Statement for the Record of Karen R. Harned

Executive Director, NFIB Small Business Legal Center

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Subcommittee on Regulatory Affairs and Federal Management

Hearing on: "Improving Small Business Input on Federal Regulations: Ideas for Congress and a New Administration"

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

Chairman Lankford and Ranking Member Heitkamp,

On behalf of the National Federation of Independent Business (NFIB), I appreciate the opportunity to submit for the record this testimony for the Senate Subcommittee on Regulatory Affairs and Federal Management's hearing entitled, "Improving Small Business Input on Federal Regulations: Ideas for Congress and a New Administration."

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

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

When it comes to regulations, small businesses bear a disproportionate amount of the regulatory burden.[6] This is not surprising, since it's the small business owner, not one of

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

[2] *Id.*

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

[4] Data generated from www.regulations.gov

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

[6] Babson, *The State of Small Business in America 2016*, chrome-extension://oemmndcbldboiebfnladdacbdfmadadm/http://www.babson.edu/executive-education/custom-programs/entrepreneurship/10k-small-business/Documents/goldman-10ksb-report-2016.pdf; Crain, Nicole V. and Crain, W. Mark,

a team of “compliance officers” who is charged with understanding new regulations, filling out required paperwork, and ensuring the business is in compliance with new federal mandates. The small business owner is the compliance officer for her business and every hour that she spends understanding and complying with a federal regulation is one less hour she has to service customers and plan for future growth.

During my nearly 15 years at NFIB I have heard countless stories from small business owners struggling with a new regulatory requirement. To them, the requirement came out of nowhere and they are frustrated that they had “no say” in its development. That is why early engagement in the regulatory process is key for the small business community. But small business owners are not roaming the halls of administrative agencies, reading the *Federal Register* or even *Inside EPA*. Early engagement in the rulemaking process is not easy for the small restaurant owner in Norman, Oklahoma or small manufacturer in Bismarck, North Dakota. As a result, small businesses rely heavily on the notice-and-comment rulemaking process, small business protections in the Regulatory Flexibility Act (RFA), and internal government checks like the Office of Advocacy at the Small Business Administration (SBA) and Office of Information Regulatory Affairs (OIRA) to ensure agencies don’t impose costly new mandates on small business when viable and less expensive alternatives to achieve regulatory objectives exist.

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

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

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

The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business, September 10, 2014. chrome-extension://oemmndcbldboiebfnladdacbdfmadadm/http://www.nam.org/Data-and-Reports/Cost-of-Federal-Regulations/Federal-Regulation-Full-Study.pdf.

NFIB Supports Expansion of SBREFA Protections to All Federal Agencies

NFIB supports reforms that would expand SBREFA's reach into other agencies. SBREFA and its associated processes, such as the Small Business Advocacy Review (SBAR) panels, are important ways for agencies to understand how small businesses fundamentally operate, how the regulatory burden disproportionately impacts them, and how the agency can develop simple and concise guidance materials that are designed with the small business owner in mind.

Department of Labor "Overtime" Rule

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

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

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

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

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

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

employers and employees.

Currently, Mr. Mayfield employs exempt managers at all five locations. These individuals earn, on average, about $30,000 per year and work between 40-50 hours per week. The managers also receive bonuses, more flexible work arrangements, including paid vacation and sick time, training opportunities, and promotions that Mayfield's hourly employees do not. Mayfield explained that, in his company, promotion to an exempt management position carries a great deal of status with employees who, (upon promotion to a manager position) boast about no longer having to punch time clocks. In Mayfield's opinion, it would be demeaning to force managers to punch a clock. He also noted that his managers have more flexibility for things like doctors' appointments and kids' activities. Since they aren't punching in and out on a time clock, they are paid a weekly salary even if they're out for personal activities.

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

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

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

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

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

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

Regulatory agencies often proclaim indirect benefits for regulatory proposals, but decline to analyze and make publicly available the indirect costs to consumers, such as higher energy costs, jobs lost, and higher prices. The indirect cost of environmental regulations is particularly problematic. It is hard to imagine a new environmental regulation that does not indirectly impact small business. Whether a regulation mandates a new manufacturing process, sets lower emission limits, or requires implementation of new technology, the rule will increase the cost of producing goods and services. Those costs will be passed onto the small business consumers that purchase them. Does that mean that all environmental regulation is bad? No. But it does mean that indirect costs must be included in the calculation when analyzing the costs and benefits of new regulatory proposals.

Clean Power Plan

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

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

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

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

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

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

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

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

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

NFIB Supports Other Regulatory Reforms that Would Benefit Small Business

NFIB also would support the following regulatory reforms:

<u>Waiver for First-Time Paperwork Violations</u>

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

<u>More Vigorous Cost-Benefit Analysis</u>

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

costs exceed benefits or when costs are unreasonable. And Congress should make that prohibition enforceable in court.

End *Chevron* Deference

Congress should end the so-called *Chevron* Doctrine made up by the Supreme Court in the 1984 *Chevron* case. In *Chevron*, the Supreme Court decided that courts should defer to reasonable interpretations by agencies of statutes the agencies administer, when the statutes are ambiguous. Unfortunately many statutes are ambiguous. Courts now routinely let agencies decide what the law means. The *Chevron* Doctrine gives too much authority to 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." In short, we pay judges, not bureaucrats, to determine in a court case 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.

All Americans, including small business owners, would benefit. Under the principle of separated powers that guards our liberties, no single part of the government should have power to both make law and enforce law. With *Chevron* overturned, federal agencies would no longer have the power to make up the law under the guise of interpreting ambiguous statutes and then enforce the law they made up, through agency proceedings and in courts. 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 of the less-burdensome alternatives that were considered. Each agency should provide an evidence-based explanation for why it chose a more-burdensome versus less-burdensome option and explain how their rule may act as a barrier to entry for a new business. To this end, NFIB would support third-party review when the agency and the SBA Office of Advocacy disagree on small business impact. If the disagreement occurs then the analysis would be turned over to OIRA for review and a determination as to whether the agency must perform a better RFA analysis.

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

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

Agency Focus on Compliance

NFIB is concerned that over the last several years many agencies shifted from an emphasis on small business compliance assistance to an emphasis on enforcement. Small businesses lack the resources needed to employ specialized regulatory compliance staff. Congress can help by stressing to the agencies that they need to devote adequate resources to help small businesses comply with the complicated and vast regulatory burdens they face.

Twenty Years Later, Agency Compliance with SBREFA Is Not Assured

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

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

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

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

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

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

Conclusion

Small businesses are the engine of our economy. Yet over the last several years the crushing weight of regulation has been a top reason preventing them from growing and creating jobs. NFIB looks forward to working with the 115th Congress to pass 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.