from regulatory

[6] William J. Clinton, "Message to the Congress Reporting on the State of Small Business," May 6, 1999 (stating that "The new process is working. Agencies and businesses are working in partnership to ensure that small business input is a part of the rule-making process.") . Online by Gerhard Peters and John T. Woolley, THE AMERICAN PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws/?pid=57528.

[7] *Agency Compliance with the Small Business Regulatory Enforcement Fairness Act (SBREFA): Hearing Before the H. Committee on Small Business*, 107th Cong. (2002) (statement of Thomas M. Sullivan, Chief Counsel for Advocacy, office of Advocacy, U.S. Small Business Administration), *available at* https://www.sba.gov/sites/default/files/files/test02_0306.txt.

burdens as Congress intended. For example, S. 584 would close the loopholes agencies have been using to skirt economic analyses of their rules and ensure that agencies conduct proper analyses on how their regulations impact small businesses. Similarly, the Prove It Act would empower the Small Business Administration ("SBA") to request that the Office of Information and Regulatory Affairs ("OIRA") review any federal agency certification that a proposed rule, if promulgated, would *not* have a significant economic impact on a substantial number of small entities (in which case the agency does not need to submit a regulatory flexibility analysis of the rule). Such provisions are significant. It is far too common for agencies to formally perform an economic impact analysis (without analyzing the data in a meaningful way or by analyzing incomplete data) and find that a regulation would not have significant impact.[8]

NACS supports the principles behind the Prove It Act and the Small Business Regulatory Flexibility Improvement Act, and encourages the Committee to move them through the legislative process. If RFA and SBREFA are to be truly effective, agencies must be required to conduct meaningful analyses based upon legitimate and complete data sets and to consider and implement where possible less burdensome requirements.

III. CASE STUDY: RFA AND SBREFA FAILED TO PROTECT SMALL BUSINESS CONVENIENCE STORES DURING THE MENU LABELING RULEMAKING PROCESS.

An example of how RFA and SBREFA failed to protect small businesses is found below. In particular, it highlights how an inaccurate regulatory impact analysis and failure to find meaningful small business regulatory alternatives results in costly burdensome requirements for small businesses. The below example is a case in point for why Congress should be pushing to give RFA and SBREFA more teeth.

In December 2015, the Food and Drug Administration ("FDA") issued its long-awaited final rule on nutrition labeling of standard menu items in restaurants and similar retail food establishments.[9] Businesses must begin complying with the rule, which arose out of the menu labeling provisions of the Patient Protection and Affordable Care Act ("ACA"), by May 5, 2017.

Between enactment of the ACA and FDA's issuance of its final rule, NACS and many similarly situated parties actively engaged with the agency to achieve common sense

[8] NACS saw this first-hand during the recent rulemaking process to enhance retailer standards in the Supplemental Nutrition Assistance Program. *See e.g.*, Office of Advocacy, U.S. Small Business Administration, Letter to Undersecretary Kevin Concannon re: Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program, (May 17, 2016)(stating that the Food and Nutrition Service should "improve its regulatory flexibility impact analysis and consider reasonable regulatory alternatives that will minimize the impact of the rule on affected small businesses" and that FNS' conclusions regarding the rule's impact on small retailers is underestimated), ID: FNS-2016-0018-1169, *available at* https://www.regulations.gov/document?D=FNS-2016-0018-1169.

[9] Food Labeling, 21 C.F.R. Part 101 (2014); Final Rule, Dept. of Health and Human Services, *Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments; Calorie Labeling of Articles of Food in Vending Machines,* 79 Fed. Reg. 71156 (Dec. 1, 2014).

implementation of the rule.[10] FDA, however, largely ignored the myriad real-world complications of implementing the underlying statute and the problems it created with its proposal. In the final rule, despite the agency's admission that the final rule will "have a significant economic impact on a number of small entities,"[11] the agency stated that in complying with RFA, "we have accordingly analyzed regulatory options that would minimize the economic impact of the rule on small entities consistent with statutory objectives. We have crafted the final rule to provide flexibility for compliance."[12] Yet, a close examination of the various iterations of this rule and the accompanying guidance documents shows that FDA did not truly analyze or provide for any meaningful alternatives that would have lessened the regulatory burdens for small businesses. FDA merely "checked the box" on its RFA and SBREFA requirements by stating empty words in its regulations. It did not accurately gauge the cost burdens the rule placed on small businesses, the unique problems the rule presented for small businesses, or any meaningful alternatives to reduce burdens on small businesses.

Section 4205 of the ACA required FDA to mandate disclosure of certain calorie information by any "restaurant *or similar retail food establishment* that is part of a chain with 20 or more locations doing business under the same name."[13] In its final rule, FDA failed to properly consider the differences between restaurants and other retail businesses, and whether non-restaurant businesses should be covered by the rule at all and if so, how.[14] This failure resulted in a regulation that is utterly devoid of flexibility for different business models (e.g., chain restaurant, grocery store, or convenience store) with respect to how and where calorie counts are displayed. In addition, it has led to substantial uncertainty related to core definitions and components of the rule, such as what constitutes a "menu" and natural calorie variations between fresh food products.

For instance, if a convenience store posts an advertisement for a sandwich + drink special inside the store, FDA has indicated it might be considered a menu and need to display calorie

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[10] *See* Letter from Carin Nersesian, Director, Government Relations, National Association of Convenience Stores to Dr. Margaret Hamburg, Commissioner of Food and Drugs, Food and Drug Administration, Docket ID FDA-2011-F-0172-0191 (May 4, 2011) (commenting on FDA's Proposed Rule on Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments, 76 Fed. Reg. 19192 (Apr. 6, 2011) (hereinafter "Proposed Rule")); *see also* Letter from Erik Lieberman, Regulatory Counsel, Food Marketing Institute to Dr. Margaret Hamburg, Commissioner of Food and Drugs, Food and Drug Administration, Docket ID FDA-2011-F-0172-0455 (July 8, 2011) (commenting on FDA's Proposed Rule); Letter from Lisa Mullings, President and CEO, NATSO to Dr. Margaret Hamburg, Commissioner of Food and Drugs, Food and Drug Administration, Docket ID FDA-2011-F-0172-0467 (July 8, 2011) (commenting on FDA's Proposed Rule).

[11] Notwithstanding the agency's estimate that the rule would have a "significant economic impact," estimates by third parties found the cost would be even higher than the agency estimated.

[12] 79 Fed. Reg. at 71244.

[13] 21 U.S.C. § 343(q)(5)(H)(i).

[14] FDA dramatically expanded the scope of "similar retail food establishment" to effectively include any business that sells even a small amount of prepared food. The final rule now reaches "bakeries, cafeterias, coffee shops, convenience stores, delicatessens, food service facilities located in entertainment venues (such as amusement parks, bowling alleys, and movie theaters), food service vendors (e.g., ice cream shops and mall cookie counters), food take-out and delivery establishments (such as pizza take-out and delivery establishments), grocery stores, superstores, quick service restaurants, and table service restaurants." 79 Fed. Reg. at 71157.

information. If the advertisement were posted on a gas pump or on the street corner, however, it is even less clear. In fact, FDA staff has been unable to confirm whether any of these advertisements would be considered a menu under the regulations—despite having years to develop this regulation. As such, convenience store owners must expend vast amounts of money to rework advertisements that may or may not be considered menus.

If FDA actually adhered to the requirements of RFA and SBREFA, these points of confusion would likely have been cleared up between the proposed and final rule and the various guidance documents. FDA would have considered how small business owners – particularly small business owners across different business models – would be impacted by the rule and would have come up with viable alternatives for those companies. Instead, FDA did not consider (in any meaningful way) the difficulties and expense that small businesses will incur to comply with the requirements in the final rule.

IV. CONCLUSION

NACS believes that RFA and SBREFA are beneficial tools to protect small businesses against burdensome and expensive regulations. Over time, though, agencies have performed regulatory impact analyses as mere formalities, instead of revising and adjusting proposed rules to ensure small businesses are not adversely impacted. That is why – as evidenced by FDA's absurd implementation of its menu labeling rule – legislation addressing loopholes in the RFA and SBREFA is needed now more than ever.

NACS stands ready to assist the Committee as it examines RFA and SBREFA and considers future policy changes.

Statement for the Record of the

National Federation of Independent Business

Before the

U.S. Senate Committee on Small Business and Entrepreneurship

Hearing on: "Examining How Small Businesses Confront and Shape Regulations"

March 29, 2017

National Federation of Independent Business (NFIB)
1201 F Street, NW Suite 200
Washington, DC 20004

Chairman Risch and Ranking Member Shaheen,

The National Federation of Independent Business (NFIB), appreciates the opportunity to submit for the record this statement for the Senate Committee on Small Business and Entrepreneurship's hearing entitled, "Examining How Small Businesses Confront and Shape Regulations."

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 proudly represents hundreds of thousands of members nationwide from every industry and sector.

Impact of Regulation on Small Business

Overzealous regulation is a perennial concern for small business. The uncertainty caused by future regulation negatively affects a small-business owners' ability to plan for future growth. Since January 2009, "government regulations and red tape" have been listed as among the top-three problems for small business owners, according to the NFIB Research Foundation's monthly Small Business Economic Trends survey.[1] Not surprisingly then, the latest Small Business Economic Trends report analyzing December 2016 data had regulations as the second biggest issue small business owners cite when asked why now is not a good time to expand.[2] Within the small business problem clusters identified by the NFIB Research Foundation's Small Business Problems and Priorities report, "regulations" rank second behind taxes.[3]

Despite the devastating impact of regulation on small business, federal agencies issued 4,084 rules in 2016 – more than 11 each day.[4] In addition, according to the Administration's fall 2016 regulatory agenda, government bureaucrats are working on at least 3,318 more.[5]

When it comes to regulations, small businesses bear a disproportionate amount of the regulatory burden.[6] This is not surprising, since it's the small business owner, not one of a team of "compliance officers" who is charged with understanding new regulations, filling out required paperwork, and ensuring the business is in compliance with new federal mandates. The small business owner is the compliance officer for her business and every hour that she spends understanding and complying with a federal regulation

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[1] NFIB Research Foundation, *Small Business Economic Trends*, at p. 20, January 2017. chrome-extension://oemmndcbldboiebfnladdacbdfmadadm/http://www.nfib.com/assets/SBET-December-2016.pdf

[2] *Id.*

[3] Wade, Holly, *Small Business Problems and Priorities*, at p. 17, August 2016. chrome-extension://oemmndcbldboiebfnladdacbdfmadadm/http://www.nfib.com/assets/NFIB-Problems-and-Priorities-2016.pdf

[4] Data generated from www.regulations.gov

[5] https://www.reginfo.gov/public/do/eAgendaMain

[6] Babson, *The State of Small Business in America 2016*, chrome-extension://oemmndcbldboiebfnladdacbdfmadadm/http://www.babson.edu/executive-education/custom-programs/entrepreneurship/10k-small-business/Documents/goldman-10ksb-report-2016.pdf; Crain, Nicole V. and Crain, W. Mark, *The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business*, September 10, 2014. chrome-extension://oemmndcbldboiebfnladdacbdfmadadm/http://www.nam.org/Data-and-Reports/Cost-of-Federal-Regulations/Federal-Regulation-Full-Study.pdf.

is one less hour she has to service customers and plan for future growth.

NFIB hears countless stories from small business owners struggling with new regulatory requirements. To them, the requirements come 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. But small business owners are not roaming the halls of administrative agencies, reading the *Federal Register* or even *Inside EPA*. Early engagement in the rulemaking process is not easy for the small restaurant owner in Norman, Oklahoma or small manufacturer in Bismarck, North Dakota. As a result, small businesses rely heavily on the notice-and-comment rulemaking process, small business protections in the Regulatory Flexibility Act (RFA), and internal government checks like the Office of Advocacy at the Small Business Administration (SBA) and Office of Information Regulatory Affairs (OIRA) to ensure agencies don't impose costly new mandates on small business when viable and less expensive alternatives to achieve regulatory objectives exist.

It has been two decades since the Small Business Regulatory Enforcement Fairness Act (SBREFA) amendments were passed and signed into law. These amendments to the RFA may not be well-known to the average American, but they have positively impacted small business owners and their customers in every state across the country.

In its 20-year history, SBREFA has been instrumental in tamping down the "one-size-fits-all" mentality that can be found throughout the regulatory state. When followed correctly, SBREFA can be a valuable tool for agencies to identify flexible and less burdensome regulatory alternatives. However, the last 20 years have also exposed loopholes and weaknesses in the law that allow federal agencies to act outside of the spirit of SBREFA when it comes to small business regulation. As I will discuss in my testimony, regulatory reform legislation that Congress is considering, like the Small Business Regulatory Flexibility Improvements Act, would go a long way in addressing four particular issues that continue to plague small business 20 years after SBREFA became law.

Regulatory reform is needed to ensure that SBREFA protections are expanded to other agencies, indirect costs of regulation on small business are taken into account, and judicial review is available early enough in the process to make a difference. Additionally, much work still needs to be done to ensure agencies comply with existing law and do not view SBREFA as just another box to be checked in the regulatory process.

NFIB Supports Expansion of SBREFA Protections to All Federal Agencies

NFIB supports reforms that would expand SBREFA's reach into other agencies. 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 them, and how the agency can develop simple and concise guidance materials that are designed with the small business owner in mind.

Department of Labor "Overtime" Rule

The Department of Labor (DOL) "Overtime" Rule demonstrates the need for expanded SBAR panels. On May 18, 2016 DOL issued its "Overtime" rule that would increase the salary threshold from $23,660 a year to $47,476 for executive or "white collar" employees. The rule would also would automatically increase the salary threshold every three years. [7]

Currently, agencies are required to perform an Initial Regulatory Flexibility Analysis (IRFA) prior to proposing a rule that would have a significant economic impact on a substantial number of small entities. And DOL confirmed the overtime rule would have a significant impact on small firms. However, when analyzing the rule DOL simultaneously underestimated the compliance costs to small businesses and overestimated wage increases realized by employees.

First, DOL's IRFA underestimated compliance costs because it did not take into account business size when it estimated the time it takes to read, comprehend and implement the proposed changes. As an example, DOL "estimates that each establishment will spend one hour of time for regulatory familiarization." This assumption erroneously disregarded a basic reality of regulatory compliance – the smaller the business, the longer and more expensive it is to comply. As previously noted, numerous studies have identified that federal regulatory compliance disproportionately affects small businesses, as compared to larger ones. Primarily, this is because small companies typically lack specialized compliance personnel. Typically, the duty of compliance officer falls to the business owner or the primary manager. These individuals are generally not experts in wading through regulatory text, so familiarization time is greater than for large companies. Alternatively, a small business could hire an outside expert to devise a compliance plan, but this cost will also be significantly greater than what a firm with in-house compliance staff would endure.

Second, the IRFA overestimated the wage increases employees are likely to see under the rule. The story of NFIB member, Robert Mayfield, illustrates this point.

Mr. Mayfield owns five Dairy Queens in and around Austin, Texas and is very concerned about the impact that the rule would have on his businesses and the individuals whom he employs. In his words, the rule would be "bad news" for both employers and employees.

Currently, Mr. Mayfield employs exempt managers at all five locations. These individuals earn, on average, about $30,000 per year and work between 40-50 hours per week. The managers also receive bonuses, more flexible work arrangements, including paid vacation and sick time, training opportunities, and promotions that Mayfield's hourly employees do not. Mayfield explained that, in his company, promotion to an exempt management position carries a great deal of status with employees who, (upon promotion to a manager position) boast about no longer having to punch time

[7]DOL's overtime rule was initially scheduled to take effect on December 1, 2016 until a federal district court in Texas issued a preliminary injunction enjoining the rule from being enforced while its legality is considered by the courts. NFIB is a plaintiff in one of the lawsuits challenging the rule.

clocks. In Mayfield's opinion, it would be demeaning to force managers to punch a clock. He also noted that his managers have more flexibility for things like doctors' appointments and kids' activities. Since they aren't punching in and out on a time clock, they are paid a weekly salary even if they're out for personal activities.

Under DOL's rule, Mayfield predicted that he'll need to move the managers back to hourly positions as there is simply no way he can afford to pay over 10 managers $47,000 each. As a result, he predicted the skill level of his managers will decrease. Moreover, Mayfield noted that rather than giving managers overtime, he would likely hire a few more part-time employees. What he would not do would be to pay managers overtime; instead he would continue to strictly enforce a no-overtime policy. Overtime costs, he said, could not be passed on to customers nor could the business afford to absorb added labor costs.

Overall, Mayfield said the effect would be lower-skilled managers and higher turnover, which would impact the quality of service offered at his restaurants.

The bottom line is that while IRFA analyses are helpful for agencies to realize the cost and impact a proposed rule would have on small business, they generally do not tell the full story.

Agencies would benefit from convening a SBAR panel for rules of significant impact. SBAR panels allow an agency to walk through a potential proposal with small business owners, either in person or via telephone, and receive feedback and other input from those who will be directly impacted by the regulation. These panels are currently required for the Environmental Protection Agency (EPA), the Occupational Safety and Health Administration (OSHA), and the Consumer Financial Protection Bureau. NFIB believes all agencies would achieve better regulatory outcomes if required to go through such a procedure.

Expansion of SBREFA and SBAR panels to all agencies — including independent agencies – would put agencies 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 SBA Office of Advocacy should ensure agencies are following the spirit of SBREFA. There are instances where EPA and OSHA have declined to conduct a SBAR panel for a significant rule and/or a rule that would greatly benefit from small business input.

NFIB Supports Legislation That Would Account for the Indirect Cost of Regulation on Small Business

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.

Clean Power Plan

The "Clean Power Plan" rule EPA issued on October 23, 2015 provides an excellent example of the indirect cost of regulation on small business.[8] The rule requires states to reduce carbon emissions by shutting down many coal-fired power plants. President Obama's administration has stated that EPA's rule will "aggressively transform ... the domestic energy industry" and sweeps virtually all aspects of electricity production in America under the agency's control.

Under the rule, states are required to find a mix of alternative energy sources, like wind and solar, to make up for the shuttering of coal-fired power plants. Increased reliance on these alternative energy sources is expected to significantly raise the costs of electricity and also threatens its reliability.

Even the Obama administration expects its Clean Power Plan to drive up the cost of electricity, the impact of which will fall hard on small businesses that depend heavily on affordable energy. NFIB research shows that the cost of electricity is already a top concern among small business owners across the country. Small businesses will be squeezed between higher direct expenses and lower consumer demand resulting from higher home electric bills.

NFIB supports legislation that would require federal agencies to make public a reasonable estimate of a rule's indirect impact on small business.

NFIB Supports Legislation that Would Allow for Judicial Review of RFA Compliance During the Proposed Rule Stage

Under SBREFA agency decisions are 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 economic growth. Under current law, an agency determination that a rule does not significantly impact a substantial number of small entities may occur years before the rule is finalized. Small businesses must wait until the rule is promulgated before legally challenging the agency's determination that the rule will not significantly impact a substantial number of small entities. Unless a court stays enforcement of the rule, small

[8] The day the rule was issued NFIB joined the U.S. Chamber of Commerce, the National Association of Manufacturers, and other industry groups in suing EPA. We argue that the rule is an unconstitutional infringement of state rights and outside of EPA's statutory authority under the Clean Air Act. On February 9, 2016, the Supreme Court stopped EPA and the states from implementing the rule until the courts can determine whether or not it is legal. On September 27, 2016 the D.C. Circuit Court of Appeals met *en banc* to hear oral argument in our case and we are awaiting a final decision from that court.

businesses must comply with it while the battle over its certification is fought in court. This system imposes unnecessary costs and regulatory burdens on small business and is inefficient.

NFIB has experienced the inefficiency and needless costs of the current law first-hand. Over a decade ago, the U.S. Army Corps of Engineers (Army Corps) issued a rule defining what it considered a wetland under its Nationwide Permits program. The Army Corps failed to perform a regulatory flexibility analysis as required by SBREFA and instead promulgated the rule using a "streamlined process." NFIB sued the agency for noncompliance. 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 the agency to be fixed, the court only admonished the Army Corps not to use its "streamlined process" in the future. Small business owners affected by the NWP rule realized no relief.

NFIB supports legislation that would afford small business advocates judicial review during the proposed rule stage of rulemaking.

NFIB Supports Other Regulatory Reforms that Would Benefit Small Business

NFIB also would support the following regulatory reforms:

Waiver for First-Time Paperwork Violations

Congress should pass legislation that would waive fines and penalties for small businesses the first time they commit a non-harmful error on regulatory paperwork. Because small businesses lack 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.

More Vigorous Cost-Benefit Analysis

Congress should require every agency to determine, compare, and publish the costs and benefits of a proposed regulation. Congress should make clear that this requirement overrides any prior legislation or court decision that does not require such a cost/benefit analysis. Congress should not allow agencies to adopt regulations when costs exceed benefits or when costs are unreasonable. And Congress should make that prohibition enforceable in court.

Third-Party Review of RFA Analyses

Congress should demand that agencies perform regulatory flexibility analyses and require agencies to list all of the less-burdensome alternatives that were considered. Each agency should provide an evidence-based explanation for why it chose a more-burdensome versus less-burdensome option and explain how their rule may act as a barrier to entry for a new business. To this end, NFIB would support third-party review when the agency and the SBA Office of Advocacy disagree on small business impact. If

the disagreement occurs then the analysis would be turned over to OIRA for review and a determination as to whether the agency must perform a better RFA analysis.

Agency Focus on Compliance

NFIB is concerned that over the last several years many agencies shifted from an emphasis on small business compliance assistance to an emphasis on enforcement. Small businesses lack the resources needed to employ specialized regulatory compliance staff. 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.

Twenty Years Later, Agency Compliance with SBREFA Is Not Assured

Finally, work still needs to be done to ensure agencies comply with the letter and spirit of existing law. NFIB remains deeply troubled by the lack of attention the Army Corps and EPA paid to following SBREFA when the agencies promulgated the Waters of the U.S. rule.[9]

The rule, issued on June 29, 2015, would change the Clean Water Act's definition for "waters of the United States" to govern not just navigable waterways, as stated in the statute, but every place where water could possibly flow or pool. Under the rule, EPA and the Army Corps could require homebuilders, farmers, and other property owners to spend tens of thousands of dollars on a permit before they can build or even do simple landscaping around seasonal streams, ponds, ditches, and depressions.

It was clear to the regulated community the moment the rule was proposed that EPA and the Army Corps had little interest in conducting a meaningful assessment of the proposed rule's impact on small business. Indeed, EPA and the Army Corps failed to analyze the small business impact of the rule as required by the RFA. In early 2015, SBA's Office of Advocacy formally urged EPA to withdraw the waters of the U.S. rule because of its potentially huge impact on small businesses. It cited the EPA's own estimate that the rule would cost the economy more than $100 million.[10]

Twenty years after it was signed into law, it is inexcusable that federal agencies view SBREFA as a law to work-around or ignore rather than embrace. NFIB hopes that the new administration will understand the important role SBREFA plays in reducing the regulatory burden on America's job creators and that Congress will hold federal agencies to account when they fail to follow the letter and spirit of SBREFA.

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[9] NFIB, joined by the U.S. Chamber of Commerce, challenged the rule in a federal court in Oklahoma arguing, among other things, that EPA is acting outside of its authority under the Clean Water Act and the rule is an unconstitutional infringement of state rights to regulate intrastate lands and waters. On October 9, 2015, the 6th Circuit Court of Appeals stopped EPA and the Army Corps from moving forward in implementing the rule until the 6th Circuit can determine whether or not it is legal.

[10] https://www.sba.gov/advocacy/1012014-definition-waters-united-states-under-clean-water-act

Conclusion

Small businesses are the engine of our economy. Yet over the last several years the crushing weight of regulation has been a top reason preventing them from growing and creating jobs. NFIB looks forward to working with the 115th Congress to pass the Small Business Regulatory Flexibility Improvements Act and other regulatory reforms that would improve current law and level the regulatory "playing field" for small business.

NEMO Equipment, Inc.

The Honorable Jeanne Shaheen
Ranking Member
Senate Committee on Small Business & Entrepreneurship
428A Russell Senate Office Building
Washington, DC 20510

Dear Ranking Member Shaheen,

I'm writing to you today to submit a Statement for the Record for the upcoming hearing on regulatory reform on behalf of my company, NEMO Equipment, Inc. of Dover, New Hampshire.

NEMO is a manufacturer of tents, sleeping bags, sleeping pads, and other backpacking and camping goods that are used by outdoor enthusiasts all over the world. Our customers benefit every day from regulations that protect their access to high-quality public lands and support innovative American businesses. Our company is especially attentive to regulations that protect small business and our environment, and that ensure clean air and clean water for generations of outdoor enthusiasts.

We welcome the efforts being undertaken by the committee and the administration to examine, reduce, and streamline regulations. As a small business, we get concerned when the regulatory process in Washington is cloudy and subject to fits and starts. Small companies like mine don't have the resources to keep up with an ever-changing regulatory environment and rely on a stable, consistent, and fair regulatory environment to protect us from unfair market competition and level the competitive playing field.

While we agree with the need for a regulatory environment that is conducive to business, we also believe that not all regulation is bad regulation. We support and rely on regulations that protect consumers, workers, and our environment. As a company that is a part of the $646 billion outdoor recreation industry, we believe it is important to examine the benefits that regulations bring, not only the cost of them, especially when it comes to their role in protecting our environment and public lands. These types of regulations help grow our business and create new jobs. If some of these were to be rolled back, it would not only hurt our business but negatively impact our public lands, where our products are used.

We believe the existence and enforcement of regulations can help grow the economy, perpetuate American values, and benefit our economy. For example, access to public lands is the backbone of the thriving outdoor recreation economy, and is central to the American identity and the mental and physical health of our citizens. We support regulations that are critical to the protection of those natural spaces. We also believe well-crafted regulations for industry can be essential in directing and enforcing the social and environmental values that are increasingly in demand in the marketplace and essential if American companies are going to stay on the cutting edge in the evolving modern economy.

Consumers have become more and more concerned with where their products come from, how they are made, and examining their entire life-cycle. Government regulation needs to keep up with the demands of consumers and the business community in promoting sustainability, social and environmental responsibility, and transparency. We believe that smart regulation can help ensure the future strength of the American economy in a global

landscape that is demanding increasingly high standards for ethical and sustainable business practice.

In short, NEMO believes in creating innovative, top-of-the-line products that both stand up to the tests of the outdoors while also making sure we produce our products in a way that does not negatively impact the same places our products are used. Streamlining regulations and creating regulatory stability and fairness is important to us, as is creating a level playing field for small businesses like ours in the global economy, but equally important to us are regulations that protect the people and places that make outdoor recreation possible.

Please don't hesitate to reach out to me if I can be of any help to you or your colleagues on the Small Business Committee.

Sincerely,

Cam Brensinger
Founder and CEO
NEMO Equipment, Inc.

Northern and Appalachian Hardwoods

NORTHLAND FOREST PRODUCTS

northlandforest.com

8 March 2017

The Honorable Jeanne Shaheen
Ranking Member
Senate Committee on Small Business and Entrepreneurship
428A Russell Senate Office Building
Washington DC 20510

Dear Senator Shaheen:

I am writing to you today to submit a Statement for the Record for the upcoming hearing on regulatory reform on behalf of my company, Northland Forest Products, Inc of Kingston NH. We also have operations in Troy, Virginia.

As a small family and employee owned business, we rely on a stable, consistent, and fair regulatory environment to protect us from unfair market competition and to level the competitive playing field. While regulatory compliance always takes a certain amount of business resources, and we know there are some regulations that are excessive and need modification, we believe that many regulations have a positive impact on our business.

For Northland Forest Products we count on a healthy and productive working forest for our raw material. Clean air, clean water and regulations that discourage mismanagement of the working landscape are key to our future. As export sales represent more than 50% of our business we are also strong supporters of trade regulations that encourage fair, free and legal trade in wood products. The Lacey Act Amendment is a great example of this. By preventing entry of illegally harvested forest products, domestic manufacturers are able to compete on a level playing field with imported products.

A stable and consistent regulatory environment is vital to our small business. When rulemaking in Washington becomes inconsistent, or when the process is opaque there can be unintended consequences for business like ours. I encourage you and your colleagues to keep this in mind as you explore the topic of business regulations. Less is not always more, and consistency and fairness are key for companies like Northland Forest Products.

Please let me know if I can provide any further information.

Sincerely,

Jameson S French, CEO

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PETE And GERRY'S ORGANIC EGGS

The Honorable Jeanne Shaheen
Ranking Member
Senate Committee on Small Business & Entrepreneurship
428A Russell Senate Office Building
Washington, DC 20510

Dear Ranking Member Shaheen,

I'm writing to you today to submit a Statement for the Record for the upcoming hearing on regulatory reform on behalf of my company, Pete and Gerry's Organic Eggs of Monroe, New Hampshire.

As a small business we rely on a stable, consistent, and fair regulatory environment to protect us from unfair market competition and to level the competitive playing field. Further, our company produces certified organic products. The regulations on organic food and the labeling associated with adhering to these regulations give us an important competitive advantage in our market.

As a small business owner, I am concerned by talk about rampant deregulation, especially in the organic food space. It is important that the organic label have real meaning, or our products will lose their value-added advantage. What's more, organic regulations are entirely voluntary, creating a great opportunity for companies to opt-in to a stricter regulatory environment in exchange for added value and a competitive advantage.

A stable and consistent regulatory environment is key to our small business. As a small business, we get concerned when the regulatory process in Washington is cloudy and subject to fits and starts. I encourage you and your colleagues to keep this is mind as you explore the topic of business regulation. Less is not always more, and consistency is key for companies like Pete and Gerry's.

Please don't hesitate to reach out to me if you need anything else.

Sincerely,

Jesse Laflamme
CEO, Pete and Gerry's Organics, LLC

Statement of the U.S. Chamber of Commerce

Examining How Small Businesses Confront and Shape Regulations

Thomas Sullivan

Vice President, Small Business Policy
and
Executive Director for the Small Business Council

Committee on Small Business & Entrepreneurship
United States Senate

March 29, 2017

The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The Chamber is dedicated to promoting, protecting, and defending America's free enterprise system.

More than 96 percent of Chamber member companies have fewer than 100 employees, and many of the nation's largest companies are also active members. We are therefore cognizant not only of the challenges facing smaller businesses, but also those facing the business community at large.

Besides representing a cross-section of the American business community with respect to the number of employees, major classifications of American business—e.g., manufacturing, retailing, services, construction, wholesalers, and finance—are represented. The Chamber has membership in all 50 states.

The Chamber's international reach is substantial as well. We believe that global interdependence provides opportunities, not threats. In addition to the American Chambers of Commerce abroad, an increasing number of our members engage in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Thank you for the opportunity to provide this statement on the important topic of how regulations impact small businesses. My name is Tom Sullivan and I run the Small Business Council at the U.S. Chamber of Commerce. The Chamber is the world's largest business federation. We represent the interests of over 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The majority of our business members are small firms. In fact, approximately 96 percent of Chamber member companies have fewer than 100 employees and 75 percent have fewer than ten. Maxine Turner, who is the founder of Cuisine Unlimited in Salt Lake City, Chairs our Small Business Council, which works to ensure the views of small business are considered as part of the Chamber's policy-making process.

I have spent most of my professional career advocating for small business. First, at the National Federation of Independent Business (NFIB), and then more recently at a law firm where I represented coalitions of small businesses and service providers. From 2002-2008, I was honored to serve as the Chief Counsel for Advocacy at the U.S. Small Business Administration (SBA). That office is charged with independently representing the views of small business before Congress and the Administration and oversees agency compliance with the Regulatory Flexibility Act.[1] Effective implementation of the Regulatory Flexibility Act plays an important role in preventing overburdensome federal regulatory mandates from crushing the small business community. The broad purpose of the Regulatory Flexibility Act is to ensure early input by small businesses in the development of regulatory policy and I applaud this Committee's oversight of the Act and your interest in amending the Regulatory Flexibility Act to make it work better.

Regulatory Flexibility Act

The Regulatory Flexibility Act requires federal agencies to satisfy certain requirements when they plan new regulations, including (1) identifying the small entities that will be affected, (2) analyzing and understanding the economic impacts that will be imposed on those entities, and (3) considering alternative ways to achieve the agency's regulatory goal while reducing the economic burden on those entities.[2] The Regulatory Flexibility Act was amended in 1996 by the Small Business Regulatory Enforcement Fairness Act (SBREFA).[3] SBREFA requires the Occupational Safety and Health Administration (OSHA), U.S. Environmental Protection Agency (EPA), and the Consumer Financial Protection Bureau (CFPB) to convene small business review panels (I refer to the panels as "SBREFA panels") whenever their planned rules are likely to have a significant economic impact on a

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1 *Regulatory Flexibility Act*, Pub. L. No. 96-354, 94 Stat. 1164 (1980), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 857 (1996) (codified as amended at 5 U.S.C. Sec. 601-612), also amended by Sec. 1100 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 2112 (July 21, 2010).

2 Keith W. Holman, *The Regulatory Flexibility Act at 25: Is the Law Achieving Its Goal?*, 33 Fordham Urban Law Journal 1119 (2006).

3 *Small Business Regulatory Enforcement Fairness Act of 1996*, Pub. L. No. 104-121, 110 Stat. 857 (1996).

substantial number of small entities. SBREFA panels include representatives from SBA's Office of Advocacy, the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) and the agency proposing the rule. The panel prepares a report containing constructive recommendations for the agency planning the rule and that report is made publicly available prior to the public providing comment on the agency's proposed rule.

There are three basic reasons for the Regulatory Flexibility Act.
(1) One-size-fits-all federal mandates do not work when applied to small business;
(2) Regulations disproportionately harm small businesses; and
(3) Small businesses are critically important to the American economy.

Prevention of one-size-fits-all federal mandates

Many times federal laws and regulations that may work for large corporations simply do not work for small firms. Several years ago, I worked with a group of small businesses in Quincy, Illinois, who found themselves in the cross hairs of Superfund. The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (referred to here as, "Superfund") was designed to fund cleanups of the nation's most polluted sites.[4] Rather than wait years and years to figure out what caused the pollution and who polluted, the Superfund law allowed the EPA to get funding from one or two of the largest companies that were responsible. The law then allowed those companies to seek reimbursement, through lawsuits, from other companies and individuals who may have contributed to the polluted site. While the liability scheme did expedite payment to the government and cleanup, it did not anticipate how small businesses could get caught up in a liability web with almost no choice but to pay significant fees, even if their only fault was responsibly sending household garbage, food scraps, and benign waste to their landfill. The authors of Superfund never intended to target small business owners like Greg Shierling who owned two McDonald's restaurants and Mac Bennett who owned a furniture store in the Quincy area, or Barbara Williams who owned a diner in Gettysburg, Pennsylvania. The unintended consequences of a one-size-fits-all statute forced small business owners to spend thousands in legal fees or settlements when they really had not done anything wrong. Thankfully, Congress took action and exempted innocent small businesses from Superfund in 2001.

Whether it is reauthorizing a new law, creating a new agency [5], or when agencies craft new regulations, government is well advised to solicit input and work with small businesses to devise solutions that maximize the law's or regulation's benefits and minimize harmful economic impact.

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[4] *Compressive Environmental Response, Compensation, and Liability Act of 1980*, Pub. L. No. 96-510, 94 Stat. 2767 (1980).

[5] Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act created the Consumer Financial Protection Bureau (CFPB). Section 1100G requires small business input in CFPB rulemaking. *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub. L. No. 111-203 (July 2010).

Small firms are disproportionately impacted by federal regulation

Research that was just released by the U.S. Chamber of Commerce Foundation sheds some light on how small businesses struggle under the yoke of excessive regulatory requirements. The report entitled, "The Regulatory Impact on Small Business: Complex. Cumbersome. Costly," pegs the impact of federal regulatory burden at $1.9 trillion per year in direct costs, lost productivity, and higher prices. ."[6] The Foundation's research also shows that those costs hit small businesses the hardest, with an impact on firms with 50 employees or fewer that is 20 percent higher than the average for all firms.

When examining the impact on small manufacturers, the Foundation cites a cost of nearly $35,000 per year per employee to comply with federal regulations for firms with fewer than 50 employees. This is 75 percent higher than the average for all manufacturers.[7]

Importance of small business to the U.S. economy and the threat of over-regulation

Recent figures show there are over 28 million small businesses in the United States.[8] The 62 million people employed at small firms represent about half of America's private sector workforce and small business is responsible for creating about 2/3 of the net new jobs over the past 15 years.[9] However, the United States has experienced a decline in start-ups over the past decade and that trend threatens a full economic recovery.[10] According to data from the U.S. Census Bureau, there were 700,000 fewer net businesses created from 2005 to 2014 than from 1985 to 1994. More worrisome is recent evidence that suggests the number of transformational startups, those that contribute disproportionately to job and productivity growth, has been in decline since 2000.[11]

At the same time start-ups are struggling, regulation is a growing concern for small businesses. A quadrennial survey of 20,000 small business owners in August found

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6 *The Regulatory Impact on Small Business: Complex. Cumbersome. Costly,* U.S. Chamber of Commerce Foundation (March 2017), available at: https://www.uschamberfoundation.org/reports/small-business-regulation-study.

7 *Id.*, at page 6.

8 *Frequently Asked Questions* , Office of Advocacy, U.S. Small Business Administration, (June 2016), *available at:* https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2016_WEB.pdf.

9 *Id.*

10 Ryan Decker, John Haltiwanger, Ron Jarmin and Javier Miranda, *The Secular Decline in Business Dynamism in the U.S.*, Working Paper, 2014, *available at:* http://econweb.umd.edu/~haltiwan/DHJM_6_2_2014.pdf.

11 Ryan A. Decker, John Haltiwanger, Ron S. Jarmin, and Javier Miranda, *Where Has all the Skewness Gone? The Decline in High-Growth (Young) Firms in the U.S.*, (NBER Working Paper No. 21776 (December 2015)), as described in the National Bureau of Economic Research Digest On-Line (February 2016), *available at:* http://www.nber.org/digest/feb16/w21776.html.

that "unreasonable government regulations" is the second-most pressing concern, up from fifth in the last survey taken in 2012. Regulation's placement as the second-most serious issue for small business is the issue's highest ranking in the 34-year history of the survey.[12] Earlier this year, the National Small Business Association (NSBA) released its survey and found that more than half of small business owners held off hiring a new employee due to regulatory burdens.[13] Finally, the report by the U.S. Chamber of Commerce Foundation includes a survey of leaders from local chambers of commerce who are alarmed by the slump in new business startups and insist that federal regulations are largely to blame.[14]

The decline in entrepreneurship and small businesses' increasing concern with regulatory burden are trends that should be reversed in order for the United States to experience growth.

Small Business Input Can Work

When agencies and small businesses work together and constructively find solutions, better regulation happens. There are numerous examples of win/win solutions to real challenges that federal agencies are trying to solve. One of my favorite examples of cooperation between small businesses and the EPA occurred shortly after I was confirmed by the Senate as Chief Counsel for Advocacy at the SBA. EPA wanted to reduce pollution from nonroad diesel engines (mostly diesel tractors). Prior to issuing a proposed rule, EPA convened a SBREFA panel and I recall one meeting we hosted between small engine manufacturers from Michigan and EPA engineers. EPA walked us through their plans that basically would have mandated a pollution-reduction device (it looked like a big muffler) attached to the engine. A small business owner, at the meeting, pointed out that the John Deere engine hood would not fit over the device and the small businessman feared that John Deere would simply source the manufacturing overseas instead of waiting for EPA to revise its regulations. Because of that conversation, EPA re-thought their approach. EPA's decision probably saved the sector, and the revised rules still reduced pollution from diesel tractors by close to 90 percent.

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12 Holly Wade, *Small Business Problems and Priorities,* NFIB Research Foundation (August 2016), available at: http://www.nfib.com/assets/NFIB-Problems-and-Priorities-2016.pdf.

13 *2017 NSBA Small Business Regulations Survey*, National Small Business Association (January 18, 2017), available at: http://www.nsba.biz/wp-content/uploads/2017/01/Regulatory-Survey-2017.pdf.

14 *See, The Regulatory Impact on Small Business: Complex. Cumbersome. Costly,* U.S. Chamber of Commerce Foundation (March 2017).

Steps Underway to Provide Small Business Relief

I am optimistic that small businesses will benefit from regulatory relief due to action taken by the President and Congress. Several resolutions passed under the Congressional Review Act (CRA) target federal agency overreach and will help alleviate unnecessary regulatory burden.[15] One of those resolutions reversed the Department of Interior's attempt to regulate streams that are already protected by EPA and several state and local authorities.[16] Another resolution that passed Congress reverses an attempt by OSHA to ignore small business input and illegally expand their enforcement authority.[17]

In addition to reversing unnecessary, overburdensome, or outdated regulation, Congress should look at ways to modernize the regulatory process and ensure that federal agencies craft regulations in a way that minimizes the burden on small business. The Administrative Procedure Act (APA) was enacted in 1946 and governs the regulatory process. [18] The Regulatory Accountability Act (H.R. 5) brings the Administrative Procedure Act (APA) into the 21st Century and has already passed the U.S. House of Representatives with bipartisan support. The U.S. Chamber of Commerce urges the Senate to take up the RAA and provide needed improvements to the APA. Additionally, the Small Business Regulatory Flexibility Improvements Act (H.R. 33), which bolsters the ability of small businesses to influence regulatory outcomes, has passed the House and was recently introduced in the Senate (S. 584). The Chamber also supports S. 584 and believes it will provide much-needed small business relief by improving the way federal agencies craft regulatory policy.

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15 Tim Devaney, *"Here's how Trump is Using a special law to do away with Obama regulations,"* The Hill, (March 26, 2017), available at: http://thehill.com/regulation/325737-heres-how-trump-is-using-a-special-law-to-do-away-with-obama-regulations.

16 *Disapproving the rule submitted by the Department of Interior known as the Stream Protection Rule,* H.J. Res. 38, Pub. L. No. 115-5 (February 16, 2017).

17 *Disapproving the rule submitted by the Department of Labor relating to "Clarification of Employer's Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness ,"* H.J. Res. 83 (submitted to the President Marcy 27, 2017).

18 *Administrative Procedure Act,* Pub. L. No. 79-404, 60 Stat. 237 (1946).

Conclusion

America needs the economic strength, job-creating power, and innovative genius[19] of small business in order to get back on track economically. Continued vigilance by the Committee on Small Business & Entrepreneurship in holding agencies accountable to how they treat small business and passage of the Regulatory Accountability Act and the Regulatory Flexibility Improvements Act will help calm the regulatory headwinds that prevent small business from being the economic engine of growth here in the United States.

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19 Research by the U.S. Small Business Administration revealed that small firms produce 16 times the number of patents per employee than large patenting firms. Anthony Breitzman and Diana Hicks, *An Analysis of Small Business Patents by Industry and Firm Size,* written for the Office of Advocacy, U.S. Small Business Administration, Contract No. SBAHQ-07-Q-0010 (November 2008), *available at*: https://works.bepress.com/anthony-breitzman/15/.

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