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BURDENSOME REGULATIONS: EXAMINING THE EFFECTS OF DOL RULEMAKING ON AMERICA'S JOB CREATORS

HEARING

BEFORE THE

COMMITTEE ON SMALL BUSINESS
UNITED STATES
HOUSE OF REPRESENTATIVES

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BURDENSOME REGULATIONS: EXAMINING THE EFFECTS OF DOL RULEMAKING ON AMERICA'S JOB CREATORS

THURSDAY, OCTOBER 19, 2023

HOUSE OF REPRESENTATIVES,
COMMITTEE ON SMALL BUSINESS,
Washington, DC.

The Committee met, pursuant to call, at 10:02 a.m., in Room 2360, Rayburn House Office Building, Hon. Roger Williams [chairman of the Committee] presiding.

Present: Representatives Williams, Luetkemeyer, Meuser, Salazar, Molinaro, Alford, Crane, Bean, Velázquez, Landsman, McGarvey, Scholten, Thanedar, and Davids.

Chairman WILLIAMS. Before we get started today—first of all, good morning to everybody—I want to recognize Congresswoman Salazar from the great State of Florida to lead us in the pledge and the prayer. If you will all rise, please.

Ms. SALAZAR. Thank you, Mr. Chairman.

And, Dear Lord, we come to your throne in the name of Jesus. And we ask you to bring peace to Congress, to the Republican Conference, to Israel, to everything that is occurring in the Middle East, and to make this hearing a very successful one.

We ask in your name, Jesus. Amen.

Thank you.

We pledge——

All. I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one nation, under God, indivisible, with liberty and justice for all.

Chairman WILLIAMS. Good morning, everyone. I now call the Committee on Small Business to order.

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

I now recognize myself for an opening statement.

And I want to welcome you to today's hearing, which will focus on examining the effects of the Department of Labor's rulemaking on Main Street America.

First, I want to thank the witnesses, all of you, for being here today. I know you have traveled to be here with us this morning, and we appreciate you taking the time to do that.

As our nation's job creators continue to fight difficult economic headwinds, agencies such as the Department of Labor continue to implement overreaching regulations that create expensive new

compliance costs and make it harder for our nation's job creators to hire more workers and expand their operations.

So, with that, I will yield to our distinguished Ranking Member from New York, Ms. Velázquez.

Ms. VELAZQUEZ. Thank you, Chairman Williams, for convening this hearing so we can learn more about the impact that the Department of Labor's regulations are having on small businesses.

I would like to take this opportunity to thank all of the witnesses for being here.

Let me say at the outset that I understand that complying with federal, state, and local regulations can be onerous for small-business owners. Small businesses don't always have the resources that larger companies do to monitor regulatory actions.

That is why Congress passed the Regulatory Flexibility Act, RFA, and created the Office of Advocacy. The Office of Advocacy serves as an independent voice for small businesses, and it works to educate agencies about the effect the rules have on small businesses. The office also seeks to find targeted solutions that are less burdensome while achieving the desired results.

Ninety-nine-point-nine percent of all U.S. businesses today are considered small. Some of these small firms can have 1,500 employees and up to $47 million in receipts, depending on the industry. That is why it is vitally important to make this distinction during our discussion today and make sure that big businesses are not hiding behind the guise of small businesses to promote an anti-regulatory agenda.

Contrary to what we will hear today, federal regulations can and do benefit small businesses and boost our economy.

I know that we are short on time, so let me say that the bottom line is this: smart, well-crafted, commonsense regulations have the potential to unleash innovation and provide critical health and safety protections.

Thank you, and I yield back.

Chairman WILLIAMS. Thank you.

And I will now introduce our witnesses.

Our first witness here with us today is Mr. Paul J. Ray.

Thank you, Mr. Ray, for being here.

Mr. Ray is the director of the Thomas A. Roe Institute for Economic Policy Studies at The Heritage Foundation, located here in Washington, D.C.

So, Mr. Ray, again, thank you for joining us, being with us.

Our next witness with us today is Mr. Mario Burgos. Mr. Burgos is the chief strategy officer at Prairie Band, LLC, located in Holton, Kansas. Prairie Band, LLC, was created in 2010 by the Potawatomi nation to create economic stability by diversifying, managing, and expanding the economic interests of the nation.

So, Mr. Burgos, thank you for joining us today. We appreciate that very much.

Our next witness here with us today is Mr. Ric Suzio—I said it right, didn't I, Ric?—Suzio—who is vice president of The Suzio York Hill Companies, located in Meridian, Connecticut.

The company got its start over a century ago when the L. Suzio Construction Company was founded by a Leonardo Suzio, an Italian immigrant, which we talked about. Great story. Now in its

third generation, the company is still a family business, with his grandchildren playing an active role in management, including having over 33 years at his family's business himself.

So I want to recognize and thank you very much for being here today.

I now recognize the Ranking Member from New York, Ms. Velázquez, to briefly introduce our last witness.

Ms. VELAZQUEZ. Thank you, Mr. Chairman.

It is my pleasure to introduce Mr. Frank Knapp, the President and CEO of the South Carolina Chamber of Commerce.

He also serves on the advisory board for the South Carolina Small Business Development Center and was recognized by the SBA as the 2014 South Carolina Small Business Financing Advocate of the Year.

From 2015 to 2017, Mr. Knapp served on the SBA's Region IV Regulatory Fairness Board, an advisory body to the SBA Office of the National Ombudsman.

Welcome, Mr. Knapp, and thank you for being here with us today.

Chairman WILLIAMS. Thank you.

And we appreciate all of you being here today. Again, I would like to say that.

Now, before recognizing witnesses, I would like to remind them that their oral testimony is restricted to 5 minutes in length. If you see the light in front of you turn red in front of you, that means your 5 minutes is up and you have concluded, and you should wrap up your testimony shortly thereafter.

With that in mind, I now recognize Mr. Ray for his 5-minute opening remarks.

Mr. Ray?

STATEMENTS OF PAUL J. RAY, DIRECTOR OF THE THOMAS A. ROE INSTITUTE FOR ECONOMIC POLICY STUDIES, THE HERITAGE FOUNDATION; MARIO BURGOS, CHIEF STRATEGY OFFICER, PRAIRIE BAND, LLC; RIC SUZIO, VICE PRESIDENT, THE SUZIO YORK HILL COMPANIES; AND FRANK KNAPP, JR., PRESIDENT AND CHIEF EXECUTIVE OFFICER, SOUTH CAROLINA SMALL BUSINESS CHAMBER OF COMMERCE

STATEMENT OF PAUL J. RAY

Mr. RAY. Thank you, Chairman Williams, Vice Chairman Leutkemeyer, Ranking Member Velázquez. It is an honor to be hear today with you. Thank you for the kind invitation.

I don't need to tell the Members of this Committee about all the good things small businesses do for their owners and workers, their customers and communities, and our country. The small-business record speaks for itself.

Almost half of all Americans work in a small business, and small businesses have created two of every three new jobs in the United States in the last 25 years. Small businesses are responsible for many of the breakthroughs that make American life what it is today and for the prosperity that even in our current business climate makes America the envy of the world.

But a small business does not merely achieve results; it also opens a path for a dignified life of initiative, creativity, and service. Millions of Americans feel the desire to put their own ingenuity and initiative to work, making their communities and world a better place, and small business provides an opportunity to do just that.

To do their important work, our small-business owners and workers need a legal and regulatory system that allows them to navigate the present and plan for the future. Unlike their larger peers, small businesses do not have armies of lawyers and compliance officers to analyze regulations; nor do they have squadrons of lobbyists to advise on how those regulations can change; nor do they often have large profit margins or cash reserves that let them respond with agility to surprising regulatory developments.

This is why small businesses need regulatory stability, clarity, and certainty. But our regulatory system fails to give small businesses what they need.

Consider stability. The American Founders placed an immensely high value on legal stability. As James Madison put it, quote, "It will be of little avail to the people that the laws are made by men of their own choice if the laws undergo such incessant changes that no man who knows what the law is today can guess what it will be tomorrow," end quote. Madison knew that rapid legal change privileges "the sagacious, the enterprising, and the moneyed few"—again Madison's words—"over the industrious and uninformed mass of the people."

Unfortunately, today's regulatory system is subject to precisely the, quote, "incessant change" that Madison worried about. Agencies issue hundreds of pages of new regulations, amendments to regulations, and other administrative materials every business day.

On many issues of importance to small business, such as labor and employment, regulations change dramatically with every change in White House control. There are now even Republican and Democratic versions of many important regulations which the agencies toggle between based on who is in power.

But even when regulations hold steady, small businesses often have great trouble knowing what those regulations require of them. This is because federal regulations are many, complex, and obscure. The Code of Federal Regulations is over 185,000 pages long and regulates everything from the electrical grid down to the diameter of spaghetti.

To make matters worse, many important regulatory documents cannot even be found in the Code of Federal Regulations. Instead, they are scattered across agency websites or archives in the form of guidance, regulatory preambles, adjudicatory decisions, and other kinds of documents.

It is hard for many small-business owners, busy enough just running their own businesses, to discover all the mandates they must comply with, let alone what those mandates mean for them.

Even putting these issues aside, our regulatory system fails to give small businesses the certainty they need on account of the way the agencies enforce their regulations—an enforcement process that too often is worse than the penalties it threatens.

Governing law leaves agencies enormous discretion in how they enforce the regulations they administer, and agencies too often have failed to conduct investigations or adjudications in a way that is fair, accurate, and prompt.

Too often, agencies leave small-business owners in legal limbo, as they did to the poor Boucher family, Indiana farmers who cut down a few trees on their own land in 1994 and in 2019 were still stuck in litigation against the USDA.

Some of the problems small-business owners face are baked in to the way we regulate, but Congress could help. For instance, the REINS Act would impose more robust procedures on rulemaking and so slow the pace of regulatory change. The GOOD Act would demand that agencies make their regulatory materials more easily accessible by small businesses. And legislation after the pattern of Executive Order 13924, section 6, would require agencies to create and stick to fair and prompt procedures in investigations and adjudications.

There are other measures, too, that Congress could take, which I would be happy to discuss in questions.

Thank you.

Chairman WILLIAMS. Thank you very much.

And I now recognize Mr. Burgos for 5-minute opening remarks.

STATEMENT OF MARIO BURGOS

Mr. BURGOS. Chairman Williams, Ranking Member Velázquez, and Members of the U.S. House Committee on Small Business, thank you for the invitation to testify this morning on the Department of Labor's rulemaking and what impact it is having on the job creators across the country and the concerns that the recent surge of federal regulations have raised during my own personal small-business journey.

My name is Mario Burgos, and until July of this year I was the president and CEO of Burgos Group, headquartered in Albuquerque, New Mexico. This is a company I founded in 2006 and grew, along with my brother, as a small-business federal prime contractor. We primarily focused on general and electrical construction.

And in July of this year, we made the decision to sell our company to Prairie Band, LLC, a company which was founded in 2010 to contribute to the long-term economic stability of Prairie Band Potawatomi nation, located in the State of Kansas. I now serve as the chief strategy officer of Prairie Band, LLC.

To understand why we chose to exit our business, the business that we labored to build over a decade and a half, I think it is important to provide you with some background.

In 2009, at the height of the Great Recession, our family business—we pivoted. We pivoted to focus on the federal construction opportunities made possible under the American Recovery and Reinvestment Act, which was signed into law by President Barack Obama. Our company became a vehicle for realizing the American Dream of two brothers who are first-generation Americans. Our father emigrated from Ecuador.

Under the Obama and Trump administration, our company grew from the two brothers to 195 employees, with a track record of com-

pleting over 100 projects doing sustainability, renovation, modernization. These projects were done for 13 different federal agencies from coast to coast.

Our growth landed us on the Inc. 5000 Fastest-Growing Private Companies—on that list 6 years in a row. Now, that is something that less than 3 percent of those companies that are on that list ever make.

We were recognized in 2015 as the SBA Small Business Prime Contractor of the Year for Region VI, which is the region with Texas and the States that surround it. And in 2017, I was honored to be the SBA Small Business Prime Contractor of the Year—I am sorry—Small Business Person of the Year for the State of New Mexico.

Unfortunately, the number of rapidly changing and ever-increasing federal and state regulatory requirements affecting the construction industry led us to conclude that our most prudent action would be to exit the business that we had labored to build.

The recent Department of Labor updates to the regulations implementing the Davis-Bacon and related acts is just the latest example of additional burdens and barriers being erected that make it difficult for small businesses to participate in the economic investments of the bipartisan Infrastructure Investment and Jobs Act or to support our nation's essential national defense missions.

In my written testimony, I have provided specifics on how requirements for the construction under the Davis-Bacon and related acts have harmed my business by creating significant confusion and costing critical dollars.

The construction industry now grapples with an avalanche of new and impending regulations, most of which have either been finalized or are poised for imminent execution, effectively creating a new tax on countless businesses that now must choose to either struggle to comply, sell, or cease operations.

It is my sincere hope that this Committee will consider the testimony that I am making and take the actions that will remove barriers and simplify compliance for America's small businesses.

Thank you again for the opportunity to serve as a witness for this hearing, and I look forward to answering any questions you may have.

Chairman WILLIAMS. Thank you very much.

And I now recognize Mr. Suzio for 5-minute opening remarks.

STATEMENT OF RIC SUZIO

Mr. SUZIO. Chairman Williams, Ranking Member Velázquez, and distinguished Members of the Committee, thank you for having me today. I am Ric Suzio, representing both The Suzio York Hill Company and the National Stone, Sand, and Gravel Association.

NSSGA is the leading voice and advocate for the aggregate industry, representing over 450 producers of crushed stone, sand, and gravel across the United States as well as the equipment manufacturers and service providers that support these industries. We are essential to the growth of our nation, providing 2.5 billion tons of materials needed to build communities, homes, deliver clean water,

produce energy, and modernize our transportation networks, as well as providing good-paying careers.

I am privileged to work for my family company, which has deep roots in Connecticut's construction history for over 125 years. Our story is not just about construction; it is about being deeply embedded in the community.

I am here to represent hundreds of small producers, bringing forth concerns and triumphs of countless businesses like mine. We have great concern with the ever-changing regulatory environment which poses challenges to small businesses. We often lack the resources to interpret, comply, and adapt to these regulations, leading us to hire expensive consultants.

Many times, these regulations are solutions looking for a problem and do nothing to address actual challenges we face, like finding the skilled workforce needed to build our nation's infrastructure.

Over time, this financial burden risks driving consolidation within our industry, overshadowing the essential role of small businesses.

The Suzio York Hill Company is a multigenerational family operation founded in 1898 that boasts a dedicated team of 93 employees. We are proud to have second-generation coworkers with unmatched loyalty and dedication. Several of our coworkers have retired after serving the company for over 40 years. We are engaged with the International Union of Operating Engineers' Apprenticeship Training Program, showcasing our commitment to professional growth and training.

In my full testimony, I highlighted eight new policies that are making it hard for our industry to build America's infrastructure and communities, but I would like to take this time to highlight two acute challenges.

The Mine Safety and Health Administration is working to update the existing occupational exposure limit for silica, reducing it to the Occupational Health Safety Administration's 2016 standard.

While a safe silica exposure limit is paramount to protecting miners, we are concerned that the proposed rule establishes a new one-size-fits-all regulatory criteria that will result in the misallocation of limited resources and fails to adequately protect the health of many of our nation's miners.

The vast majority of mining in America occurs in above-ground, non-metal mines, where there is little risk of exposure. However, MSHA's rule seems to apply new standards in reporting that is meant to address challenges faced in underground coal-mining, which accounts for a small percentage of overall mining operations.

As the rule is finalized, we need more flexibility for metal/non-metal and the MSHA rule to confirm with OSHA standards that are already in place and working.

Historically, small businesses have relied on the flexibility of hiring independent contractors, not just to manage their costs but to effectively adjust to the dynamic market demands. The simpler criteria provided by the 2021 independent contractor rule gave clarity and certainty to these businesses.

With its potential repeal, many small enterprises face the dual challenges of increased costs and bureaucratic complexities. In the aggregates industry, where independent contractors are integral,

businesses frequently mobilize such contractors daily. Imposing more rigid classification leads to added taxes, fees, and administrative burdens, increasing the cost of essential materials during an already-inflationary period.

In conclusion, I would like to extend my gratitude to the Committee Members for allowing me the opportunity to testify on these issues, and look forward to your questions. Thank you.

Chairman WILLIAMS. Thank you very much.

I now recognize Mr. Knapp for opening remarks.

Mr. Knapp?

STATEMENT OF FRANK KNAPP, JR.

Mr. KNAPP. Thank you, Chairman Williams, Ranking Member Velázquez, and Members of the Committee.

I am Frank Knapp, the president and CEO of the South Carolina Small Business Chamber of Commerce. We are a statewide advocacy organization working at both the State and federal levels with 5,000-plus supporters.

I co-founded our organization over 23 years ago, and good regulations at the state and federal level has long been an issue we have championed. Nine years ago, my organization worked to pass our State's Small Business Regulatory Flexibility Act, modeled after the federal law.

I am also a small-business owner, and, from 2015 to 2017, I served on the SBA Regulatory Fairness Board, which advises the SBA National Ombudsman on matters of federal regulatory concern to small businesses.

I want to be very clear: We expect every federal agency to fully comply with the law. That is the way we make sure that real small businesses have their voices heard and considered when new rules are being made.

No one wants to unnecessarily burden small businesses in order to comply with regulations. If there are less onerous ways of achieving the goals of new regulations, then those ways should be adopted.

But make no mistake about the need for regulations. They are the rules that give small businesses a level playing field to compete with each other and with big businesses. They help protect our environment so all of us can have healthier lives. They protect a small business's most precious asset, their employees, who we don't have enough of today. And they try to protect our economy to avoid cataclysmic events.

I have never heard an entrepreneur say that they decided not to start a business because of federal regulations. Now, this doesn't mean that new federal regulations might not put some financial burden on existing real small businesses. But big cost estimates have been generated for years for their shock value and dire warnings that federal regulations are crushing small businesses. However, the definition of what constitutes a small business ends up showing that 99 percent of all businesses are small businesses, even some with up to 1,500 employees. We and I believe most people recognize businesses with less than 100 employees as real small businesses, and those are the ones the RFA should focus on.

Plus, all we hear about is the cost of proposed regulations; we never hear about the benefits. We don't get real regulatory analysis in which benefits are supposedly taken into consideration. All of us should understand that proposed regulations have benefits; otherwise, they wouldn't be proposed.

Regulations address the health and well-being of workers, the local community, and the entire country. This creates a healthier economy for small and all businesses to prosper. Good regulations create opportunities for entrepreneurs and small businesses to innovate and grow by creating new products and services, which create new jobs.

These benefits might be difficult to quantify, but totally ignoring them only serves the purpose of those who oppose regulations or those who want to cast aspersions on an administration acting responsibly.

Our nation's economy is strong. The Federal Reserve has been trying to slow its growth. The problems that small businesses have had with growth have been due to the lack of workers and access to capital, not federal regulations.

But we do need improvements in the rulemaking process if we are serious about agencies proposing good regulations with minimal cost to small businesses.

Agencies should do a better job of reaching out to small businesses across the country and not just talk with Washington-based trade associations often controlled by big businesses.

Agencies should project costs for real small businesses with fewer than 20 employees and fewer than 100 employees. Agencies should project direct benefits of proposed regulations to the impacted small businesses and local economy.

If agencies need more resources to implement these recommendations, they should get them.

And one more thing: With all this concern about proposed new regulations, there is far too little concern with helping a small business comply with existing federal regulations, a process that is intimidating, confusing, and too time-consuming. All of those who have testified here have expressed concern about this issue.

Let's simplify this process by having one federal agency be a resource for all small businesses regarding regulatory compliance concerns, an agency that could work with the appropriate federal agency and ensure that the concerns have been successfully addressed.

The SBA National Ombudsman's Office is already set up for this responsibility and has a successful track record of this regulatory compliance assistance. Empower and fund this office for a more efficient and small-business-friendly process. Legislation has previously introduced in Congress to do just this. There may be some coming down the road this session. And I recommend that such a bill be passed.

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

Chairman WILLIAMS. Thank you very much.

And we will move into Member questions now, but I would ask the Members, since we are under a timeframe here, let's keep our questions limited so we can hear answers from the witnesses.

Mr. Ray, during your time as the Administrator of OIRA, your office played an important role with the Trump administration to reduce the regulatory burden on America's creators.

So my question is, can you describe how the regulatory process could be improved so we can better take small-business interests into account?

Mr. RAY. Thank you, Mr. Chairman. I appreciate the question.

Yes. So I think it is very helpful to break the question down into two parts: how the regulatory process can be improved with respect to individual rulemakings and how it can be improved with respect to the regulatory system writ large.

I recall one of the most interesting conversations I had as Administrator during the Trump years with a representative of the small-business community. I asked him: Which rulemaking has been most helpful for your Members, unlocking their potential to thrive and create jobs and economic growth?

And he said: Well, it is not any one regulation that has been so helpful; it is the knowledge that there is stability and certitude across the board. Our Members know that we are not going to face new regulations coming down the pike, changing the rules of the game, so we don't have to hold, basically, cash reserves in place to respond to new regulatory developments.

And I thought it was a very interesting comment.

It seems to me that the best thing that could be done to make the regulatory process as a whole more responsive to the needs of small business would be to slow the pace of regulatory growth across the board.

So one thing the Trump administration did to do that was, of course, the Two-for-One Executive Order as well as the provision of the same order that required cost caps.

I think the most important thing that could be done to the regulatory process with respect to small business is to slow the growth across the board and create greater stability.

Chairman WILLIAMS. Okay. Thank you.

Mr. Burgos, you have talked about you ultimately decided to sell the business that you created with your brother after regulations became too costly to deal with.

So can you walk us through, quickly, how you came to this conclusion? You talked a little bit about it, but remind us again what made you come to the conclusion to sell the family business.

Mr. BURGOS. Yes, Mr. Chairman. So the biggest reason was, we had an experience where we were a subcontractor on one of the border-wall projects in Arizona.

And at the end of December, right before Christmas, we received a note from DOL saying that they had been directed to audit all border-wall subcontractors and contractors, and they gave us a list of 15 documents that we needed to provide. And of those 15 documents, we had until January, the first week in January, to provide them.

To respond to those 15 documents, just to give everybody an idea of what the burden of paperwork is, it required us to put together 800 pages of documentation—800 pages of documentation.

So we provided those 800 pages of documentation. And this went on until April of 2022, is when the decisions were finally decided.

And during that time, we had interesting conversations with the Department of Labor. They came back and they told us, for example, 5 months later: Hey, this is great. You guys are obviously a good contractor. You put together all this documentation. You put it together—you didn't do a data dump. You actually put it together in a nice order for us to review. Unfortunately, did you call the union before you decided how to comply with the Davis-Bacon wage rates?

And we said: No, we didn't call the union. I have been doing this for a long time, and the Davis-Bacon wage rates spell out exactly how you go about doing this, and I wasn't aware that you needed to call the union.

And they actually said: Well, you don't, but, unfortunately, even though the Davis-Bacon wage rates say that there is a pipe-layer category—which is somebody who touches pipe; and conduit is what we were putting in the ground, which is pipe—they said: Unfortunately, the electricals union prevailed over the laborers union, and, therefore, you needed to pay everybody on your job site as an electrician.

And then they turned around and told us that was $685,000 that we owed in back wages, and they would be happy to hold that in trust in order to continue having discussions with us. Then they increased it to $950,000 several months later, almost a million.

And then when we asked them, how are you coming up with this, they kept changing what the rules were. And, ultimately, they said the analysis was that they looked at our contract and our contract noted that we were going to have switchgear and transformers and light poles and pull wire. And we had that 30 percent of our labor force were electricians and 70 percent were "other"—operators and laborers and other designations that were on the wage rate determination.

And so we said, that is correct. And in January the President issued his executive order stopping our work. And in April we took delivery of the switchgear and the transformers and the rest of the wire and the other things that were electrical components.

And they said: Oh. Okay. Well, then we will reconsider that.

And ultimately we settled for 300-and-some-odd-thousand dollars. And we just can't continue to afford to do that.

Chairman WILLIAMS. Thank you.

My time is up. I now recognize the Ranking Member for 5 minutes of questions.

Ms. VELÁZQUEZ. Thank you, Mr. Chairman.

Mr. Knapp, the size standard for some industries allows small firms to have receipts up to $47 million and 1,500 employees. In regard to the Regulatory Flexibility Act, are these size standards overly broad?

Mr. KNAPP. Absolutely. The criteria for a small business can go up to 1,500 employees, and that means 99 percent of all businesses in the country are considered a small business. The term becomes useless.

Ms. VELÁZQUEZ. Should there be specific changes to the RFA or the Office of Advocacy to better address the concerns of the smallest of small businesses?

Mr. KNAPP. Yes, absolutely. Congress passed laws to protect small businesses. If most small businesses—well, half of them have four or fewer employees. Eighty-five percent probably have less than 20 employees. I would like to say a small business is up to 100 employees. That is where Advocacy and the RFA should focus.

Ms. VELAZQUEZ. Should the RFA be amended to require the Office of Advocacy to take into consideration the benefits of regulations on small businesses?

Mr. KNAPP. Absolutely they should. If Advocacy is only looking at the cost, they are missing the big business picture. And if they are making recommendations based just on cost and not on a true cost-benefit analysis, then the recommendations and comments to you as decision-makers is not all the information. You can't make a good decision unless you know really what the cost-benefit is.

Ms. VELAZQUEZ. Can you give us some of the benefits of these Labor rules on small businesses?

Mr. KNAPP. Well, yes. The rules are there to protect employees. They are there to have a healthier workforce. Every business wants a healthier workforce, no question about that, and regulations strive for that.

They also create the lay of the land, the playing field, this level for everybody to compete. If you don't have rules—if you don't have rules, if football games don't have rules, it is a mess, and it is unfair, and it gives the advantage to people who are willing to do unsavory things.

So thank you.

Ms. VELAZQUEZ. Thank you.

You are based in South Carolina, right?

Mr. KNAPP. I am.

Ms. VELAZQUEZ. How important is outreach by federal agencies to ensure agencies hear directly from small businesses rather than Washington trade groups?

Mr. KNAPP. Yeah, look, the agencies need to get out of Washington. They need to quit relying just on trade associations that often are controlled by big businesses. They need to get out there and to talk to these gentlemen here about how this is going to affect you, before the rule goes into place.

That is how you are going to collect good information. The people out in the field, the small-business owners, they are the experts. Ask them. Ask them for their input. Listen to what they say.

Ms. VELAZQUEZ. Thank you.

Mr. Suzio, it is important for the Office of Advocacy and the Office of the Ombudsman to travel throughout the country to hear directly from small businesses like yours.

Can you share instances when the Department of Labor conducted similar outreach around the country? And did it lead to positive changes within your business?

Mr. SUZIO. Actually, with the Department of Labor, I can't address that, but what I can say is, we had a very good experience with MSHA.

Several years ago, there was quite a few fatalities in our industry, and MSHA went around and did a ToolBox Talk, coffee-hour talk, with our employees. It wasn't punitive. It was educational and

informative. And it was very helpful to us and them. And it built a great rapport, where no one felt threatened.

Ms. VELAZQUEZ. Thank you.

Mr. Paul Ray brought up the issue of certainty for small businesses. Do you agree that a government shutdown is bad for small businesses and that it will delay critical Infrastructure Investment and Jobs Act funding for your industry?

Mr. SUZIO. Without a doubt. And we rely on federal funding. The States have matching funds. They will not release work until they know that there is a secure package. And the short-term CRs kill our industry and keep us from building roads for the citizens of America.

Ms. VELÁZQUEZ. Well, sir, here we are, only 29 days before a shutdown, and we still don't have a Speaker.

I yield back.

Chairman WILLIAMS. Thank you, Ms. Velázquez.

I now recognize Chairman Luetkemeyer from the great State of Missouri for 5 minutes.

Mr. LUETKEMEYER. Thank you, Mr. Chairman.

And thank all of you for being here today, especially our small-business owner for taking time away from your businesses.

One of the things that concerns me is that, since President Biden took office, 677 final rules have passed. This has cost American businesses $430.5 billion.

Now, this figure is come up with by adding the cost—every time they do a rule, the government is supposed to also put a cost to implementing that rule. So this isn't my number. This isn't the Chairman's number. This is the government agency's number, themselves, when they initiate a rule.

$430 billion in a little over 2.5 years, and 215 million (ph) hours of paperwork. In fact, as projected, President Biden's current regulatory framework will cost Americans $1.5 trillion over the next decade.

Mr. Burgos, you talked about this in your testimony with regards to the cost of continuing to comply, continuing to go through the rigmarole of trying to be compliant with the new rules and regulations and moving of the goalposts and the moving targets that they are continuing to go after.

You know, Mr. Knapp talked about the benefits of these rules and regulations. There may be some. But when you weigh all this, your testimony tells me that there is not a lot of benefits to some of this stuff here if you are going to keep moving the goalposts on folks.

Would you like to comment on that?

Mr. BURGOS. I would. And thank you very much.

It is impossible for a small business to comply when the regulations are constantly being changed. And I would actually, respectfully, say that the cost to small business and business in general is much, much higher.

For example, for the Department of Labor's newest revisions to the Davis-Bacon and related acts, they estimate it is going to cost, I believe, $255 for a business to comply. So, if you take that number, just as an example, what they say is, essentially, it is 5 hours

of a human-resource person to read the 800 pages of documentation——

Mr. LUETKEMEYER. Speedreader, huh?

Mr. BURGOS. That is correct, sir. It would take you 16-plus hours if you read at a—at a pace. And then trying to understand it. It is all in legalese. So the additional cost of that.

You know, $50 an hour? I have yet to find an attorney that will work for me for $50 an hour. I have looked. I can't find one. They cost several hundred dollars now. And they don't charge you 1 hour to read 800 pages.

Mr. LUETKEMEYER. One of the concerns that I have—and I have been here a long time, and I have seen these rules and regulations go on. And one of the biggest problems that I have with them is this power grab by the bureaucracy to take more power to themselves and away from all of you small-business guys. They want to control what you do even more. And unfortunately for small business, it doesn't level the playing field. It makes an unlevel playing field.

Mr. Suzio, would you like to comment on that from the standpoint of you having to compete as a small business against the big guys with regards to these rules and regulations? It is costing numerous—those guys can spread this cost out over a lot more revenue compared to what a small business can do.

Mr. SUZIO. Correct, sir, without a doubt. And the margins in our industry are so minimal that, when I ask friends of mine or other counterparts around the country why they chose to no longer be a family-owned business, the number-one answer I get is there was no succession plan or the family was fighting, but close right behind it is we could not compete anymore.

And that is why the big boys keep getting bigger. Because companies like ours, we don't have an engineer, we don't have a legal department. We rely on our national associations to bring a lot of this forward to us. And it is just impossible to compete. And, as I said, the large companies have a huge advantage over those of us that truly are small, family-owned businesses.

Mr. LUETKEMEYER. It seems to me that you need a tiered system here. If you have a small business, you need to have a different set of rules that you have to comply with versus the big guys. Otherwise, the little guys are never going to be able to compete.

Mr. SUZIO. Yes.

Mr. LUETKEMEYER. One of the things that concerns me is—I have been here, again, a long time, and this particular administration continues to weaponize guidance. And it just drives me up the wall, from the standpoint of: You have laws, and you have rules to implement the laws, and you have guidance to clarify the rules. Guidance is not enforceable. It is not enforceable, period.

And yet this administration continues to allow its bureaucracies to go out here and intimidate the business community by issuing guidance and then trying to go out and enforce it and threaten them with lawsuits if they don't comply with their guidance.

Have you guys seen that kind of activity in your world, Mr. Burgos or Mr. Suzio?

Mr. SUZIO. Yes, we have. And we don't mind when government comes in in a cooperative way to educate us and be a resource. But when they automatically come in and are punitive or looking for fault within an organization that tries to do everything right, it is very frustrating.

Mr. LUETKEMEYER. Thank you, gentlemen, very much. Appreciate your time here. And when you are away from your business, I know it is a sacrifice. Thank you so much.

Mr. Chairman, I yield back.

Chairman WILLIAMS. I now recognize Representative McGarvey from the great State of Kentucky for 5 minutes.

Mr. MCGARVEY. Thank you, Mr. Chairman.

Thank all of you guys for being here today.

I want to reframe a little bit about what we are doing. Because, actually, what you see in this Committee is a whole bunch of people who are interested in helping small businesses succeed. They are the backbone of the economy in all of our districts.

And as we talk about this process, sure, we have heard about overreach. We want to be able to help our small businesses with that. But let's also talk about the process of rulemaking and how and why it is important.

Not every rule is overreach. Not every rule is unnecessary. You know, I believe that our workers deserve fair compensation. I believe that our workers deserve a safe working environment. And I don't think it is in any way radical to propose legislation in this environment that makes that possible.

Just look at my district in Kentucky. Just recently, the DOL's Wage and Hour Division uncovered a company that was employing 11- and 13-year-olds at a distribution center and allowing them to work the forklift. Just recently in my district, in Louisville, Kentucky, Wage and Hour Division discovered 10-year-olds working until 2:00 a.m. at a McDonald's, with one operating the deep fryer. And what made that crackdown possible? This process here.

And so I have always been a believer. And what we are doing here today is important, because we want our small businesses to succeed. You can be pro-worker without being anti-business.

So, Mr. Knapp, you touched on how well-crafted regulations have the ability benefit the economy by leveling the playing field, incentivizing innovation, and protecting health. Can you give us some examples of regulations that do that?

Mr. KNAPP. Let me first say, on your comments regarding some of your businesses in your State, those people are breaking the rules, right? And, therefore, they have an unfair advantage in competition with other small businesses. And that is why rulemaking is important. Because they do level—if everybody has to follow the same rules, then it does create that level playing field.

Even things that—there was an NPR story the other day about the climate rule changes. A company called Corteva in Indiana, they make seeds and chemicals, and here was their comment: "There is money to be made producing things like biofuels to power ships and airplanes with less climate pollution. Often, rules then inspire innovation, and they inspire a different process of delivering services that moves everything forward and benefits all of us."

Mr. MCGARVEY. I appreciate that.

And you are right; it does give an unfair advantage sometimes when people break the rules, and why some of this is necessary.

One of the things I would love to have a conversation about in this Committee is about how we can improve the rulemaking process. Because, again, we don't want unnecessary burdens on our small businesses. We want our small businesses to succeed. But we also know that rules are necessary and part of that.

So, Mr. Burgos, I understand your concerns with the updated Davis-Bacon regulations. And I understand that a lot of those concerns, based on what you have told us today, are on compliance costs. And I get that. If I find an attorney for $50, I will send him your way, but you might not want to use him.

So is there a way for us to reduce burdens on businesses while still carrying out the intent of Davis-Bacon, which is higher wages for our construction workers?

Mr. BURGOS. Absolutely. The simplest way is to streamline the paperwork requirements.

The examples you provided, for example, in Kentucky, I am pretty sure those examples are against the law already. That is very simple to—so it doesn't require a Davis-Bacon wage-rate revision.

As far as—and the other thing we need to do is remove the subjective nature. So, as my testimony, my written and verbal testimony demonstrated, there is a subjective nature. There is not a clear-cut rule.

If there was a clear-cut rule that said—which we did, for example, in our issue, is follow the Davis-Bacon wage rate and pay the wage rate that was determined. But then there are other things like the Frye act that was passed—that was a court case from the 1970s. DOL's response, when I said, "Well, I don't know what that is," they said, "Well, Google it from the 1970s," and it doesn't apply, and it is not answered in the revisions that were done and put out.

So, if we really want to make a difference, we would take 800 pages and put it down to very simple rules. "Here is the wage rate"—for example, "Minimum wage, here is the wage rate you are going to pay." That is, like, one line. It doesn't require a whole lot of—800 pages of narrative to support.

Mr. MCGARVEY. No, I appreciate that input from you.

And my time is going to run out. I would love to ask another question about how we could do that, whether the Ombudsman could be more involved with the SBA's Regulatory Fairness Board, how we could work that process together, but I have 6 seconds left.

And, Mr. Chairman, I yield back.

Chairman WILLIAMS. All right.

I now would like to recognize Representative Crane from the great State of Arizona for 5 minutes.

Mr. CRANE. Thank you, Mr. Chairman.

As a small-business owner myself and somebody who represents a bunch of small businesses in Arizona's Second Congressional District, I, too, am concerned about the overreach and the increasing size of the bureaucracy.

And, Mr. Burgos, as I listen to your story, it really bothers me to hear that. To listen to how you came here, you and your brother

started this company, and then you grew it to—what did you say? 190 employees?

Mr. BURGOS. 195.

Mr. CRANE. That is impressive, sir. Congratulations.

And then to hear that you ended up deciding to sell your company because of all the red tape and regulation, it is completely disappointing, to say the least.

What year, sir, were you guys audited, and what year did the overreach begin that you were talking about?

Mr. BURGOS. It was December '20 is when we were—so right before Christmas.

Mr. CRANE. Can you talk about the impact to the employees that you had and their families when you guys started going through—you know, had to file that 800-page document to answer these questions.

Mr. BURGOS. The impact was twofold.

First off, first was, the President's executive order required us to lay off 135 employees. It stopped our work. And we were under a pay-when-paid contract, which really put a lot of fiscal strain on our company. Because, to date, the agencies are still negotiating with the prime contractors. Which, all prime contractors had a 35-percent-or-greater small-business subcontracting requirement, and those subs often weren't paid unless the prime contractor is paid, and they haven't been paid yet.

And so that required additional layoffs at our company——

Mr. CRANE. Yeah.

Mr. BURGOS.—while we were also then turning around and taking our dollars to spend with attorneys to go ahead and ultimately settle with the Department of Labor.

Mr. CRANE. Yeah.

Another thing that one of my colleagues pointed out a second ago is how sometimes these bureaucracies can become weaponized. Have you seen that as well, sir?

Mr. BURGOS. I have. Because, in this case, there was no individual who had—Department of Labor was very clear, there was not an individual who said we were not paying the correct rates. At no point during the investigation did they come up with anything that said that. What it was was, "Hey, we have just determined that you need to pay more."

And I found it interesting that I have done over 100-plus projects and this one was selected because it was tied to the border wall.

Mr. CRANE. Yeah. So it was political, wasn't it.

Mr. BURGOS. I couldn't say who directed the Department of Labor.

Mr. CRANE. Yeah.

Mr. BURGOS. I just have never been told that——

Mr. CRANE. Well, it is funny, because I have my own experience with that. I ran a small business for about a decade, a veteran-owned small business, where we manufactured our products in the United States of America. And the very week I announced that I was running for Congress, I was driving to work, I got a call from one of my employees, and he said, "Hey, you need to get down here ASAP. OSHA is down here to do a surprise inspection." Never happened before. Never happened before.

And that is one of the things that American citizens, they are terrified about. They are seeing this government that is supposed to protect them and represent them become weaponized against them.

And so I do agree with what my colleague, I think Mr. McGarvey, said, that you can be pro-worker and also pro-business at the same time, but you also—we also have to recognize how things play out.

Like, I have seen a lot of my colleagues fight for standardizing minimum wages, right, and saying that that is pro-worker. But what they don't realize is, often, if they don't increase the amount of profits that a business owner is making, often regulations like that negatively impact workers. Because employers are like, "Well, you are saying I have to pay these guys more money now, but you are not increasing the amount of money I am making," so they end up having to lay off people.

Have you seen anything like that, Mr. Burgos, in your business experience?

Mr. BURGOS. There is absolutely an impact when we just continually raise rates. It has an impact on what benefits we are able to offer.

And I think what everybody needs to remember is, in a family-owned business like the one I had, you know, our employees are also part of that family.

Mr. CRANE. Yeah.

Mr. BURGOS. I mean, we are not a large, huge company. Even at 195 employees, I was in the field to make sure that our business didn't fail.

Mr. CRANE. Thank you.

I yield back, Mr. Chairman.

Chairman WILLIAMS. Thank you very much.

I now recognize Representative Meuser from the great State of Pennsylvania for our final questions.

Mr. MEUSER. I appreciate that, Mr. Chairman.

Yeah, unfortunately, all, we have to get to another meeting, but greatly appreciate you all coming in and sharing your stories.

I do apologize for missing some of your opening, but I will read it, because what you have to say is very compelling and very important. We are here as the Small Business Committee to serve as your advocates, your voice in Congress, and I hope we can keep the dialogue going.

You know, you have all been dealing with Bidenomics, you know, not to get political about it, but, I mean, let's face it. The highest inflation in our lifetimes, or some of us anyway, since the 1970s. Energy—losing our energy independence. Gasoline, groceries are certainly affected.

Interest rates have an enormous effect on small businesses. I mean, I had a small business recently, and this company did about $75 million in sales, but their line of credit was about $15 million. And the interest-rate increases have added almost $2.5 million to their bottom line. And their margins, their net income, is barely $3.5 million. So, you know, either they are engaged in inflation raising prices; meanwhile, they are trying to compete—it is an

American-based company—you know, with the rest of the world. So some serious issues there.

And, by the way, from the federal government standpoint, less net income means less net revenue in taxes, right? And what a big surprise. Look at our revenues for personal income tax, for passthroughs. It is enormously down. In fact, we are going to be down as a federal government about $100 billion just in small-business income tax because of that inflationary squeeze.

So your sales are up; your net revenues are down. You are dealing with—and now we throw, you know, all the regulations—not just throw them in. That is what this hearing is about.

So, as Mr. Luetkemeyer brought up, it is not a fair playing field. And I know it very well. Over 20 years in business, we went from a small business to a larger business. And, you know, from the 1990s to the early 2000s or even late 2000s, the 2010s, the level of compliance and regulations, we had a roomful of people. If we would have had to do that in the late 1980s or early 1990s, we never would have gotten off the ground. So it is getting a lot worse.

And as our colleague brought up a little while ago, he was talking about underage workers and people being forced to, you know, work extended hours. Those laws have been on the books for 80, 90 years against that, okay? We are not talking—that is an enforcement issue, okay, and, clearly, a bad apple running that company.

So, quickly—I promised our Chairman I was going to be quick—federal or state, which are more of a problem to you, from a regulatory standpoint?

Mr. Suzio?

Mr. SUZIO. I would definitely say federal, because they are more overbearing and, also, they tend to pass it with a paintbrush for all businesses, whereas at the State they are more looking at the local and the size and the reactions to them.

Mr. MEUSER. Who do you call when you are running into these federal issues? Largely, you probably handle it yourselves, or you have your compliance guy or, you know, whoever it might be—environmental. Who do you call?

Mr. SUZIO. In our case, we call our national associations. That is who have the resources to help us, guide us through it. If we did not have them, we would not be sitting here today.

Mr. MEUSER. I am going to have to yield back. Thank you very much.

Chairman WILLIAMS. Thank you.

And I will yield a minute, 17 to my colleague from Michigan.

Mr. THANEDAR. Thank you, Chairman. Thank you so much for your kindness. I will just be quick and not take much time.

I just wanted to know—we are less than 30 days away from a possible government shutdown. And I just want to know, any witnesses, how they perceive a likely shutdown will impact our hard-working small businesses.

Mr. SUZIO. In our case, being a construction materials supplier that does work with the State of Connecticut, it will affect us tremendously and adversely affect our employees with the number of hours they can work. Because the State will not let any work out unless they have a true funding mechanism. And CRs are not reli-

able and are inconsistent, and they lead to stagnation in our industry.

Mr. THANEDAR. Thank you.

Chairman WILLIAMS. Anybody else?

Mr. THANEDAR. I yield back, Chair.

Chairman WILLIAMS. All right.

I now yield the time to Ms. Scholten, 1 minute, from the great State of Michigan.

Ms. SCHOLTEN. Thank you. Thank you so much, Mr. Chair, I really appreciate it.

And thank you so much to the witnesses today. I have read and reviewed your testimony. Incredibly important to the work that we are trying to do today.

And I thank my Republican colleagues for holding such an important hearing.

I hear consistently from small businesses across west Michigan and throughout our State. They are the backbone of our economy in west Michigan. Most small businesses don't have attorneys, accountants, other resources to learn every federal regulation and figure out how to be competitive in this space.

I am the Ranking Member on the Government Contracting Subcommittee. I am going to take my response for the record, because I know we are limited in time. But, Mr. Burgos, in particular, in your testimony, you mentioned that the lack of small contractors in the defense industry is a national security issue. I couldn't agree with you more.

What regulatory reforms do you think could increase the competitiveness of small businesses versus larger businesses with advantages in this space?

Mr. BURGOS. So we have set-asides already. What we need now is we need the burdensome nature of the regulations to be streamlined so that businesses can understand.

Next week, I am going to actually be speaking to the Hispano Chamber, to those small businesses that are interested in entering the small-business sector. And what they are is overwhelmed by how to go ahead and enter the sector, and we need to streamline that.

Ms. SCHOLTEN. Thank you.

Thank you.

Chairman WILLIAMS. Thank you very much.

I would like to thank our witnesses here today. We have a last-minute scheduling problem. As you know, we have to elect a Speaker. But we will have to adjourn the meeting a little earlier. But I want to thank all of the witnesses for taking time to be up here today.

And all Members will have 5 legislative days to submit any questions that were not asked in writing to the witnesses.

And, with that being heard, this hearing is adjourned. Thank you.

[Whereupon, at 11:02 a.m., the Committee was adjourned.]

APPENDIX

Prepared Statement of Paul J. Ray

How Our Regulatory System Fails Small Business

Before the House Committee on Small Business

October 19, 2023

Chairman Williams, Vice Chairman Luetkemeyer, and distinguished members of the Committee, thank you for inviting me to testify today on the effects of regulation on small business. I am the Director of the Heritage Foundation's Roe Institute for Economic Policy Studies, where we focus on research and education about economic and regulatory issues. The views I express here are my own rather than the official views of the Heritage Foundation. From June 2018 through January 2021, I served in the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB); for the last year of that period I had the honor to serve as Administrator of the office. In this capacity I oversaw the federal regulatory system. Before that I served as Counselor to the U.S. Labor Secretary and practiced administrative appellate law at Sidley Austin LLP here in Washington.

In many ways, small businesses are the quintessential American enterprise and define the American workplace. The vast majority of American businesses are small.[1] These small businesses create an enormous number of jobs. A little less than half of all Americans work at a small business,[2] and two of every three new jobs in the United States over the last twenty-five years have been created by small businesses.[3] They also generate a vast amount of wealth. Some 44% of U.S. GDP is the fruit of small business activity.[4] But small businesses offer much more than employment and productivity, as vital as these are. For millions of Americans, opening a small business is a way to achieve agency in their own lives—a way to provide for themselves and their families and serve their customers and communities by dint of their own ingenuity and effort. For this reason we can even say that small business is a school of self-government, offering Americans the chance to develop the practical wisdom they need to carry out their duties as citizens.

The U.S. regulatory system fails small businesses, their owners, and their employees by undermining the rule of law. Rule-of-law values enable small businesses to create jobs, increase production, and make a positive difference in the lives of their customers and communities,[5] so the administrative system's failure hinders the ability of small business to achieve all these vital

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[1] U.S. Small Business Administration, Office of Advocacy, *Frequently Asked Questions* (March 2023), chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://advocacy.sba.gov/wp-content/uploads/2023/03/Frequently-Asked-Questions-About-Small-Business-March-2023-508c.pdf.

[2] *Id.*

[3] *See* Daniel Wilmoth, *Small Business Facts: Small Business Job Creation* (April 2022), chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://advocacy.sba.gov/wp-content/uploads/2022/04/Small-Business-Job-Creation-Fact-Sheet-Apr2022.pdf.

[4] *Frequently Asked Questions*, *supra* n. 1.

[5] *See, e.g.*, Lon Fuller, *The Morality of Law* 9 (rev. ed. 1969) (the rule of law enables lives of effective agency).

goals. My focus in these remarks is on the regulatory system as a whole rather than on the substance of any particular regulation, and on how the system affects small business specifically rather than business or the regulated public generally.[6]

I. Rapid Change, Unpredictable Demands

In the *Federalist*, James Madison explained that constant changes to governing law—what he calls "a mutable policy"—"poisons the blessing of liberty itself."[7] "It will be of little avail to the people," he tells us, "that the laws are made by men of their own choice, if ... they be repealed and revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is to-day, can guess what it will be to-morrow."[8] Among the many ills created by a mutable policy is

> the unreasonable advantage it gives to the sagacious, the enterprising, and the moneyed few over the industrious and uninformed mass of the people. Every new regulation concerning commerce or revenue, or in any way affecting the value of the different species of property, presents a new harvest to those who watch the change, and can trace its consequences; a harvest, reared not by themselves, but by the toils and cares of the great body of their fellow-citizens.[9]

Madison argued that the proposed Constitution contained safeguards to prevent the mutability which plagued state laws at the time.[10]

As Madison's remarks suggest, stable laws are of immense importance to small business. Small businesses need to be able to predict what the law will permit and prohibit in the future so they can make plans and investments today to prepare for that future. Likewise, they need to know the compliance costs the law will impose on them in the future so they can budget for new hires, equipment, materials, etc. Knowledge of the law's future requirements sets small

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[6] For this reason I do not discuss issues, such as agency compliance with principles of cost-benefit analysis, which affect small and large businesses in more or less the same ways. For the same reason I do not discuss the recent amendments to Executive Order 12866, *see* E.O. 14094, 88 Fed. Reg. 21879 (Apr. 6, 2023), or the proposed amendments to OMB Circular A-4, *see Request for Comments on Proposed OMB Circular No. A-4, "Regulatory Analysis,"* 88 Fed. Reg. 20915 (Apr. 7. 2023).

[7] Alexander Hamilton, John Jay, & James Madison, *The Federalist* No. 62, 400 (Modern Library ed. 2000).

[8] *Id.*

[9] *Id.*

[10] *Id.* at 394-401.

businesses up for productivity, and it also enables their owners and employees to exercise agency effectively rather than merely responding to the government's initiative.[11] Further, small businesses often lack access to the high-priced counsel and strategists that enable larger businesses to respond effectively to, and even take advantage of, regulatory changes. Indeed, small businesses often find it difficult even to learn of regulatory changes. Regulatory changes therefore tend to place small businesses at a competitive disadvantage vis-à-vis their larger peers.[12]

These points were brought home to me during my service at OIRA. I recall asking a leader of the small business community which regulatory rescissions had most benefited small business. He responded that, more than any one regulatory change, the knowledge that new regulatory burdens would not be added to small businesses for some years—that the regulatory environment was stable—encouraged small businesses to ramp up hiring and production.

Our regulatory system fails to give small businesses the stability they need to grow and thrive. Regulations in the United States change at a dizzying pace. The Federal Register publishes hundreds of pages of new regulations, amendments to existing regulations, and other administrative materials every business day.[13] On many issues of key importance to small businesses, such as labor, regulations undergo sweeping changes with every alteration in White House control.[14] The rapidity of regulatory change often bears no relation to changes in the real-world circumstances that businesses face. And while principles of administrative law modestly protect the reliance interests that small businesses, among others, build up around existing regulations,[15] these protections generally operate on a regulation-by-regulation basis rather than with respect to the regulatory ecosystem considered as a whole. But more than the prospect of

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[11] *See* Fuller, *supra* n. 5, at 37.

[12] *See, e.g.*, Small Business Administration, Office of Advocacy, *Reforming Regulations and Listening to Small Business* 3, 11 (Apr. 2020), chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://advocacy.sba.gov/wp-content/uploads/2020/04/2nd-Progress-Report-on-Reg-Reform-Roundtables.pdf (reporting small business concerns about "[h]igh costs associated with changing regulatory requirements" and noting that small "businesses have "fewer resources for regulatory compliance").

[13] *See* Federal Register, *Federal Register & CFR Statistics* (accessed Oct. 12, 2023), chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://uploads.federalregister.gov/uploads/2023/02/23171002/2022_Aggregated_Charts.pdf (more than 60,000 pages published in the Federal Register every year from 2013 through 2022).

[14] Examples include regulations governing independent contractor and joint employer status as well as the overtime threshold.

[15] *See, e.g.*, *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2012) (refusing deference to agency interpretation that would have created an "unfair surprise").

change to any one rule, it appears to be the mutability of the regulatory system as a whole that impedes small business growth.

The reasons for our regulatory instability are many, but two are worth noting here. First, the regulatory process makes it relatively easy to issue, amend, and rescind regulations. The legislative process is famously difficult; this difficulty of course can present its own problems, but it comes with an important benefit: legislation once enacted is difficult to change or repeal, so small businesses can act and plan in reliance on it. But regulations can be changed by the simple expedient of issuing a notice of proposed rulemaking, receiving and evaluating comments from the public, and then issuing a final rule.[16] Sometimes agencies claim that emergency circumstances justify them in laying aside even these modest procedural requirements. Even easier is the process for issuing guidance: agencies can release guidance with no previous notice to the regulated public and need not provide opportunity for public input. (While guidance is often labeled as non-binding, often failure to comply with it comes with a materially increased risk of enforcement, such that regulated parties feel strong incentives to comply.)

Second and relatedly, while new legislation requires consensus by hundreds of legislators pursuing disparate interests,[17] new regulations require the consensus of few officials—indeed, in the last analysis, of only one.[18] Further, the officials with prime responsibility for new regulations are all typically appointed by the same President and hence (unlike in Congress) share large agreement about policy values and measures. When the White House changes control, these officials likewise change. As Madison put it, from "this change of men must proceed a change of opinions; and from a change of opinions, a change of measures."[19]

From the perspective of a critical mass of small business owners and workers, often regulatory stability may be more important than even beneficial regulatory changes at undue frequency. But the regulators—whether career staff or political appointees—do not themselves have to live under the regulations they issue. They lack the "communion of interests and sympathy of sentiments" with the people that Madison and other founders thought so important.[20] Their perspective therefore tends—even with all the goodwill in the world—to shortchange the importance of stability and overemphasize the worth of the policy changes they pursue.

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[16] *See* 5 U.S.C. 553.

[17] *See, e.g.*, *The Federalist* No. 10, *supra* n. 7, at 60.

[18] This number is slightly higher (two or three) for independent, multi-member commissions.

[19] *See, e.g.*, *The Federalist* No. 62, *supra* n. 7, at 399.

[20] *Id.* No. 57, 367.

II. Obscurity

A second major way the regulatory system fails small businesses is by issuing numerous, complex, and sometimes inaccessible regulations that, on account of these features, are at times practically impossible for anyone but the most sophisticated parties to understand. This regulatory obscurity makes it difficult for small businesses to plan and operate effectively, depressing job creation and productivity and restricting small business owners' ability to put their ingenuity and initiative to work.[21]

The problem of legal obscurity is not a new one. In his first annual message to Congress, President Lincoln, after touching on matters affecting the war, urged Congress to simplify the federal laws, which at the time "fill[ed] more than six thousand closely printed pages."[22] He worried that so extensive a body of laws contained provisions "often obscure in themselves, or in conflict with each other, or at least so doubtful as to render it very difficult for even the best informed persons to ascertain precisely what the statute law really is."[23]

Today's federal statutes exceed by an order of magnitude those in effect in Lincoln's day.[24] But regulations are more abundant still: the Code of Federal Regulations, which houses the collection of permanent federal regulations, totals some 185,000 pages[25]; that is about three regulatory pages for every statutory page. And this figure does not count the many, many pages of regulatory preambles, precedential adjudications, and guidance documents, none of which appear in the Code of Federal Regulations. The magnitude of this body of secondary regulatory documents is difficult to exaggerate; for instance, a single agency, the Department of Labor, offers some 9,600 guidance documents on its online guidance portal, and this figure does not include precedential adjudications or regulatory preambles.[26] Unlike the provisions in the Code

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[21] *See* Fuller, *supra* n. 5, at 36 (obscurity undermines the rule of law).

[22] Abraham Lincoln, Annual Message to Congress 279, 286 (Dec. 3, 1861) in *Abraham Lincoln: Speeches and Writings*, 1859-1865 (1989).

[23] *Id.*

[24] *See, e.g.*, GovInfo, GPO Produces U.S. Code with New Digital Technology (Sept. 23, 2019), https://www.govinfo.gov/features/uscode-2018#:~:text=The%20U.S.%20Code%20is%20a,of%20the%20Law%20Revision%20Counsel (noting that the U.S. Code is approximately 60,000 pages long).

[25] *See* Federal Register, *supra* n. 13 (188,343 Code of Federal Regulations pages in 2021).

[26] *See* Guidance Search, available at https://www.dol.gov/guidance (accessed Oct. 12, 2023).

of Federal Regulations, secondary regulatory documents can be found all over agency websites and, in some cases, can be inspected only for a fee or in person.[27]

To be sure, most regulations do not apply to most businesses; no small business owner needs to know the vast majority of regulations. Nevertheless, the magnitude and dispersal of federal regulations can make it hard for small business owners, who often cannot afford to retain counsel with deep regulatory expertise, to know where to begin to learn the standards that apply to them.[28] Further, some of the bodies of regulations covering specific topics relevant to small businesses are quite large. For instance, the regulations governing just overtime payments, which affect a vast number of small businesses, run some seventy-two pages even excluding guidance and other interpretive documents.[29] And small businesses often find themselves subject to equal employment opportunity statutes, with their many pages of Equal Employment Opportunity Commission guidance.

While agencies promulgate and amend regulations with vigor, the same cannot be said for updating or rescinding regulations that have been overtaken by events. Neglected regulations accumulate over time, forming an obscure hodge-podge that the regulators themselves would not have chosen. When this happens, small businesses facing long-abandoned regulations must choose whether to tie up time and other resources in likely-meaningless compliance or risk non-compliance.

Some of the causes for regulatory obscurity are the same as those covered in the preceding Part. Another cause is the union in the same agencies of policy-setting and enforcement powers. The conjunction of these two powers gives policy-setting officials the opportunity to issue guidance, preambles, and other secondary regulatory material that claim to lack legal effect but to which the enforcement offices can nevertheless be expected to give considerable weight. This dynamic seems to have fostered the proliferation of secondary regulatory material in a wide variety of locations outside the Code of Federal Regulations.

Further, agencies lack incentives to rescind regulations that no longer respond effectively to present-day conditions. Agencies have limited resources; absent strong external constraints, they tend to spend these resources responding to the day's most salient problems (as identified either by themselves or by political direction from the White House) rather than on revisiting regulations issued in response to yesterday's problems. While Congress has attempted to supply

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[27] *See* Emily S. Bremer, "Incorporation by Reference in an Open-Government Age," 36 *Harvard Journal of Law & Public Policy* 131, 181-82 (2013) (discussing costs for acquiring standards incorporated by reference).

[28] *See* Small Business Administration, Office of Advocacy, *supra* n. 12, at 9 (reporting small business concerns about regulations "that run to hundreds of pages, and which require advanced legal and technical background to understand).

[29] *See* 29 CFR pt. 778.

such an external constraint, in the form of the Regulatory Flexibility Act's requirement of retrospective review,[30] that requirement has proven largely ineffective.

III. Regulatory Enforcement

No discussion of the regulatory system's impact on small business can be complete without coverage of regulatory enforcement. Enforcement issues bear powerfully on rule-of-law values for many reasons. Among them is that, because administrative investigations precede an agency's determination that a violation has occurred, even perfectly compliant small businesses may find themselves under investigation. The same is true with respect to administrative adjudications, which are sometimes commenced against parties ultimately found to be in compliance. This matters because investigative and adjudicatory proceedings themselves can be immensely costly. This is true especially for small businesses. Unlike their larger peers, small businesses often do not have the flexibilities to devote significant staff time to correspondence with agency officials and appearances before administrative tribunals, and they may not have access to high-caliber counsel to help them through investigations and represent them in adjudications. The upshot is that small businesses may not be able to bear the costs of investigations and adjudications as efficiently as their larger peers.[31] For small businesses in particular, then, it is important that investigations and adjudications limit their imposition of costs in time, effort, and expense.

Agencies have extremely broad discretion when conducting investigations and prosecuting violations. The Administrative Procedure Act has little to say on point,[32] and other sources of law likewise leave agencies with very large discretion. The result is sometimes agency investigations that impose heavier burdens on their targets than an adverse adjudication would have done. For instance, consider the Boucher family, Indiana farmers who cut down nine trees on a portion of their own land which the U.S. Department of Agriculture suspected might be a wetland.[33] USDA initiated its investigation some eight years after the first trees were cut down, and its investigation took more than ten years to complete.[34] The ability of such untimely and protracted investigations to upset reasonably formed expectations is immense. The prospect of unduly costly investigations and adjudications, even of compliant parties, further

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[30] 5 U.S.C. 610. I discuss the retrospective review requirement further below.

[31] *See* Small Business Administration, Office of Advocacy, *supra* n. 12, at 3 (for small businesses, the "cost of regulations is higher relative to available resources").

[32] *See* 5 U.S.C. ch. 5, subch. II.

[33] *See Boucher v. U.S. Dep't of Agriculture*, 934 F.3d 530 (7th Cir. 2019).

[34] *Id.*

undermines the rule-of-law values necessary for small businesses to thrive and support their workers and communities.

IV. Promising Reforms

A. Addressing Mutability

The regulatory system was created partly to obtain flexibility to respond rapidly to changing circumstances.[35] Much of the potential for mutability, then, is baked into the system, and opportunities to remedy it are limited. Nevertheless, opportunities do exist.

Regulations are so mutable due chiefly to the expedition of the procedures by which they may be issued. Congress could counteract regulatory mutability by demanding more rigorous procedures for issuing regulations. One way it could do so would be to enact legislation like the Regulations from the Executive in Need of Scrutiny (REINS) Act.[36] The REINS Act would require affirmative congressional approval for the most important regulations, thus layering the robust deliberative procedures specified in Article I of the Constitution atop the much less stringent procedures employed by agencies. Passing the REINS Act would bring greater stability and accountability to the regulatory environment.

There are also more modest steps Congress could take to enhance regulatory stability. For instance, Congress could require advance notices of proposed rulemaking and advance consultation with potentially affected parties for important regulations, much as the Regulatory Accountability Act would have done.[37] The notice provided by publication of an ANPRM and consultations with affected parties would allow regulated parties longer lead time within which to alter their conduct to respond to the possibility of regulatory change. This longer time horizon is no substitute for regulatory durability, especially for small businesses which may not monitor the coverage generated by ANPRMs or participate in advance consultations, but nevertheless would represent a meaningful contribution toward addressing the problem of mutability.

B. Addressing Obscurity

Insofar as regulatory obscurity is the product of the very large number of federal regulations, the same ease of regulating which leads to the mutability problem also promotes

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[35] *See* James Landis, *The Administrative Process* 69 (1938) ("The chief virtue of th[e] modern tendency toward delegation [to administrative agencies] is that it is conducive to flexibility—a prime quality of good administration. The administrative is always in session. Its processes operate with comparative rapidity.")

[36] *See, e.g.*, H.R. 277 (2023).

[37] H.R. 5 (2017). See in particular section 103(c) of the bill.

obscurity, and some of the remedies for the former would also address the latter. In this section I focus on remedies specific to the obscurity problem.

One major reason small businesses may struggle to learn the regulatory standards that apply to them is, as I have said, the fact that those standards cannot all be found in the Code of Federal Regulations, but rather are dispersed across many locations. Executive Order 13891,[38] issued in 2019, sought to address this problem by requiring each agency (or agency component) to place all its guidance on a single, searchable website.[39] By bringing each agency's guidance together in a single place, E.O. 13891 made it significantly easier for small businesses to access these documents, helping to level the playing field between small businesses and their larger competitors. The Guidance Out of Darkness (GOOD) Act[40] would impose a similar requirement to similar effect.

E.O. 13891 also required each guidance document to contain a disclaimer informing the public of its non-binding character.[41] Executive Order 13892 reinforced this requirement by forbidding agencies from relying on guidance to prove a violation.[42] The Guidance Clarity Act[43] would likewise mandate a disclaimer that guidance does not bind at law. This approach would alleviate the obscurity problem, because it would inform small businesses (and other relatively unsophisticated parties) which standards are mandatory and which are not, helping small business owners and workers to understand precisely where they stand.

Yet another step Congress could take to bring much-needed regulatory clarity to small businesses is to require that (some or all) federal regulations expire after a specified period of time, subject to such exceptions as necessary to make the legislation workable and to provide for emergencies, unless the author agency finds through a new rulemaking process that the regulation remains necessary. As I have mentioned, Congress has already enacted a retrospective review requirement,[44] but this requirement has proven generally ineffective on account of its lack of enforceability against agencies, which hesitate to commit significant resources to retrospective review. A sunset provision would give the agencies the necessary

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[38] 84 Fed. Reg. 55235 (Oct. 9, 2019).

[39] *Id.* at 55236, sec. 3.

[40] H.R. 890 (2023).

[41] 84 Fed. Reg. at 55237, sec. 4.

[42] 84 Fed. Reg. 55239, 55240, sec. 3 (Oct. 9, 2019).

[43] H.R. 4428 (2023).

[44] *See supra* at 8.

incentives to review their existing regulations and rescind or amend those that are no longer necessary or effective, clearing the field for small businesses' initiative and ingenuity.

C. Making Enforcement Fair and Predictable

Executive Order 13924 recognized the tight connection between fair administrative enforcement and small business growth.[45] Pursuant to that insight, the order set out a list of standards for fairness in enforcement and directed agencies to revise their procedures accordingly.[46] Congress could take a similar approach, either devising standards for agency enforcement itself or directing agencies to promulgate standards and then operate by them. Doing so would increase the ability of small businesses to rely on their compliance with existing law and regulations as protection against unreasonable costs in response to agency enforcement actions.

Conclusion

Our modern regulatory system's failure to uphold rule-of-law values impedes the ability of small business owners and workers to create jobs, increase productivity, and make a difference in the lives of their families and communities. Congress can take action to promote the rule of law for small business.

[45] 85 Fed. Reg. 31353, 31353-54, sec. 1 (May 19, 2020) (agencies "should give businesses, especially small businesses, the confidence they need to re-open by … committing to fairness in administrative enforcement and adjudication").

[46] *Id.* at 31355, sec. 6.

APPENDIX

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Testimony of:

Mario Burgos on behalf of Associated Builders and Contractors

Chief Strategy Officer

Prairie Band LLC

Albuquerque, New Mexico

U.S. House Committee on Small Business Hearing:

"Burdensome Regulations: Examining the Effects of DOL Rulemaking on America's Job Creators"

October 19, 2023

Chairman Williams, Ranking Member Velazquez and Members of the U.S. House Committee on Small Business:

Thank you for the invitation to testify this morning on the impact the U.S. Department of Labor's rulemaking is having on job creators across the country and the concerns that recent federal regulations have raised during my small business journey.

My name is Mario Burgos, and until July of this year, I was the president and CEO of Burgos Group, headquartered in New Mexico. This is a company I founded in 2006 and grew along with my brother as a small business federal contractor, primarily focused on general and electrical construction. In July, we made the decision to sell our company to Prairie Band LLC, a company that was founded in 2010 to contribute to the long-term economic stability of the Prairie Band Potawatomi Nation located in the state of Kansas.

I now serve as the chief strategy officer of Prairie Band LLC.

To understand why we chose to exit the business that we labored to build for over 15 years, I think it is important to share more background. In 2009, at the height of the Great Recession, our family business pivoted to focus on federal construction opportunities made possible under the American Recovery and Reinvestment Act, signed into law by President Barack Obama. Burgos Group became a vehicle for realizing the American dream of two brothers who are first-generation Americans—our father emigrated from Ecuador.

Under the Obama and Trump administrations, our company grew from two to 195 employees with a track record of completing more than 100 sustainability, renovation and modernization projects for 13 different federal agencies from coast to coast. Our growth landed us on the Inc. 5,000 Fastest-Growing Private Companies list six years in a row—something achieved by only 3% of the companies on that list. We were recognized in 2015 as the Small Business Administration's Region VI Contractor of the Year and, in 2017, I was honored to be the SBA Small Business Person of the Year for New Mexico.

Unfortunately, the number of rapidly changing and ever-increasing federal and state regulatory requirements affecting the construction industry led us to conclude that the most prudent action would be to exit the business. The recent DOL updates to regulations implementing the Davis-Bacon and Related Acts is just the latest example of additional burdens and barriers erected, which make it more difficult for small businesses to participate in the economic investments of the bipartisan Infrastructure Investment and Jobs Act or to support our nation's defense missions.

To that latter point, Secretary of Defense Lloyd J. Austin III noted in the U.S. Department of Defense Small Business Strategy released in January of this year:

"[Small Businesses] account for over ninety nine percent of all employer firms and generate over forty-four percent of our Nation's economic activity." He went on to say, "Contracting, participation of small business in the defense industrial base has declined by over forty percent in the past decade. Small businesses comprise more than seventy percent of the companies that do business with the Department. If the Department does not work to reverse the decline of small business contracting, then the industrial base that equips our military will weaken."

When I first learned that the DOL was going to do a comprehensive regulatory review and revise regulations to promote compliance, provide appropriate and updated guidance and enhance their usefulness in the modern economy, I was cautiously optimistic. This was particularly since President Joe Biden's Day One Executive Order 13985 had directed agencies to work to make contracting opportunities more readily available to all eligible firms and to remove barriers faced by underserved individuals and communities.

What the DOL has done with its updates to regulations issued under the DBA is the direct opposite of what I had hoped.

Based on personal experience with the DOL, there were two critical areas that I had hoped these revisions would address that would make it easier for small, disadvantaged businesses to successfully participate as federal contractors:

1. Reduction of administrative and paperwork burden; and
2. Elimination of the subjective nature of DBA compliance.

The DOL acknowledged the first of these very real concerns were shared by others in the following statement: "Finally, some commenters [including the SBA Office of Advocacy] raised concerns about the administrative or paperwork burdens contractors might face while adjusting to, and under, the Department's final rule. The Department considered such concerns in its economic analyses and concluded that the paperwork burdens associated with the rule are limited and are outweighed by the benefits of the regulation."

The DOL provided a theoretical example of their approach to analysis which determined, "On a per firm basis, direct employer costs are estimated to be $224.73 in Year 1. These costs are somewhat higher than the costs presented in the NPRM because the Department increased the time for regulatory familiarization in response to comments."

According to the rulemaking's regulatory familiarization cost estimate, "The Department assumed that on average, 4 hours of a human resources staff member's time [at $49.94 per hour] will be spent reviewing the rulemaking. This was increased from 1 hour in the NPRM per comments."

The DOL's assumption that it costs every business roughly $225 for only one person to read and familiarize itself with the new 800-plus page final rule is shockingly out of touch. The rule is nearly 250,000 words, which would take almost 18 hours for the average American reader, at 238 words per minute, to finish. In addition, the new rule is likely to require many small businesses to hire costly labor lawyers, at significantly more than $50 an hour, to review and provide compliance recommendations. Likewise, the rulemaking doesn't account for the time it takes small businesses to understand and operationalize the new rule.

Of note, the regulation is just as time-consuming and onerous for larger contractors, as the rule doesn't estimate costs to familiarize and operationalize changes companywide, which requires HR, payroll, estimators, managers and forepersons to understand the changes as well. It is clear that the DOL regulators are vastly underestimating the regulatory costs of this new rulemaking.

Unfortunately, the DOL has also failed to alleviate existing burdens caused by the Davis-Bacon Act. I would like to provide a very real example of the true cost of the administrative and paperwork burden of compliance as well as the subjective nature of compliance.

On Dec. 22, 2020, Burgos Group received a letter from the DOL notifying us that we had been "scheduled for a compliance review to determine compliance with the provisions of the Fair Labor Standards Act (FLSA) of 1938, as amended, the Davis Bacon Act, and other related Federal labor laws for work that your company performed as a subcontractor to Southwest Valley Constructors Co under Contract No. W912PL19C0015: 'Tucson Sector Barrier Wall Replacement Project' let by Department of Defense, Department of Army."

In future conversations, the DOL informed us that this compliance review was not the result of a complaint filed by an employee but was a "directed audit of all border wall contractors and subcontractors."

We were requested to provide a list of documents to support this compliance review and upload the documents on or before Jan. 8, 2021, giving us a short amount of time to comply with the request. A team, including myself, our COO, our vice president of operations, our controller, our staff accountant and our office manager spent the holidays organizing and uploading the over 800 pages of supporting documentation required to comply with the DOL's request for "15 items" needed for their review.

This compliance review would not conclude until we settled with the DOL in April 2022. We had many interesting conversations with the DOL during this period of time. For example, they congratulated us on being a good contractor and providing the documents they requested in a timely and organized manner, which made it easy for them to review as opposed to doing a data dump.

They asked interesting questions such as, "When you decided to pay all laborers the higher Laborer: Pipelayer wage of $20 per hour instead of the lower wage of $15.65 for Laborer: Common or General did you contact any union to get their input or direction?" I was puzzled by this question since I was not aware of any DBA requirements that mandate contacting the unions for the direction when complying with the DBA.

It was not until July 9, 2021, that we had a call with the DOL in which they informed us that we had misclassified 84 employees as laborers (pipelayers) who should have been paid as electricians because IBEW Local Union 570 claimed the work, even though we had already provided them a link to the Arizona Laborers' Agreement on the DOL website.

This agreement was annotated as "covering all highway, heavy, industrial, building and residential work within the State of Arizona." On page 17 of the document, it stated, "Pipe Layer including, but not limited to water pipe, sewer pipe, drain pipe, and underground tile pipe and conduit."

We were laying conduit, and we paid all laborers a wage rate of $20 per hour. This matched the DBA wage determination rate provided by the government for the project.

The DOL explained that the electrical union had prevailed over the laborers' union, so it was the DOL's calculation that we had made an underpayment of $685,914.28 in wages. When I asked them to provide written notice of when the IBEW prevailed since we were not notified by USACE or the general contractor of this being the case, the DOL told me they could not provide that information, but I should call the IBEW. They also told me that the responsibility to call the union before doing the work is covered under the Fry Brothers decision. They suggested that I Google that decision from the 1970s.

On Sept. 1, 2021, we were required to consent to the DOL request that until we had resolved the matter by agreement—or determined that it cannot be resolved by agreement—the government may as if in trust hold back from payments due but not yet paid by the federal government on the project in an amount from those payments that will equal the amount in dispute: $685,914.28.

By Dec. 9, 2021, the DOL had requested more information, conducted further analysis and determined that our company now owed more funds and asked us to "agree to front the amount of $990,351.80 until an agreement or ruling is reached." Part of the DOL rationale for noncompliance with the DBA was that they had analyzed our subcontract language with the prime contractor and noted that it included switchgear, transformers, light poles and pulling wire. It was their determination that the language of the contract spelled out electrical work, but their analysis showed that, while 30% of our employees in the field were paid electrical wages, 70% were paid other wages (i.e., laborer, equipment operator, etc.)

When I pointed out during this discussion that the presidential proclamation suspending our contract was issued on Jan. 20, 2021, and we accepted the switchgear, transformers, etc., for storage in April 2021, the DOL agreed to reconsider their calculations.

Ultimately, on April 1, 2022, we agreed, without any admission of fault or wrongdoing, to pay $328,807.10 determined to be owed by the DOL. We agreed to settle for two reasons:

1. This would allow us to collect the larger amount being withheld by the DOL since September.
2. This would allow us to go back to focusing on operating our business and stop paying significant and mounting legal fees.

I do not believe that anyone at the DOL acted maliciously. Quite to the contrary, I believe that the subjective nature of the existing regulations created ambiguity, which puts a presumption of guilt on businesses and makes the enforcement and compliant responsibilities of DOL personnel more difficult.

Unfortunately, the DOL's new 800-plus page rule has made no effort to provide clarity to the regulated community related to the Fry Brothers problem, all concerning the adoption of union work rules when the union wage rate prevails. The DOL needs to publish union collective bargaining agreements publicly, or not apply this standard. Small businesses are hurt with cloak and dagger regulations.

My experience shows how difficult it can be to comply with DBA regulations when the correct wage determination is not easily determined.

The revisions of the DBA, which will go into effect Oct. 23, 2023, further compound this problem.

In my example, the DOL withheld an amount of money due that far exceeded a final settled amount just to agree to continue to have discussions. The new DOL regulations allow cross-withholding on multiple contracts, which could have devastating effects on small business prime contractors and their small business subcontractors. If the prime is not paid, they will not have the money to pay their subcontractors.

Even holding a prime general contractor liable for all their subcontractors is a significant additional barrier for the entry of new small businesses into the federal marketplace. If a prime contractor is going to be held liable for their subcontractors, they are unlikely to give an opportunity to small businesses new to federal government contracting—the risk is too great.

Moreover, the approach the DOL relies on for determining wage rates does not consider the realities of how America's small businesses operate, particularly the startups in minority communities that are job creators of tomorrow. According to the U.S. Bureau of Labor and Statistics, only 25% of new businesses make it to 15 years or more. Take it from a small business owner who made it to 17 years, we struggled day in and day out to beat the odds.

Small businesses do not have free time to complete voluntary wage surveys that the DOL's Wage and Hour Division uses to help them calculate the so-called prevailing wage. For decades, the DOL Office of Inspector General and Government Accountability Office have pointed to flaws in the DOL's wage determination process, yet the DOL's final rule does little to fix this problem. In fact, the new rule makes it worse by rescinding pro-taxpayer and commonsense policies that were enacted more than 40 years ago because they were not reliably producing a timely or local prevailing wage, as required by statute.

It is my sincere hope that this committee will consider this testimony and take actions that will remove barriers and simplify compliance for America's small businesses. Thank you again for the opportunity to serve as a witness for this hearing and I look forward to answering any questions you may have.

NSSGA

NATIONAL STONE, SAND
& GRAVEL ASSOCIATION

STATEMENT OF RIC SUZIO
VICE PRESIDENT, YORK HILL TRAP ROCK QUARRY Co.

ON BEHALF OF
THE NATIONAL STONE, SAND, & GRAVEL ASSOCIATION

BEFORE THE HOUSE
COMMITTEE ON SMALL BUSINESS

HEARING ON
BURDENDOME REGULATIONS: EXAMINING THE EFFECTS OF DOL RULEMAKING ON AMERICA'S JOB CREATORS

WASHINGTON, D.C.
THURSDAY OCTOBER 19th, 2023

66 Canal Center Plaza, Suite 300
Alexandria, VA 22314 nssga.org

Chairman Williams, Ranking Member Velázquez, and Distinguished Members of the Committee:

Thank you for extending the invitation for me to share insights and perspectives before the House Committee on Small Business. I am Ric Suzio, and I am here today to represent both The Suzio York Hill Company and the National Stone, Sand, and Gravel Association (NSSGA).

The National Stone, Sand & Gravel Association otherwise known as NSSGA is the leading voice and advocate for the aggregates industry in the United States. It represents over 400 producers of crushed stone, sand, and gravel across the United States, as well as the equipment manufacturers and service providers that support these industries.

I am privileged to work for my family company as the Vice President of Suzio York Hill Company. Our family business is rooted in Connecticut's construction history since 1898, which was the vision of my forefather, Leonardo Suzio. From foundational projects like the Polish Falcon Hall, to our specialization in road building by the 20th century, we have been pivotal in molding Connecticut's infrastructure.

Our story is not just about construction; it's about community and commitment. Our family-run enterprise has always been deeply embedded in community initiatives, supporting local landmarks and institutions like the Gaylord Hospital. Our environmental consciousness led us to adopt innovative systems like the Johnson-Marsh, earning us public recognition.

Today, as I represent the aggregates industry, including hundreds of small producers, I bring forth the concerns and triumphs of countless businesses that, like mine, juggle innovation, community responsibility, and the challenges of an ever-evolving regulatory landscape.

The heart of our concerns today evolves around the ever-changing regulatory environment which poses disproportionate challenges to small businesses. As small businesses, we often lack the resources to interpret, comply, and adapt to these regulations, inevitably leading us to hire expensive external experts. The financial strain such regulations place on us is substantial, with many of us absorbing these costs. Over time, this financial burden risks driving consolidation within the industry, overshadowing the essential role of small businesses.

The Suzio York Hill Company is multi-generational 125-year-old family operation that currently boasts a dedicated team of 93 employees. With a rich history that spans generations, the company is proud to have second-generation coworkers who have upheld and continued the legacy of their predecessors. Over the years, many of our coworkers have shown unmatched loyalty and dedication, as evidenced by several coworkers who have retired after serving the company for over 40 years. Moreover, the Suzio York Hill Company is actively engaged with the International Union of Operators

Apprenticeship Program, showcasing their commitment to professional growth, training, and ensuring that their workforce remains at the forefront of industry standards and practices.

I would also like to highlight that in celebration of our 125-year legacy, the Suzio York Hill Company is generously donating $1,000 for each year of our history, amounting to $125,000 in charitable contributions, over and above our regular philanthropic efforts. At my company, we believe in the power of community engagement and hands-on experiences. When the Boys and Girls Club members visit, we offer them an extensive tour of our facilities. The sheer curiosity and excitement in their eyes as they explore our operations are genuinely heartwarming. Being a proud member of the Lions Club, we actively participate in their initiatives and events, championing community service and promoting a sense of unity.

Our collaboration with both the Boy Scouts and Girl Scouts has been particularly rewarding. We frequently host tours tailored for them, diving deeper into areas of interest that align with their badges or projects. Moreover, our team has had the honor of offering resources and guidance for numerous Eagle Scout and Gold Award projects, fostering a spirit of mentorship and shared learning.

Our involvement with these groups is a testament to our commitment to enriching the community, sharing our knowledge, and nurturing the next generation of leaders and innovators. Every interaction, tour, and collaboration underlines our core belief – community always comes first.

The aggregates industry, comprising stone, sand, and gravel businesses, is pivotal in developing America's infrastructure. Small businesses like ours are its backbone. Yet, we find ourselves grappling with regulations, changing societal expectations, and the perpetual drive for sustainable innovation. For small businesses, navigating these waters is an uphill task. Consider, for instance, the financial toll recent price hikes have taken - 33% for tires and 20% for cement. These aren't mere statistics; they're real challenges that affect our daily operations and long-term viability.

Many times, the businesses in our industry go above and beyond regulatory frameworks that are in place by federal, state and local entities. Although regulations are essential for standardization and safety, they often times come with unintended repercussions for small businesses. Multiple changing and conflicting standards create extreme uncertainty and unnecessary red tape. Small businesses, unlike larger corporations, do not have the dedicated teams to parse through and implement regulatory changes. As a result, they resort to hiring expensive external consultants, a substantial financial burden. Over time, these financial pressures can lead to industry consolidation, diminishing the role and impact of small businesses.

In my testimony I would like to highlight some of the regulations that have recently come from the U.S. Department of Labor, and their impacts on small businesses.

Tracking of Workplace Injuries and Illnesses

In 2022, the Occupational Safety and Health Administration (OSHA) unveiled the Proposed Rule, "Improve Tracking of Workplace Injuries and Illnesses," underlining their commitment to worker safety and the aspiration of ensuring that every employee returns home unharmed each day. This is a mantra lived by my company and the members of the NSSGA, we have no greater mission than protecting our coworkers.

Central to this initiative is the mandate for enterprises to provide electronic reports detailing injury statistics. OSHA's dedication to maintaining workplace transparency and holding establishments accountable is unquestionable. However, for small businesses, the landscape this rule paints is considerably different. The foundational ethos of many small enterprises is rooted in trust, close-knit community ties, and an almost familial rapport between the employer and employees. The potential for public exposure of intricate injury data not only risks eroding this bond but also presents a myriad of logistical hurdles. Small businesses, often operating without extensive technological systems or dedicated IT personnel, could find themselves overwhelmed. Furthermore, the evolving nature of OSHA's regulations, marked by periodic adjustments, presents an environment of flux. For compact enterprises, this translates to regularly recalibrating their compliance approaches — a task that is not just tedious but can also strain their already limited resources.

Worker Walkaround Representative Designation Process

In a recent proposed rulemaking by OSHA, there is a significant change regarding workplace inspections. The rule aims to grant OSHA inspectors the authority to be accompanied by external entities such as union organizers, community activists, or other third-party representatives during a workplace inspection, provided an employee makes such a request. This new stipulation applies irrespective of whether the workplace in question is unionized or not, marking a significant departure from traditional inspection protocols.

For small businesses, this proposed rule presents a plethora of challenges. First, the logistical and administrative burdens of accommodating expanded inspections could exert undue pressure on their limited resources. Small businesses often operate with a more direct and intimate employer-employee dynamic, and the introduction of external entities into this setting could disrupt this equilibrium. Furthermore, with the potential involvement of individuals whose intentions and affiliations might be unfamiliar to the business owner, there's a heightened risk of unforeseen liabilities. We are also concerned that some entities, who have negative intentions may utilize the new walkaround powers to cause future harm to our establishments. This uncertainty, combined with the potential for frequent policy adjustments by OSHA, leaves small businesses in a precarious position, constantly needing to adapt and reassess their compliance strategies.

Proposed Rulemaking on Overtime Pay Exemptions

The essence of the Wage and Hour proposal to increase overtime pay is rooted in justice and fair compensation, advocating that every coworker should be adequately compensated for extended working hours. Our employers are family. We pay them extremely well and we have mutigenerational employees who work in our company. Our turnover rates are extremely low as we are proud to provide a healthy work life balance. This is true not only in our company but across the entire industry.

Yet, while the intention might be commendable, its ramifications for small businesses are pronounced. For small enterprises, already grappling with myriad challenges, a sudden 55% hike in the minimum salary threshold for overtime exemption poses a significant strain. It is worth noting that many small businesses pride themselves on nurturing familial ties with their employees, often going above and beyond to offer competitive wages that reflect the dedication and hard work of their teams. They strive to ensure an equilibrium between fair compensation and the sustainability of their operations. Introducing such a steep increase, compounded by the unpredictability of automatic triennial updates, not only threatens this delicate balance but can also introduce financial volatility. Small businesses thrive on predictability; frequent, automatic changes hinder their ability to strategically plan, potentially jeopardizing both their stability and the well-being of their employees.

Proposed Silica Rule

We appreciate the work of the Mine Safety and Health Administration (MSHA) to update the existing occupational exposure limit for respirable crystalline silica and reducing the exposure limit to the limit adopted by the Occupational Health and Safety Administration (OSHA) in 2016.While a safe silica exposure limit is paramount to protecting miners, we are concerned that the proposed rule established new, one-sized fits all, regulatory criteria that will result in the misallocation of limited resources and, consequently, fails to adequately protect the health of many of our nation's miners.

The vast majority of mining in America occurs in above ground, metal non/metal (MNM) mines where there is very little risk of potentially hazardous silica exposures. For example, in the aggregates industry, many operations mine materials (for example, limestone) that contain very little if any crystalline silica. A number of aggregates operations, particular sand and gravel operations, are wet, the material is dredged from a pond, or the material is mined hydraulically with water and sold without being dried. In the aggregates industry, which accounts for 10,000 of America's 13,000 mining operations, there is no evidence of a silica crisis as operators have been diligent limit exposure where respirable crystalline silica may exist.

We are concerned that the prosed rule will apply unnecessary reporting, surveillance, and sampling requirements on America's material producers, which will result in producers incurring costs in excess of MSHA's estimates. MSHA estimates that the proposed rule will cost of $1,220 per $1 million in revenue for small operators. We

understand that the cost of sampling alone for small operators will exceed the MSHA estimate, largely because small operators will use outside resources for sampling and do not benefit from the reduction in costs because of volume like large operators. MSHA also estimated the annual cost of engineering controls for all MNM to be $4.89M. We have been advised that the 2023 engineering controls budget for one company is approximately equal to MSHA's estimate for all of MNM.

Further, the current infrastructure of testing labs and surveillance clinics does not exist to implement the proposed MSHA standards. If the proposed rule should go into effect, many operators would be unable to meet the requirements under the proposed timelines as they would not be able secure the needed materials, testing and surveillance leading to severe backlogs and supply chain shortages.

We are urging MSHA to make changes to the proposed rule to conform the MSHA silica standard for MNM operations to the OSHA silica standard adopted in 2016. OSHA's silica regulation takes a risk based approach, requiring additional silica monitoring and sampling when the potential for silica exposure exceeds a risk based threshold. In addition, OSHA incudes a "Table 1" that lists tasks, with known and auditable engineering controls that limit exposures, and does not require additional sampling for these tasks if the strict requirements in Table 1 are complied with. Aligning MSHA's proposed rule with OSHA's 2016 risk-based standard will ensure that limited resources are being applied to address silica exposure risk, and, conversely will avoid wasting time and money sampling and providing medical surveillance to miners who, for example, work on a dredge in a pond, or mine material that contains no silica.

In addition, as many MNM operations are co-located with OSHA regulated properties, having a more unified standard will eliminate confusion and duplicative sampling and testing regime placed on workers.

We are also concerned that the proposed effective date of 120 days will not provide the adequate time for material and mineral operators to comply with the prosed regulatory regime MSHA has proposed. This is especially important for small operations that do not have in-house compliance teams and have limited resources to hire new lawyers and consultants. Also, as we noted above, there needs to be additional time to allow the analytic labs and the resources that provide medical surveillance services to increase their capacities to meet the increased demand that will result from the MSHA rule. The OSHA general industry standard received a two-year effective date (June 2018). The 120 day effective date exacerbates the cost issue, particularly as companies work to understand exposures and develop engineering controls.

Independent Contractors

On the significant issue of the classification of employees versus independent contractors, particularly under the proposed changes by the Department of Labor. The recent rule modifications seek to redefine the criteria that differentiate independent contractors from regular employees. However, these changes bring with them

unintended consequences that disproportionately affect small businesses across the nation.

Historically, small businesses have relied heavily on the flexibility offered by hiring independent contractors – not just to manage their costs but also to efficiently adjust to dynamic market demands. The simpler criteria provided by the 2021 Independent Contractor Rule gave clarity and certainty to these businesses. With its potential repeal, many small enterprises face the dual challenges of increased costs and bureaucratic complexities. For instance, in the aggregates industry, where independent contractors are integral, businesses frequently mobilize hundreds of such contractors daily. Imposing more rigid classifications would lead to added taxes, fees, and administrative burdens, potentially increasing the cost of essential materials during an already inflationary period. Furthermore, as many contractors value their independence and the freedom to dictate their work schedules, this change could exacerbate the existing labor shortages, putting an undue strain on small businesses trying to meet their operational demands.

While the intent behind ensuring fair worker classifications is laudable, the potential repercussions on small businesses cannot be ignored. We urge the committee to consider the wider implications of this rule change, especially its impact on the backbone of our economy: our small businesses.

Davis Bacon

The initial proposed changes to the Davis Bacon Act generated concerns among the construction materials industry. A salient issue arose from the new definition of "material suppliers," potentially categorizing even temporary material production facilities on job sites under Davis Bacon standards. Such redefinitions would have inadvertently classified suppliers setting up temporary, portable equipment on sites as contractors— an impractical standard that could have disrupted the current, efficient methods of material supply and escalate costs.

On August 8, the final rule included a clarification for material suppliers, that activities that are incidental to material supply, such as loading, unloading and pickup, do not constitute construction activity. However, if a material supplier is also performing construction activities at the project (i.e. supplying aggregates and paving on a highway project) then all employees including the material supplier would be subject to Davis Bacon.

Furthermore, if small businesses do not fall into this exclusion, the changes will present significant barriers to participation in federally funded projects, especially for minority-owned and smaller enterprises. Such businesses often lack the extensive resources and legal infrastructure required to navigate the labyrinthine regulations, which could inadvertently edge them out of crucial public works projects. This is antithetical to the spirit of fostering diversity and inclusivity in our nation's entrepreneurial landscape. Moreover, the proposed shift in wage and fringe benefit surveys, from capturing 50% to

just 30% of responses, could distort wage structures, adversely impacting both employers and employees. We urge the Committee to consider these potential ramifications, especially on our nation's small businesses, and reassess the modifications to the Davis Bacon Act. Your attention to this matter will ensure the continued vitality and inclusivity of our nation's construction materials industry.

Joint Employer

The NLRB's recent proposal seeks to modify the definition of joint-employer status, emphasizing both direct control and indications of reserved and/or indirect influence over essential employment conditions. While the intent – to ensure clarity in employer-employee relationships and promote collective bargaining – is commendable, the broader implications for small businesses, especially those involved in franchising or subcontracting relationships, cannot be overlooked.

From the vantage point of small businesses, the proposed rule raises significant concerns:

1. Operational Ambiguity: The introduction of concepts like "indirect" and "reserved" control could lead to ambiguities in contractual relationships. For small businesses, which often lack the legal resources of larger corporations, this ambiguity could result in an inability to clearly define roles and responsibilities with their business partners.

2. Liability Concerns: Small businesses could find themselves unexpectedly liable for actions or decisions over which they had minimal or no actual influence, simply because of a perceived reserved or indirect control.

3. Impact on Collaborative Business Models: Franchising, a popular business model among small entrepreneurs, relies heavily on a clear distinction between the roles of franchisors and franchisees. The proposed rule might deter larger companies from entering into franchising agreements, thereby limiting opportunities for small entrepreneurs.

4. Economic Implications: Increased legal uncertainties could lead to higher litigation costs, which small businesses are ill-equipped to bear. This might discourage them from pursuing growth opportunities, hiring more staff, or even continuing their operations.

As the Committee deliberates on this matter, I urge you to consider the unique challenges faced by small businesses and ensure that the final rule fosters an environment where they can continue to thrive and contribute to our nation's economic fabric.

OMB SBREFA

OIRA's long-standing open-door policy has been instrumental in providing stakeholders, especially small businesses, with a platform to voice concerns about regulations that directly affect them. The Small Business Regulatory Enforcement Fairness Act (SBREFA) was designed to specifically acknowledge and address the unique challenges faced by small enterprises in the regulatory process. However, the OMB's new draft guidance, with its emphasis on prioritizing outreach based on historical interactions, risks sidelining the targeted input that SBREFA aims to capture for small businesses. By potentially prioritizing some entities over others and setting an inflexible stance against repeat meetings, this guidance may inadvertently silence small businesses, which often don't have the same resources as larger entities to constantly engage but offer invaluable, on-the-ground insights when they do. The adjustments proposed in Executive Order 14094, particularly raising the economic significance threshold, further risk sidelining regulations that, while not meeting this new higher bar, could still profoundly impact small business sectors.

Conclusion

In conclusion, I would like to extend my heartfelt gratitude to the committee members for allowing me the opportunity to testify on this pivotal matter. It is crucial to recognize the disproportionate regulatory burdens placed on small businesses when overarching rules fail to account for their unique challenges. Small businesses, the backbone of our economy, deserve regulations that support their growth rather than hinder it. We earnestly hope our insights shed light on these complexities. We eagerly look forward to any questions you may have and appreciate the committee's commitment to understanding and addressing these concerns.

Burdensome Regulations: Examining the Effects of DOL Rulemaking on America's Job Creators

United States House of Representatives
Committee on Small Business

Frank Knapp Jr.
South Carolina Small Business Chamber of Commerce

October 19, 2023

Chairman Williams, Ranking Member Valasquez, and members of the Committee, I am Frank Knapp, the president and CEO of the South Carolina Small Business Chamber of Commerce. We are a statewide advocacy organization working at both the state and federal levels with 5,000 plus supporters.

I co-founded our organization over 23 years ago and good regulations at the state and federal level has long been an issue we have championed. Nine years ago, my organization worked to pass our state's Small Business Regulatory Flexibility Act modeled after the federal law.

I am also a small business owner and from 2015 to 2017 I served on the SBA Regulatory Fairness Board, which advises the SBA National Ombudsman on matters of federal regulatory concern to small businesses.

I want to be very clear. We expect every federal agency to fully comply with the law. That is the way we make sure that real small businesses have their voices heard and considered when new rules are being made. No one wants to unnecessarily burden small businesses in order to comply with regulations. If there are less onerous ways of achieving the goals of needed regulations, then those ways should be adopted.

But make no mistake about the need for regulations. They are the rules that give small businesses a level playing field to compete with each other and with big businesses. They help protect our environment so all of us can have healthier lives. They protect a small business's most precious asset, their employees, who we don't have enough of today. And they try to protect our economy to avoid cataclysmic events.

I have never heard an entrepreneur say that they decided not to start a business because of federal regulations.

Now, this doesn't mean that new federal regulations might not put some financial burden on existing real small businesses.

But big cost estimates have been generated for years for their shock value and dire warnings that federal regulations are crushing small businesses.

However, the definitions of what constitutes a small business ends up showing that 99 percent of all businesses are small businesses, even some with up to 1,500 employees. We, and I believe most people, recognize businesses with less than 100 employees as real small businesses and those are the ones the RFA should focus on.

Plus, all we hear about is the cost of proposed regulations.

We never hear about the benefits.

We don't get real regulatory analysis in which benefits are supposed to be taken into consideration.

All of us should understand that proposed regulations have benefits, otherwise they wouldn't be proposed.

Regulations address the health and well-being of workers, the local community, and the entire country. This creates a healthier economy for small and all businesses to prosper.

Good regulations create opportunities for entrepreneurs and small businesses to innovate and grow by creating new products and services which create new jobs.

These benefits might be difficult to quantify, but totally ignoring them only serves the purpose of those who oppose regulations or those who want to cast dispersions on an administration acting responsibly.

Our nation's economy is strong. The Federal Reserve has even been trying to slow its growth. The problems that small businesses have had with growth have been due to the lack of workers and access to capital—not federal regulations.

But we do need improvements in the rule-making process if we are serious about agencies proposing good regulations with minimal cost to small businesses.

Agencies should do a better job of reaching out to small businesses across the country and not just talk with Washington-based trade associations often controlled by big businesses.

Agencies should project costs for real small businesses with fewer than 20 employees and fewer than 100 employees.

Agencies should project the direct benefits of the proposed regulations to the impacted small businesses and local economy.

If agencies need more resources to implement these recommendations, they should get them.

One more thing.

With all this concern about proposed new regulations, there is far too little concern with helping a small business comply with existing federal regulations—a process that is intimidating, confusing, and too time consuming.

Let's simplify this process by having one federal agency be a resource for all small business regulatory compliance concerns. An agency that can work with the appropriate federal agency and ensure that the concerns have been successfully addressed.

The SBA Ombudsman's Office is already set up for this responsibility and has a successful track record of this regulatory compliance assistance. Empower and fund this office for a more efficient and small-business friendly process.

Legislation has previously been introduced in Congress to do just that and I recommend that such a bill be passed.

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

Questions for the Record
Small Business Full Committee Hearing on "Burdensome Regulations: Examining the Effects of DOL Rulemaking on America's Job Creators"

Questions From Ranking Member Velázquez to Mr. Mario Burgos. Chief Strategy Officer, Prairie Band, L.L.C on behalf of the Association of Builders and Contractors.

- Have you worked directly with the Office of Advocacy, and what has been your experience?

As a graduate of the SBA 8(a) program, I have worked with the SBA. I have not worked directly with the Office of Advocacy except to participate in the Office of Advocacy's roundtables for small businesses.

- Have you participated in any of the Office of Advocacy's roundtables for small businesses, and what has been your experience?

Yes, most recently I participated in both the Small Business Virtual Roundtable on DOL's Proposed Rule on the Davis Bacon Act and the Virtual Roundtable on the FAR Council's Proposed Rule Requiring Project Labor Agreements. While I found the SBA Office of Advocacy understood the detrimental impact of both proposed rules on small businesses, recommendations of the Office of Advocacy seem to carry little weight with those agencies issuing the rules which harm small businesses.

For example, the Office of Advocacy filed a comment letter noting that, "DOL's Initial Regulatory Flexibility Analysis is deficient and does not properly inform the public about the impact of this rule on small entities. Additionally, DOL has underestimated the administrative burdens and compliance costs of this complicated regulation." However, as pointed out in my testimony, DOL chose to disregard that input.

- In your testimony, you reference DOL's 800-page final rule, and state that it would take 18 hours for the average American reader to finish. As you may know, the Department of Labor publishes compliance assistance materials to help small businesses understand their responsibilities. Are you familiar with these materials, and are they useful?

I have not only reviewed DOL compliance assistance materials, but I have sat through DOL sponsored and led compliance training. However, as I noted in my testimony, when it comes to compliance investigations, DOL's approach is based on subjective rather than objective interpretation of the regulations. The DOL investigator even suggested that I use Google to understand the basis of the Fry Brothers basis of their initial findings. This is clear evidence that current DOL compliance assistance materials are sorely lacking and the new 800 pages of regulations did nothing to remedy the deficiencies.

- Have you worked with the Office of the National Ombudsman, which was created to help small businesses deal with unfair penalties imposed by Federal agencies?

No, I have not worked with the Office of the National Ombudsman. However, as I understand it, the role of the National Ombudsman is to act as an impartial liaison, referring comments submitted by a small business to the appropriate agency for high-level fairness review. In the situation outlined in my testimony, an impartial liaison was not what was required. Instead, what is needed is an impartial arbitrator within the SBA that could conduct a high-level fairness review in the case of arbitrary, unfair, or excessive enforcement action by a federal agency. That SBA Arbitrator should then have the ability to force a binding outcome on any other federal agency to help small businesses succeed.

- *Follow-up:* What can be done to increase awareness of this little-known office?

Congress should mandate that anytime a federal agency initiates a compliance review of a small business that the agency is required to provide a courtesy copy to the Office of the National Ombudsman. In turn, Congress should require the Office of the National Ombudsman to contact the small business within seven days of receipt of such notice to offer their services should the outcome of the compliance review seem arbitrary, unfair, or excessive. Congress should also require that all communications from regulatory enforcement agencies to small businesses include information about the role of the Office of the National Ombudsman and the appropriate point of contact assigned to assist the small business.

This would increase awareness. My answer to the previous question would increase effectiveness. It is my sincere hope that Congress would want both.

Questions From Representative Chu for Mr. Frank Knapp Jr., President & CEO, South Carolina Small Business Chamber of Commerce

Question: Mr. Knapp, OSHA is currently finalizing a rule to create a national standard related to extreme heat that will protect workers who work in non-climate-controlled environments such as farms, highways and construction sites, warehouses, laundries, steel mills, meat-packing plants or delivery vehicles. How will a regulation to protect these workers from heat exhaustion or related injuries benefit businesses?

Response: Employees are the most valuable assets of a business. Without healthy and experienced workers, a business cannot produce the quantity or quality of goods and services to meet consumer demand. Well-crafted regulations that protect workers from injuries or illness from heat exhaustion are a short and long-term benefit to businesses just from a revenue perspective. It is good business practice to keep the skilled workers who are far more productive than someone new or, in today's labor shortage, no new worker at all. In addition, the negative financial consequences to employers intentionally exposing workers to known-dangers can far exceed the loss of productivity and can threaten the business's survival.

A final comment. It is incomprehensible that any business with outside workers doing hard manual labor would not provide these workers with water or shade when possible and enough paid downtime to keep the workers as healthy and accident free as possible. But if they refuse to treat these employees humanely, then it falls on the federal government to create the needed regulations, which would then also establish a level competitive field for the similar businesses that are operating humanely.

Question: What would this standard mean for workers, especially those in states like Texas which recently banned basic heat stress protections?

Response: Clearly, workers benefit from workplace standards on excessive heat that protect their health and life, the loss of which would take away their ability to earn a living for themselves and their families. Such a financial loss to these families often will result in them turning to government programs for survival and thus increased costs to all taxpayers.

Question: Mr. Knapp, given your experience with the regulatory process and the inclusion of small business voices in that process, what more could be done to ensure agencies consider both costs *and* benefits so that they can present a complete picture of the full potential impact of a rule on small businesses?

Response: To the degree that federal agencies are not factoring benefits of regulations to the impacted businesses and local community, federal law must clearly state that such considerations must be included in their analysis of cost-benefits of proposed regulations. In addition, The Regulatory Flexibility Act should be amended to require the Office of Advocacy to take regulation benefits into consideration in performing its duties and issuing reports to Congress.

Question: Mr. Knapp, you pointed out in your testimony that agencies should not ignore a regulation's benefits, even if those benefits might be difficult to quantify. In your view, do agencies need additional resources so they can accurately measure a rule's potential benefits?

Response: Yes, if federal agencies are not analyzing the benefits of regulations to see how they offset the costs, then they should be required to do so and they should be provided more financial resources if needed to carry out this important task.

Full Committee Hearing: "Burdensome Regulations: Examining the Effects of DOL Rulemaking on America's Job Creators" - Engine's Statement

October 26, 2023

House Committee on Small Business
2361 Rayburn House Office Building
Washington, D.C., 20510

Dear Chairman Williams, Ranking Member Velázquez and members of the House Committee on Small Business,

Thank you for convening a hearing last week covering the effects of Department of Labor (DOL) rulemaking on small businesses and startups. Engine is a non-profit technology policy, research, and advocacy organization that bridges the gap between policymakers and startups. Engine works with government and a community of thousands of high-technology, growth-oriented startups across the nation to support the development of technology entrepreneurship through economic research, policy analysis, and advocacy on local and national issues. Access to talent is critical for a startup as it scales, and we are grateful for the opportunity to provide our feedback on how DOL regulations impact the talent pool in the innovation ecosystem.

Independent contractors are integral to remaining at the forefront of innovation in the United States. Founders rely on the flexibility independent contractors provide their startups as they grow their teams. While budgetary concerns certainly are a consideration for startups as they hire, the reality is, particularly in their early stages, startups often do not have enough work to allow for the hiring of full time employees for many tasks. Instead, they need flexible talent who can fill project-by-project roles to build their products and services. Ensuring that startups can hire independent contractors help startups stretch every dollar of their limited resources for maximum impact.[1]

Unfortunately, the Biden administration's rule to reclassify independent contractors limits the ability of startups to hire the talent they need, requiring businesses to classify workers as employees if they are "economically dependent" on a company as determined by six factors.[2] A founder may easily in good faith believe a worker to be a contractor but may be unable to make that determination when trying to parse the analysis required under the rulemaking. While large, established companies have the resources to hire legal professionals and employment experts to navigate a changing regulatory landscape and to perform a complex assessment in order to

[1] Engine, *House Judiciary Antitrust Comments*, https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/617bfed3b500f2546d60c1d1/1635516116358/House+Judiciary+Antitrust+comments+-+Oct+20%2C+2021.pdf
[2] Engine, *Startup News Digest 4/21/23*, https://www.engine.is/news/startup-news-digest-042123-anyp9-34cc6-rxbyz-659n2-agnez-tn3k6-y3ran-mp8gg

determine a worker's status as an employee or independent contractor, many startups do not have that luxury. And hiring assistance to ascertain whether they are meeting shifting regulatory requirements is simply outside the scope of many startups' budgets.

The DOL's rule upends the ability of many companies, including startups, to hire talent as needed and could either force them to hire full time employees they cannot afford or forgo hiring for needed roles, limiting their growth. As we've stated in the past, while established, large companies are well suited to handle the expense associated with employing a full time workforce, many startups operating on razor-thin budgets rely on contract labor for needs like web design or accounting services to fulfill temporary and one-off needs. As Grant Leah, the co-founder of Woodland-based startup Nytch, explained to Engine, "The reality is that startups are so small and so lean that we can't really hire employees....Founders are the ones who typically don't take a salary. Without the ability to hire independent contractors to fill these voids, most startup ideas would never get off the ground."[3]

The average startup launches with a bootstrap budget, and talent costs can be significant. Even the most successful of seed-stage startups are only working with an average of around $55,000 per month in resources.[4] With limited cash, founders have to choose between funding items that are all essential, such as R&D, advertising, and employees. Just one full-time engineer salary, for example, would account for over 10% of that average seed-stage startup's budget.[5] And studies have indicated that independent contractors are critical to startup teams. The Mercatus Center found that "[s]ome 57 percent of startups indicate that the use of contractor labor is an essential part of their business models." Further, their results found that "79 percent of startups have at least one contractor," and that "technology startups overwhelmingly use contractor labor because in their early stages they require flexibility and face limited funding and uncertainty that preclude committing to an employee." These results are in contrast to findings for typical U.S. companies (versus technology startups), where per the U.S. Census Bureau, only 29% of businesses rely on contract labor.[6]

For startups that err on the side of caution and hire or shift to full-time workers, they must also compete with larger technology companies for the same talent that are often able to offer more robust compensation packages, which can significantly drive up the cost of full-time talent. Moreover, it is unclear what the cost to small businesses would be in forgoing hiring altogether due to the proposed rule, either because of an inability to afford to do so, or because of fear of hiring altogether, and to identify what these talent decisions mean for startup growth. There may also be associated job losses for workers employed by small businesses.

As was mentioned by members of this subcommittee, policymakers can take action in support of the startup ecosystem. Ensuring startups have the ability to make the best hiring choices

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[3] Edward Graham, *#Startups Everywhere: Woodland, California*, https://www.engine.is/news/woodland-calif

[4] Engine, *the State of the Startup Ecosystem*, https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/60819983b7f8be1a2a99972d/1619106194054/The+State+of+the+Startup+Ecosystem.pdf

[5] *Id.*

[6] Liya Palagashvili, *Exploring How Regulations Shape Technology Startups*, https://www.mercatus.org/system/files/palagashvili_-_mercatus_research_-_exploring_how_regulations_shape_technology_startups_-_v1.pdf.

to grow is paramount. And for regulations that limit the ability to hire independent contractors, policymakers should ensure these frameworks work for small, burgeoning startups, and not subject them to the same requirements faced by large, established businesses. The U.S. remains the global leader in innovation, but this will only continue to be so if startups are able to focus on innovating, instead of overly burdensome regulations that don't suit the startup ecosystem and limit flexibility for employers and employees alike.

Thank you once again for your commitment to examining the barriers faced by current startup owners and exploring how Congress can better support them. Engine is happy to serve as a resource for the committee as you continue this critical work.

Sincerely,

Engine Advocacy
700 Pennsylvania Ave SE
Washington, D.C., 20003

NATIONAL ASSOCIATION OF REALTORS®

October 19, 2023

The Honorable Roger Williams
Chairman
House Committee on Small Business
2361 Rayburn House Office Building
Washington D.C., 20515

The Honorable Nydia Velázquez
Ranking Member
House Committee on Small Business
2069 Rayburn House Office Building
Washington D.C., 20515

Dear Chairman Williams and Ranking Member Velázquez,

On behalf of the more than 1.5 million members of the National Association of REALTORS® (NAR), I thank you for holding this hearing examining the rulemaking effects out of the U.S. Department of Labor. The Department of Labor has jurisdiction over employment opportunities for workers across the country and its policies impact all industries, including the hardworking professionals supporting consumers in the real estate market.

The National Association of REALTORS® is America's largest trade association, including NAR's five commercial real estate institutes and its societies and councils. REALTORS® are involved in all aspects of the residential and commercial real estate industries and belong to one or more of some 1,200 local associations or boards, and 54 state and territory associations of REALTORS®. NAR represents a wide variety of housing industry professionals, including approximately 25,000 licensed and certified appraisers, committed to the development and preservation of the nation's housing stock, along with its availability to the widest range of potential homebuyers.

Policies issued by the Department of Labor (DOL) not only set federal standards, but they influence action at the state and local level for the benefit of workers and their families. However, oftentimes state and local policy may already be well settled, and conflicting positions out of DOL may add unnecessary confusion, especially if such policies also fail to incorporate other existing federal authority. The Department's position on independent contractor classification is one example of how existing federal and state laws should be acknowledged when it comes to classifying real estate professionals as independent contractors. Given the role of real estate professionals in the housing market, and the housing market's role in the economy, federal policymakers should aim for clarity and consistency, minimizing disruption and uncertainty when rulemaking around worker classification.

THE HOUSING MARKET'S IMPACT ON THE ECONOMY

The current state of the economy and the impact on the housing market influences how real estate professionals are best able to advocate for the needs of consumers. Likewise, consumers' real estate transactions help promote economic growth. The real estate industry comprises of $3.9 trillion or 17 percent of the economy, and as a result, is

greatly impacted by a magnitude of factors including rising inflation, increasing interest rates, spiking home prices, and new federal regulations. The Federal Reserve's rate hiking cycle has resulted in increased mortgage interest rates to levels not seen since the 1970's. With mortgage rates hovering over 7.5 percent and home prices remaining elevated due to lack of supply, a homebuyer for the current median home price of $400,000 is looking at a monthly payment of over $2,250.[1] Demand for homes continues to outpace supply and affordability for many consumers remains an ongoing concern, especially for first-time homebuyers. Eighty-five percent of first-time homebuyers reported using a real estate professional to help them understand the homebuying process. These new market participants rely on the guidance and insight from their agents to navigate these intense market challenges for one of the biggest and most complex financial transactions of their lives.

Most real estate professional are small business owners – 65 percent of whom are women – who exemplify the entrepreneurial spirit of this country. They are experts in their field, deciphering the legal and regulatory details to provide consumers with the most useful information necessary to manage the home buying and selling process. Rather than increasing federal regulatory burdens that may impact their ongoing business operations, clear and consistent guidance from federal agencies should be paramount to best support these professionals in order to instill confidence in consumers and boost economic growth. To that end, DOL's upcoming final rule interpreting "Employee or Independent Contractor Classification Under the Fair Labor Standards Act," should recognize the integral work provided by real estate professionals working as independent contractors.[2] The Department should promote entrepreneurship and autonomy through its rulemaking, especially within the real estate industry given the importance of housing within the economy.

PROMOTING INDEPENDENT CONTRACTOR CLASSIFICATION

The ability to be classified as an independent contractor is crucial to real estate practitioners' ability to serve consumers and which has been protected under existing federal law for decades. Approximately 89 percent of REALTORS® are classified as independent contractors, with a majority being affiliated with an independent real estate company.[3] The housing industry and specifically the real estate professionals that serve buyers and sellers are vital to promoting homeownership that is the foundational bridge to financial security and wealth building for consumers. With their independent contractor classification, real estate professionals can continue to provide excellent service to consumers, manage the multifaceted sales transaction, and maintain stability in the housing market.

NAR supports the protection of, and efforts to further secure, the right of real estate salespeople to work as independent contractors and for brokers to choose to classify real estate salespeople as independent contractors. Being classified as an independent contractor is why many individuals are attracted to the real estate sales industry – it empowers entrepreneurship, maximizes flexibility, and promotes autonomy. On average, REALTORS® have 11 years of experience in the real estate industry and are

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[1] Jessica Lautz, *Instant Reaction: Mortgage Rates, October 12, 2023*, https://www.nar.realtor/blogs/economists-outlook/instant-reaction-mortgage-rates-october-12-2023
[2] 87 Fed. Reg. 62,218 (Oct. 13, 2022) (to be codified at 29 C.F.R. pts. 780, 788, and 795).
[3] NAR Research Group, *2023 Member Profile*, https://www.nar.realtor/research-and-statistics/research-reports/highlights-from-the-nar-member-profile.

remaining within real estate as a career choice for a longer duration. The ability to be classified as an independent contractor is a primary reason the real estate profession is so appealing and preserving that structure is integral to the functioning of the housing market.

The *U.S. Internal Revenue Code* (IRC) has long recognized the treatment of "qualified real estate agents" as non-employees and we have encouraged DOL to incorporate this provision into their proposed rule examining worker status under the *Fair Labor Standards Act* (FLSA).[4] The IRC provision (26 U.S.C. §3508) that has been law since 1982, specifically provides for the ability to classify real estate professionals as independent contractors using three simple and clear factors for all purposes of the Code. According to the IRC, real estate agents are "statutory nonemployees" if three factors are met. First, the real estate agent must be licensed. Second, substantially all payments for the licensed real estate agent's services must be directly related to their sales or other output rather than based on number of hours worked. Lastly, the real estate agent's services must be performed pursuant to an agreement that states the real estate agent will not be treated as an employee for federal tax purposes.

While satisfaction of the aforementioned IRC test relates only to the federal tax treatment of qualified real estate agents, it demonstrates the federal government's long-standing recognition of the unique nature of the real estate industry and, as such, the need to treat it differently. Last month, bipartisan legislation was introduced that would mirror the IRC language in the FLSA, the "Direct Seller and Real Estate Agent Harmonization Act" (H.R. 5419). NAR, alongside the millions of direct sellers working across the country, have advocated for this legislative harmonization and encouraged DOL to reflect the IRC provision in the recent rulemaking so that individuals in these industries can continue to prosper on their own terms.[5] Preserving the ability to be classified as an independent contractor is integral to the functioning of these professions for the benefit of the consumer sales and housing markets. Direct sellers contributed $42.7 billion to the United States economy in 2021 and for every home sale, more than $100,000 is generated in local economic activity. Also, every two home sales support one American job.

There are also many state statutes that follow the federal lead and address how real estate salespersons are classified as independent contractors. While these state statutes range from workers' compensation laws to real estate specific statutes, each are explicit in qualifying a licensed real estate agent (or salesperson or licensee) as an independent contractor based on certain criteria and/or are expressly permitting the ability of a real estate broker to treat their real estate sales agents as independent contractors.

For example, following the California Supreme Court decision in *Dynamex v. Superior Court*,[6] applying the "ABC test" statewide, the state legislature enacted laws exempting occupations, including for real estate licensees, recognizing the unworkable nature of such a test and the importance of maintaining choice in independent contractor

[4] 87 FR 62218. Read NAR's Comment Letter to the Department of Labor at: https://narfocus.com/billdatabase/clientfiles/172/3/4685.pdf.
[5] Read the NAR and DSA Comment Letter to the Department of Labor at: https://narfocus.com/billdatabase/clientfiles/172/3/4686.pdf.
[6] 4 Cal. 5th 903 (2018).

classification.[7] With over 400,000 real estate practitioners working in this state alone, adoption of a more stringent classification test would significantly disrupt the current certainty that exists under state law.

In Texas, there is a general exclusion in the labor code that states "employment" does not include services performed by an individual as a real estate broker or salesperson if engaged in certain activities, such as those defined by "broker," when remuneration of those services is directly related to sales or other output rather than hours worked, and there is a written contract between the individual and the person for whom the service is performed.[8] In New York, there is statutory language in workers compensation and employment security law, plus a real estate specific statute. Each of these are explicit in outlining the definition of "employment" and exclusions of licensed real estate broker or sales associates, when certain conditions are met.[9] In Michigan, there is an existing real estate statute defining an "independent contractor relationship" as a relationship between a real estate broker and an associate broker or real estate salesperson where there is both a written agreement between the parties stating that the associate broker or real estate salesperson is not considered an employee for federal and state income tax purposes and also clarity around the financial structure of that relationship.[10]

These examples, and numerous others, illustrate the longstanding protections *excluding* real estate professionals' classification as employees.[11] DOL's final rule must not erode any of these existing protections enacted at the federal or state level, but more importantly, should recognize and incorporate this industry standard, which is of critical importance to real estate practitioners supporting consumers all over the country. Referencing 26 U.S.C. §3508 within the final rule would specifically define qualified real estate agents as independent contractors, mirroring other laws, and eliminating any uncertainty posed by differing definitions or analyses.

With increased litigation challenging worker classification, and with businesses seeking greater flexibility to modernize and operate their businesses, NAR remains steadfast in championing clarity within the FLSA. Regulatory certainty through a uniform position across federal laws and regulations ensures much needed consistency for workers and employers.

REDUCING REGULATORY UNCERTAINTY

As federal agencies contemplate new regulations and guidance, we encourage recognition of the compliance burdens placed on small businesses, especially independent contractors. The average real estate professional may not be closely tracking the day-to-day activities of federal agencies and the potential rulemakings coming down the pipeline. Many are laser focused on running their businesses, serving consumers, navigating the local housing market, and complying with the myriad of existing federal, state, local, and industry standards to make homeownership a reality

[7] California Labor Code 2778(c), 2779-2784.
[8] Tex. Lab. Code Ann. §201.072 (West).
[9] N.Y. Workers' Comp. Law §2 (McKinney); N.Y. Workers' Comp. Law §201 (McKinney); N.Y. Comp. Codes R. & Regs. Tit. 19, §175.27; and N.Y. Lab. Law §511 (McKinney).
[10] Mich. Comp. Laws Ann. §339.2501 (West).
[11] See a comprehensive list of state real estate laws here: https://www.nar.realtor/advocacy/nar-issue-brief-real-estate-professionals-classification-as-independent-contractors.

for more families. These small entities may lack teams of compliance personnel to track, implement, and maintain fulfillment with comprehensive regulations. Further, such regulatory overhauls may actually upend longstanding business practices that may be structured to meet other existing federal and state laws.

When agencies seek to add additional regulations or modify existing rules, an initial step should be to analyze where an issue may already be resolved and when there is clear congressional authority on a matter, incorporate that wherever possible. Consistency and harmonization with other federal laws and regulations that small businesses and independent contractors may already be familiar with would increase recognition and compliance, minimizing the overall burdens for these entities.

For the Department's FLSA rulemaking, we encourage the acknowledgement of the integral work provided by independent contractors in the economy and hope that the final rule will promote workers' ability to create opportunities for themselves. An authoritative interpretation that recognizes and incorporates the uniqueness of different industries will offer needed clarity and reduce uncertainty for the real estate industry and others. With spending in the housing market supporting our country's economic growth, it is very critical that the Department works to minimize any disruption to this industry. Any shifts in the way the real estate industry have historically done business would drastically impact the overall services provided to consumers and the stability of the housing market.

CONCLUSION

We thank the Committee for holding this hearing in upholding the vital role independent contractors play in today's economy and your efforts to ensure that all legislative and regulatory actions promote entrepreneurs. Such support within the real estate industry will allow residential, commercial, and industrial development to proceed without jeopardizing the livelihoods of the independent contractor workforce and without unreasonable regulatory encumbrances that could cause legal uncertainty. We appreciate your actions in recognizing consumers' needs when seeking to reach the American Dream and the broad economic growth that stems from achieving that dream.

Sincerely,

Tracy Kasper
2023-2024 President, National Association of REALTORS®