

TESTIMONY BEFORE THE UNITED STATES CONGRESS
ON BEHALF OF THE
NATIONAL FEDERATION OF INDEPENDENT BUSINESS



Statement for the Record of Karen R. Harned
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Before the

**Committee on Education and the Workforce
Subcommittee on Workforce Protections
United States House of Representatives**

**Hearing on: “Regulatory Reform: Unleashing Economic Opportunity for Workers
and Employers”**

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

Chairman Byrne and Ranking Member Takano,

On behalf of the National Federation of Independent Business (NFIB), I appreciate the opportunity to submit for the record this testimony for the House Committee on Education and the Workforce Subcommittee on Workforce Protections hearing entitled, “Regulatory Reform: Unleashing Economic Opportunity for Workers and Employers.”

My name is Karen Harned, and I serve as the executive director of the NFIB Small Business Legal Center. NFIB is the nation’s leading small business advocacy association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB’s mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB proudly represents hundreds of thousands of members nationwide from every industry and sector.

The NFIB Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation’s courts through representation on issues of public interest affecting small businesses.

Impact of Regulation on Small Business

Overzealous regulation is a continuous concern for small business. The uncertainty caused by future regulation effectively acts as a “boot on the neck” of small business – negatively impacting a small business owner’s ability to plan for future growth, including hiring new workers. Since January 2009, “government regulations and red tape” have been listed as among the top-three problems for small business owners, according to the NFIB’s monthly *Small Business Economic Trends* survey.¹ Within the small business problem clusters identified by the NFIB’s *Small Business Problems and Priorities* report, “regulations” rank second only behind taxes.²

When it comes to regulations, small businesses bear a disproportionate amount of the regulatory burden.³ This finding is not surprising since it’s the small business owner, not one of a team of “compliance officers” who is charged with understanding new regulations, filling out required paperwork, and ensuring the business complies with new federal mandates. The small business owner is the compliance officer for her business and every hour that she spends understanding and complying with federal regulation is one less hour she has available to service customers and plan for future growth.

In a *Small Business Poll* on regulations, NFIB found that almost half of small businesses surveyed viewed regulation as a “very serious” (25 percent) or “somewhat serious” (24 percent) problem.⁴ NFIB’s survey was taken at the end of 2016, and, at that time, 51

¹ *Small Business Economic Trends*, NFIB Research Center (April 2018), 18, available online at <https://www.nfib.com/assets/SBET-April-2018.pdf> (last visited May 16, 2018).

² Holly Wade, *Small Business Problems and Priorities*, NFIB Research Foundation, 17, (August, 2016), available online at <https://www.nfib.com/assets/NFIB-Problems-and-Priorities-2016.pdf> (last visited May 16, 2018).

³ Babson, *The State of Small Business in America 2016*; Crain, Nicole V. and Crain, W. Mark, *The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business*, (September 10, 2014), available online at <http://www.nam.org/Data-and-Reports/Cost-of-Federal-Regulations/Federal-Regulation-Full-Study.pdf> (last visited May 16, 2018).

⁴ Holly Wade, *Regulations*, Vol. 13, Issue 3, 2017, 6, available online at <http://411sbfacts.com/files/Regulations%202017.pdf> (last

percent of small business owners reported an increase in the number of regulations impacting their business over the last three years.⁵

Compliance costs, difficulty understanding regulatory requirements, and extra paperwork are the key drivers of the regulatory burdens on small business.⁶ Understanding how to comply with regulations is a bigger problem for those firms with one to nine employees, since 72 percent of small business owners in that cohort try to figure out how to comply themselves, as opposed to assigning that responsibility to someone else.⁷

Finally, NFIB's research shows that the volume of regulations poses the largest problem for 55 percent of small employers, as compared to 37 percent who are most troubled by a few specific regulations.⁸

Small Business Applauds Deregulation Under Trump Administration

With that as background, it is understandable that America's small business owners view President Trump's commitment to rolling back unnecessarily burdensome and duplicative regulation as one of his Administration's greatest accomplishments in his first year in office. Every president has contributed to the problem of overregulation, with tens of thousands of pages added to the Federal Register every year.

Yet, the Trump Administration, to its great credit, has reversed that trend -- reducing the number of pages in the Federal Register by 36 percent (61,949 pages in 2017 as compared to 97,110 pages in 2016).⁹ For fiscal year 2017, President Trump promised to eliminate two regulations for every new one proposed. But the Administration exceeded that goal -- eliminating 22 regulations for every new regulatory action.¹⁰ Indeed, agencies undertook sixty-seven deregulatory actions and levied only three regulatory rules.¹¹

And the Trump Administration promises even more deregulation in 2018.¹² To that end, on September 7, 2017, Office of Information and Regulatory Affairs (OIRA) Administrator Neomi Rao issued a memorandum to the regulatory reform officers at all federal agencies directing each agency to propose "a net reduction in total incremental regulatory costs for FY 2018."¹³ The Administrator noted that this instruction carries out "the regulatory policies and priorities set forth in Executive Orders 13771 and 13777,

visited May 16, 2018).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 10.

⁸ *Id.* at 9.

⁹ Records provided by Law Librarians Society of D.C., available online at <http://www.llsdc.org/assets/sourcebook/fed-reg-pages.pdf> (last visited May 16, 2018).

¹⁰ Budget and Spending Fact Sheet: "President Donald J. Trump is Delivering on Deregulation," available online at <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-delivering-deregulation/> (last visited May 16, 2018).

¹¹ *Id.*

¹² *Id.*

¹³ Memorandum from Neomi Rao, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget, Executive Office of the President, to Regulatory Reform Offices at Executive Departments and Agencies regarding "FY 2018 Regulatory Cost Allowances," (Sept. 7, 2017), available online at <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/FY%202018%20Regulatory%20Cost%20Allowances.pdf> (last visited May 16, 2018).

including the goal ‘to lower regulatory burdens on the American People by implementing and enforcing regulatory reform.’”¹⁴ Administrator Rao, quoting Executive Order 13777, said “[i]t is the policy of the United States to alleviate unnecessary regulatory burdens placed on the American people.”¹⁵

Department of Labor Appears to be Enhancing Compliance Assistance

Over the last several years, NFIB expressed concern that many agencies, including the Department of Labor (DOL), shifted from an emphasis on small business compliance assistance to an emphasis on enforcement. Since it’s often the small business owner who serves as the chief compliance officer for the business, agency programs that help employers understand their obligations are particularly important to the small business community. For this reason, NFIB is pleased with DOL’s apparent shift to more robust compliance assistance programming.

On June 27, 2017, Secretary Acosta announced that DOL would again issue opinion letters.¹⁶ After over seven years of the program lying dormant, small business owners and other members of the regulated community were pleased to hear that the department’s Wage and Hour Division (WHD) would once again use opinion letters as one of the ways it provides guidance to employers and employees. When a small business owner has a question about how a law applies to his business, they can ask DOL for an opinion letter. In this way, DOL can provide fact-specific guidance to employers, which is invaluable to the small business owner just looking for an answer as to what is and is not permitted under the law.

More recently, on April 3, 2018, DOL launched “Payroll Audit Independent Determination” (PAID), a six-month pilot program for employers and employees to resolve Fair Labor Standards Act (FLSA) disputes.¹⁷ Under the program, employers conduct self-audits of their payroll. If they discover overtime or minimum wage violations, they self-report those violations to WHD. Employers then work with WHD to correct their mistakes and quickly provide any back wages due to affected employees. PAID aims to resolve wage and hour claims expeditiously and without litigation, to improve employers’ compliance with the FLSA, and to ensure that more employees legally due back wages receive them faster.

Meaningful, Lasting Regulatory Reform Must Come from Congress

Congress also has provided significant relief by rejecting sixteen burdensome regulations using its authority under the Congressional Review Act (CRA).¹⁸ With the CRA, Congress assures the regulated community that each of these problematic regulations will not be re-proposed by later administrations without significant substantive revision unless Congress passes a law that specifically allows the agency to

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ “U.S. Department of Labor Reinstates Wage and Hour Opinion Letters,” <http://www.dol.gov/newsroom/releases/whd/whd20170627> (June 27, 2017).

¹⁷ U.S. Department of Labor Wage and Hour Division PAID Program, <https://www.dol.gov/whd/paid/>.

¹⁸ 5 U.S.C. 8.

do so.¹⁹

In particular, NFIB appreciates Chairman Byrne's leadership last year by sponsoring and pushing for enactment of H.J. Res 83, which repealed what is known as the "Volks" rule.²⁰ The rule, promulgated by the Occupational Safety and Health Administration (OSHA), extended to five years the time in which the agency could cite employers for recordkeeping violations.²¹ NFIB believes the OSHA rule was illegal, since it was in direct conflict with the six-month statute of limitations for recordkeeping violations set forth in Section 9(c) of the Occupational Safety and Health Act.²² The six-month limit was not included by Congress so that employers could get away with violations. Instead, Congress understood the burden of mounting a defense once a claim has become stale. Memories fade and employees quit, retire or die – a problem that is only exacerbated by trends in employee mobility. Small businesses would have been hit particularly hard by this rule and we truly appreciate the Chairman's leadership in repealing it.

Moving forward, small business owners have been asking for decades for lasting and meaningful reforms to ensure smart, efficient, and transparent regulation. The House of Representatives has passed several regulatory reforms that would go a long way in delivering much-needed structural reforms to the regulatory process. These reforms would, among other things, improve cost-benefit analysis, transparency and stakeholder engagement. NFIB supports H.R. 5, the "Regulatory Accountability Act," (RAA) particularly Title III – the "Small Business Regulatory Flexibility Improvements Act" (SBRFIA), which would provide important procedural regulatory reforms for small business.

During my over 16 years at NFIB, I have heard countless stories from small business owners struggling with new regulatory requirements. To them, newly effective federal mandates come out of nowhere. They are frustrated and believe that they have "no say" in the development of regulation. That is why early engagement in the regulatory process is key for the small business community.

But small business owners are not roaming the halls of administrative agencies, reading the *Federal Register* or even *Inside OSHA*. Keeping up with the rulemaking process is not easy for the small restaurant owner in Fairhope, Alabama or small manufacturer in Riverside, California because they are busy running their business. As a result, small businesses depend on the notice-and-comment rulemaking process for the opportunity to voice their concerns (or for NFIB to raise those concerns on their behalf), and on the requirement that agencies must consider and minimize small business impacts under the Regulatory Flexibility Act (RFA). In addition, they rely heavily on internal government checks, including the Office of Advocacy at the Small Business Administration (SBA) and OIRA, to ensure that agencies are limiting the costs of new mandates on small business when there are viable and less expensive alternatives to achieve the same

¹⁹ *Id.*

²⁰ Pub. L. 115-21 (Apr. 3, 2017).

²¹ "Clarification of Employer's Continuing Obligation To Make and Maintain an Accurate Record of Each Recordable Injury and Illness," 81 Fed. Reg. 91,792 (Dec. 19, 2016).

²² 29 U.S.C. 658 (c).

regulatory objectives.

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

In its 20-year history, SBREFA has been instrumental in tamping down the “one-size-fits-all” mentality that can be found throughout the regulatory state. When followed correctly, SBREFA can be a valuable tool for agencies to identify flexible and less burdensome regulatory alternatives. However, the last 20 years have also exposed loopholes and weaknesses in the law that allow federal agencies to act outside of the spirit of SBREFA when imposing regulation on small business. Legislation, like the “Small Business Regulatory Flexibility Improvements Act,” would go a long way in addressing four issues that continue to plague small business 20 years after SBREFA’s enactment.

NFIB Supports Expansion of SBREFA Protections to All Federal Agencies

NFIB supports reforms that would expand SBREFA to cover other agencies. SBREFA and its required procedures are vital because they force agencies to think seriously about small business concerns. For example, the requirement for a promulgating agency to solicit the views of the small business community through Small Business Advocacy Review (SBAR) panels is important in educating federal bureaucrats on how small businesses operate in the real world.²³ SBAR panels are also helpful in explaining how regulatory burdens will disproportionately impact small businesses, offering alternative approaches, or aiding the agency in developing simple and concise guidance materials for the small business community. Under current law, OSHA is the only DOL component required to conduct these panels and NFIB believes the entire department would benefit from these panels for any rule it promulgates that significantly impacts small business.

“Overtime” Rule

DOL’s “Overtime” Rule issued in 2016 demonstrates the need for expanded SBAR panels to all of DOL. On May 18, 2016, the agency issued its “Overtime” Rule, which would have increased the salary threshold from \$23,660 a year to \$47,476 for executive or “white collar” employees. The rule also would have increased automatically the salary threshold every three years.²⁴

²³ Currently the Environmental Protection Agency, Occupational Safety and Health Administration, and Consumer Financial Protection Board are the only agencies required to conduct SBAR panels for rules that significantly impact a substantial number of small businesses.

²⁴ DOL’s overtime rule was initially scheduled to take effect on December 1, 2016; however, a federal district court in Texas issued a preliminary injunction enjoining the rule from being enforced through pendency of litigation. *Nevada v. U.S. Department of Labor*, 218 F.Supp.3d 520 (E.D. Tex, 2016). On August 30, 2016 the Judge Mazzant found the rule invalid. DOL has appealed this ruling to the 5th Circuit Court of Appeals and the case is currently held in abeyance as DOL considers whether it will issue a revised rule. *Nevada v. U.S. Department of Labor*, 227 F.Supp.3d 696 (E.D. Tex. 2016).

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

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

Second, the IRFA overestimated the wage increases employees were likely to see under the rule. The story of NFIB member, Robert Mayfield, illustrates this point. Mr. Mayfield owns eight Dairy Queens in and around Austin, Texas and was very concerned about the impact that the rule would have on his businesses and the individuals whom he employs. In his words, the rule would have been "bad news" for both employers and employees.

At the time the rule was promulgated, Mr. Mayfield employed exempt managers at all five locations. These individuals earned, on average, about \$30,000 per year and worked between 40-50 hours per week. The managers also received bonuses, more flexible work arrangements, including paid vacation and sick time, training opportunities, and promotions that Mayfield's hourly employees did not. Mayfield explained that, in his company, promotion to an exempt management position carries a great deal of status with employees who (upon promotion to a manager position) boast about no longer having to punch time clocks. In Mayfield's opinion, it would have been demeaning to force managers to punch a clock. He also noted that, as salaried employees, his managers have more flexibility for things like doctors' appointments and kids' activities.

Under DOL's rule, Mayfield predicted that he would have needed to move the managers back to hourly positions as there is simply no way he could have afforded to pay over ten managers \$47,000 each. As a result, he predicted the skill level of his managers would have decreased. Moreover, Mayfield noted that rather than giving managers overtime, he likely would have hired a few more part-time employees. In no scenario did he envision paying managers overtime; instead he would have enforced a strict, no-overtime policy. Overtime costs, he said, could not be passed on to customers nor could the business afford to absorb added labor costs.

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

The bottom line is that while IRFA analyses are helpful for agencies to realize the cost and impact a proposed rule would have on small business, they generally do not tell the full story. Agencies would benefit from convening an SBAR panel for rules of significant impact. SBAR panels allow an agency to walk through a potential proposal with small business owners, either in person or via telephone, and receive feedback and other input from those who will be directly impacted by the regulation. These panels are currently required for the Environmental Protection Agency (EPA), the Occupational Safety and Health Administration (OSHA), and the Consumer Financial Protection Bureau. NFIB believes that DOL would have benefited from soliciting feedback through SBAR panels, and that all agencies would achieve better regulatory outcomes if required to go through such a procedure.

Expansion of SBREFA and SBAR panels to all agencies — including independent agencies — would put agencies in a better position to understand how small businesses fundamentally operate, how the regulatory burden disproportionately impacts them, and how each agency can develop simple and concise guidance materials. Moreover, Congress and SBA Office of Advocacy should ensure agencies are following the spirit of SBREFA. Unfortunately, there are instances where EPA and OSHA have declined to conduct an SBAR panel for a significant rule and/or a rule that would greatly benefit from small business input.

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

Regulatory agencies often proclaim indirect benefits for regulatory proposals but decline to analyze and make publicly available the indirect costs to consumers, such as higher energy costs, jobs lost, and higher prices. The indirect cost of regulations is particularly problematic. Whether a regulation mandates a new manufacturing process, sets lower emission limits, or requires implementation of new technology, the rule will increase the cost of producing goods and services. Those costs will be passed onto the small business consumers that purchase them. Does that mean that all regulation is bad? No. But it does mean that indirect costs must be included in the calculation when analyzing the costs and benefits of new regulatory proposals.

NFIB supports legislation that would require federal agencies to make public a reasonable estimate of a rule's indirect impact on small business, in addition to acknowledging the rule's direct costs.

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

Under SBREFA, agency decisions are reviewable once a rule is finalized and published in the *Federal Register*. However, waiting until the end of the regulatory process to challenge a rule creates uncertainty for the regulated community – which directly stifles economic growth. Under current law, an agency determination that a rule does not significantly impact a substantial number of small entities may occur years before the rule is finalized. Small businesses must then wait until the rule is promulgated before legally challenging the agency’s determination that it will not significantly impact a substantial number of small entities. Unless a court stays enforcement of the rule (after it is finalized), small businesses must comply while the battle over the agency’s RFA certification is fought in court. This system imposes unnecessary costs and regulatory burdens on small business. It is also extremely inefficient for all parties involved.

NFIB supports legislation that would afford small business advocates judicial review during the proposed rule stage of rulemaking—once an agency has improperly certified that there will be no significant small business impact in a proposed rule.

NFIB Supports Other Regulatory Reforms that Would Benefit Small Business

NFIB also would support the following regulatory reforms:

Waiver for First-Time Paperwork Violations

Congress should pass legislation that would waive fines and penalties for small businesses the first time they commit a non-harmful error on regulatory paperwork. Because small businesses lack specialized staff, mistakes in paperwork will happen. If no harm occurs because of the error, the agencies should waive penalties for first-time offenses and instead help owners to understand the mistake they made.

More Vigorous Cost-Benefit Analysis

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

End Chevron Deference

Congress should end the so-called *Chevron* Doctrine, which was made up in 1984 by the Supreme Court in *Chevron U.S.A. v. National Resource Defense Council, Inc.*²⁵ In *Chevron*, the Supreme Court decided that courts should defer to “reasonable” interpretations by agencies of statutes the agencies administer when the statutory text is “ambiguous.” Unfortunately, many statutes are ambiguous. Courts now routinely let agencies decide what the law means. As such, the *Chevron* Doctrine allows bureaucrats to do the job of judges. As Chief Justice John Marshall said in 1803: “It is emphatically the province and duty of the judicial department to say what the law is.”²⁶ In short, we pay judges, not bureaucrats, to determine what the law means.

Under the Administrative Procedure Act (APA), Congress has assigned to regulation-reviewing courts the duty to “interpret . . . statutory provisions.” Congress should amend the APA provision to make clear that, in statutory interpretation, the court should give no deference to the agency’s view beyond the power of the agency’s arguments to persuade. That would end the *Chevron* Doctrine—and restore a proper constitutional balance between the executive, legislative and judicial branches of government.

All Americans, including small business owners, would benefit. Under the principle of separation of powers that guards our liberties, no single part of the government should have power to both make and enforce the law. With *Chevron* overturned, federal agencies would no longer be able to make up the law under the guise of interpreting ‘ambiguous’ statutes and could enforce the law only consistent with judicial interpretations. With *Chevron* gone, the courts once again would serve as a check on the power of federal agencies, helping to preserve our freedom.

Third-Party Review of RFA Analyses

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

Codification of Executive Order 13563

NFIB supports legislation that would codify Executive Order 13563 and strengthen the cost/benefit review of regulation. Among other things, this legislation would statutorily ensure that agencies are examining the true cost of regulations, tailoring regulatory solutions so that they are least burdensome and most beneficial to society, encourage public participation in the regulatory process, promote retrospective analysis of rules

²⁵ 467 U.S. 837.

²⁶ 1 Cranch 137, 177.

that may be outmoded, ineffective, insufficient, or excessively burdensome, and periodically review significant regulatory actions.

Conclusion

Small businesses are the engine of our economy. Yet over the last several years, the crushing weight of regulation has used up valuable human and financial capital, which is in short supply for America's small business owners. NFIB applauds this Subcommittee for highlighting the importance of regulatory reform to employers and employees alike. We continue our work with Congress to pass regulatory reforms that would improve current law and level the regulatory "playing field" for small business.

Thank you for inviting me to testify today. I look forward to answering any questions you may have.