TESTIMONY BEFORE THE UNITED STATES CONGRESS
ON BEHALF OF THE

NATIONAL FEDERATION OF INDEPENDENT BUSINESS

NFIB
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Statement for the Record of Karen R. Harned

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Hearing on: "Shining Light on the Federal Regulatory Process"

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

Chairman Gowdy and Ranking Member Cummings,

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 Oversight and Government Reform hearing entitled, "Shining Light on the Federal Regulatory Process."

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. 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 Center'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 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 (January 2018), 18, *available* online at https://www.nfib.com/assets/SBET-January-2018-1.pdf (last visited March 1, 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 March 1, 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 March 1, 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 it's the volume of regulations that 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 not surprising to learn 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.

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 the 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 67 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

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visited March 1, 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 March 1, 2018).

[10] Budget and Spending Fact Sheet: "President Donald J. Trump is Delivering on Deregulation," (December 14, 2017), *available* online at https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-delivering-deregulation/ (last visited March 1, 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 March 12, 2018).

"the regulatory policies and priorities outlined in Executive Orders 13771 and 13777, 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]

Agencies Increasingly Use "Guidance Documents" And Other "Sub-regulatory" Pronouncements To Regulate

Knowing the negative impact that unnecessary and burdensome regulation has on small business, it has been disconcerting to see agencies increasingly use guidance documents and other "sub-regulatory" pronouncements to impose new mandates on small business. The NFIB Small Business Legal Center outlined this phenomenon and cataloged abuses of it in our September 2015 report, "The Fourth Branch & Underground Regulations."[16]

Underground Regulation Through Guidance

Make no mistake, easy-to-understand guidance documents can be an effective tool to help small business owners understand their regulatory obligations. Practical considerations likewise demand that agencies must prepare documents breaking-down and summarizing regulatory requirements, the steps necessary for permit approvals, enforcement priorities, etc. Such guidance documents are important, not only as a tool to ensure that agency employees interpret and apply existing statutes and regulations in a consistent manner, but also in giving the regulated community fair notice as to how the agency intends to administer and enforce the law. In fact, the NFIB Small Business Legal Center frequently directs small business owners to such helpful guidance documents, like the Department of Labor's (DOL) Wage and Hour Tip Sheets and the Environmental Protection Agency's (EPA) one-stop page for small business compliance assistance.[17]

But there is a bright and discernable line between merely restating the law as it stands and establishing regulatory policy through "guidance."

In a true guidance or advisory, the document should do no more than restate the requirements of established law -- ideally as plainly and simply as possible. But where the agency offers an interpretation that seeks to apply existing legal principles to address questions of statutory interpretation that are not well settled, there is a significant risk that the new interpretation may impose affirmative burdens on the regulated community.[18] While the agency's interpretation would have to be applied and

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[14] *Id*.
[15] *Id*.
[16] *The Fourth Branch & Underground Regulations*, NFIB Small Business Legal Center (September 2015), *available* online at: https://www.nfib.com/pdfs/fourth-branch-underground-regulations-nfib.pdf (last visited March 11, 2018).
[17] Department of Labor Wage and Hour Division Fact Sheets, available online at: https://www.dol.gov/WHD/fact-sheets-index.htm (last visited March 11, 2018); U.S. EPA Small Businesses Resource Information Sheet, available online at: https://www.epa.gov/sites/production/files/2017-06/documents/smallbusinessinfo.pdf (last visited March 11, 2018).
[18] "FDA's growing dependence on guidance documents presents a couple of problems. First, these informal announcements may operate as de facto rules but escape normal procedural safeguards for their promulgation or review. Second, they allow the FDA to take positions that do not even constrain agency officials, which leaves regulated entities guessing about their rights and obligations." Lars Noah, *Governance by the Backdoor: Administrative Law (Lessons?) at the FDA*, 93 Neb. L. Rev. 89, 97 (2014).

affirmed in court before it could be officially incorporated into the standing body of regulatory law, the "guidance" may nonetheless impose immediate burdens on the regulated community as a practical matter. This is because a newly announced interpretation puts the public on notice that the agency intends to administer and enforce the law in a certain manner. Anyone who ignores the new interpretation -- proceeding with business as usual -- risks fines, sanctions, enforcement actions, and/or lawsuits.

Underground Regulation Through Amicus

Another way an Administration can set federal regulatory policy without raising public awareness -- and political backlash -- is through strategic amicus filings in cases between private litigants, where there is potential to establish precedential authority on a question of statutory interpretation. These "friend of the court" briefs are intended to guide the court's analysis on difficult legal questions. In principle they should offer useful insights, expertise and practical considerations that the court may find helpful in resolving thorny issues.[19]

In some cases a judge will call upon the Department of Justice (DOJ), or other agencies, to file an amicus brief because courts assume that an agency, charged with administering and enforcing a statute, may offer particularly valuable insight and institutional expertise.[20] In other cases, federal agencies proactively file these briefs when they have identified cases that, in their view, raise important open questions of statutory construction.[21] Most commonly these briefs urge reversal of an arguably errant district court judgment that the agency believes causes disharmony between jurisdictions, or which might otherwise have serious implications for how the agency administers or enforces a statute.

As such, agencies have traditionally used amicus briefs as a tool to ensure consistent interpretations of statutes or to weigh in on cases of great importance.[22] But, in recent years, some scholars have raised concerns over the appearance that amicus briefs are being used to advance the President's political agenda. Notably, University of Maryland Law School professor, Deborah Eisenberg published a comprehensive analysis of the DOL's amicus practices since the New Deal.[23] Her study confirmed that there has been a steep escalation in DOL's amicus activity in the past quarter-century.[24] Though the up-tick began under the Clinton and George W. Bush administrations, amicus activity significantly increased under the Obama administration.[25]

In this vein, there is certainly a legitimate role for an agency, charged with administering and enforcing a statute on behalf of the public, to bring to light practical considerations

[19] Federal Rules of Appellate Procedure, Rule 29, (stating that an amicus must explain why its brief is desirable and relevant).
[20] Deborah Thompson Eisenberg, Regulation by Amicus: The Department of Labor's Policy Making in the Courts, 65 Fla. L. Rev. 1223, 1244, FN 128 (2013).
[21] *See e.g.*, Ben James, DOL Says Judge Dropped Ball In Hearst Intern Wage Row, Law360 (April 7, 2014).
[22] See e.g., Eisenberg, *supra* note 20 at 1245 ("The most active DOL amicus curiae activity in FLSA cases occurred immediately after the Act's passage. After the battle to achieve passage of the FLSA, the Roosevelt and Truman administrations used amicus briefs to establish judicial precedents broadly construing the scope of the FLSA's protections. Indeed, more than half of all FLSA amicus briefs in the database (170 out of 324 briefs) were filed by these two administrations.")
[23] *See generally*, *supra* note 20.
[24] *Id.*
[25] *Id.*

and institutional expertise that may elucidate an issue. As with private parties who may have an interest in the resolution of a statutory issue, these agencies may have some organic interest in their amicus filings. But, when an administration changes its position or announces a new interpretation in amicus filings -- or even in a direct enforcement action -- there is a likelihood that the newly asserted position is politically or ideologically motivated.[26] And regardless of whether the agency has in fact asserted its new position to influence public policy, it nonetheless undermines the goal of ensuring public notice and opportunity for comment when adopting a position that will impose new burdens on individuals or businesses.

Underground Regulation Through Executive Order

Finally, the President can set policies that substantively impose new burdens on the regulated community through executive orders. In some cases, the President chooses to allow an opportunity for notice-and-comment on important executive orders; however, in recent years executive orders have been issued without an opportunity for open and transparent deliberation.

NFIB believes none of the "sub-regulatory" tools outlined above are an appropriate way to create new regulatory obligations since each imposes a new burden without going through the Administrative Procedure Act's (APA) notice-and-comment process.

Example Of Agencies Inappropriately Using "Sub-regulatory" Pronouncements To Impose New Regulatory Burdens On Small Business

IRS Prohibits Stand-Alone Reimbursement Accounts under the Affordable Care Act

When Congress passes complex regulatory schemes, like the Affordable Care Act (ACA or "Act"), it can be very difficult for the regulated community to understand its legal obligations. For agencies implementing a law like the ACA, the goal should be to issue guidance that restates the law in straightforward terms that any person can understand without resorting to lawyers and accountants. Unfortunately, in the implementation of the ACA, the U.S. Department of Health and Human Services, DOL, and the Internal Revenue Service (IRS), in many cases, did not effectively explain the ACA's requirements in easily digestible terms.

Even worse, in some cases, where the Obama administration offered "guidance," it was not so much 'restating the law' as providing an interpretive gloss. Rather than explaining certain ambiguous provisions, federal agencies issued interpretive statements which effectively pronounced new rules -- imposing legal obligations and liabilities that Congress may not have ever intended. Still worse, these underground regulations were pronounced without any opportunity for public comment. One clear example was IRS's guidance on stand-alone reimbursement accounts (*i.e*., the practice of giving employees a set amount of money for their health care expenses on a monthly or annual basis in lieu of health insurance). The IRS issued a guidance document, which declared this

[26] Eisenburg, *supra* note 20 at 1229 ("The increasingly politically charged nature of both agency's amicus efforts as seen during the Bush and Obama administrations in particular – and the ideological split in the Supreme Court's decisions about whether to defer to them portends a chaotic future for FLSA litigation in the lower courts. But one thing is clear: the agency amicus strategy can be a potent tool of policymaking.").

practice illegal under the ACA -- even though no single provision of the ACA directly addressed stand-alone reimbursement accounts.

This interpretive rule was certainly consistent with the Obama administration's stated goal to achieve near-universal health insurance coverage through, among other things, employer-provided health insurance. So, it was not surprising that the IRS chose to interpret ambiguous provisions of the ACA in a manner that affirmatively discouraged employers from giving employees money to use toward their health expenses in lieu of providing health insurance. But there was no clear textual prohibition on this practice -- likely because many in Congress assumed employers would be free to continue offering these benefits to employees or to pursue this arrangement as an alternative to paying costly health insurance premiums.

Many small business owners wanted to provide their employees with some financial assistance toward their health care expenses, even if they couldn't afford to offer health insurance. But IRS never sought input from these business owners. Instead, the agency chose to issue a definitive interpretation of the ACA -- proclaiming the practice illegal -- without any public outreach. Through sub-regulatory guidance, IRS effectively made law. And employers who chose to defy IRS risked severe penalties of $100 per day, for each employee or $36,500 per employee, per year.[27]

Yet one cannot go so far as to say that the agency's interpretive rule was plainly inconsistent with the text of the ACA. Indeed, the Act was either silent or incoherent on this issue. But, the troubling thing is that courts will generally defer to an agency's interpretation, which enables the Executive Branch to flesh out ambiguities in accordance with the President's preferred policy objectives, as what happened here.[28] The agency's interpretation may or may not comport with the interpretation a court might think most appropriate; however, it will likely receive deference if challenged.[29]

Although IRS refused to conduct notice-and-comment outreach before issuing that interpretive rule, America's small business owners spoke up loudly to their elected officials. Appropriately, Congress – not unelected bureaucrats – passed the 21st Century Cures Act and affirmatively made law allowing small employers to provide stand-alone health reimbursement accounts to their employees.[30]

DOL Changes its Interpretation of Qualifying Exempt Employees Under the FLSA

Employers must properly classify their employees as either "exempt" or "non-exempt" under the Fair Labor Standards Act (FLSA) because only "exempt" employees can be paid a flat salary.[31] "Non-exempt" employees must be paid an hourly wage and are entitled to overtime if they work more than 40 hours in a week. As such, employers face the possibility of federal enforcement actions and lawsuits for backpay should they

[27] According to NFIB research, in 2015, 16 percent of small employers were in violation of the rule and another 20 percent were seriously considering offering the prohibited benefit. Small Business's Introduction to the Affordable Care Act, Part III, NFIB Research Foundation, (November 2015), *available* online at: https://www.nfib.com/assets/nfib-aca-study-2015.pdf (last visited March 11, 2018).
[28] *Perez v. Mortgage Bankers Ass'n*. No. 13-1041, 2015 WL 998535, at 15 (U.S. March 9, 2015) (J. Thomas concurring).
[29] *Id*. at 12 (J. Scalia concurring).
[30] Section 18001 of Pub. 114-255 (December 13, 2016).
[31] 29 U.S.C. 201

misclassify an employee.

In *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012), the U.S. Supreme Court held that an agency should not receive deference on a newly asserted position where the agency has failed to give the public fair notice of the change, or where individuals and businesses have acted -- in reasonable reliance -- on the agency's previous position. The case was brought by pharamacutical sales representatives who alleged that they had been misclassified as "exempt employees" when they should have been classified as "non-exempt."

The employer in *SmithKline* had prudently relied on existing DOL regulations, which addressed the exemption for "outside salesm[e]n."[32] Long-standing DOL regulations defined the term to mean "any employee… [w]hose primary duty is … making sales…"[33] Since 1940 DOL stressed a *liberal* interpretation of the term.[34] But, in a 2009 amicus brief, filed in the Second Circuit, DOL announced a new, and more narrow, interpretation of its regulations.[35] And DOL filed amicus briefs in *SmithKline* to further advance this new position, but with an apparently 'evolving' rationale.[36]

Under DOL's new interpretation unveiled in the agency's amicus filings, pharmacuetical sales representatives could not qualify as exempt "outside salesm[e]n" because they did not *technically* consummate sales.[37] As a technical matter pharmaceutical sales represenatives are forbidden by law from finalizing a sale. Under state and federal law they may only promote their company's prescription drugs, meaning that, at most, they could obtain a "nonbinding commitment from a physician to prescribe those drugs in appropriate cases."[38] But, for decades DOL had allowed pharmaceutical companies to treat their sales represenatives as falling within the "outside salesman" definition.[39] As the defendant-company pointed out, DOL had explicitly "stressed that [the] requirement[,] [for qualification as an outside salesman,] [was] met whenever an employee 'in some sense [made] a sale."[40] As such, the Supreme Court appropriately viewed DOL's new position with skepticism, not only because it constituted a change in position, but because it would result in an "unfair surprise" for employers.[41]

The Supreme Court ultimately refused to defer to DOL's new position because it would

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[32] *Christopher v. SmithKline Beecham Corp*., 132 S. Ct. 2156, 2167 (2012).
[33] 29 C.F.R. § 541.500.
[34] *SmithKline Beecham Corp.*, 132 S. Ct. at 2163.
[35] "DOL first announced its view that pharmaceutical sales representatives are not outside salesmen in a series of amicus briefs, there was no opportunity for public comment, and the interpretation that initially emerged from the DOL's internal decision making process proved to be untenable." *SmithKline Beecham Corp*., 132 S. Ct. at 2160.
[36] "The DOL changed course after the Court granted certiorari in this case, however, and now maintains that '[a]n employee does not make a 'sale' … unless he actually transfers title to the property at issue.' The DOL's current interpretation of its regulations is not entitled to deference under *Auer v. Robbins* … Although *Auer* ordinarily calls for deference to an agency's interpretation of its own ambiguous regulation, even when that interpretation is advanced in a legal brief … this general rule does not apply in all cases. Deference is inappropriate, for example, when the agency's interpretation is 'plainly erroneous or inconsistent with the regulation', or when there is reason to suspect that the interpretation 'does not reflect the agency's fair and considered judgment on the matter …There are strong reasons for withholding Auer deference in this case. Petitioners invoke the DOL's interpretation to impose potentially massive liability on respondent for conduct that occurred well before the interpretation was announced. To defer to the DOL's interpretation would result in precisely the kind of 'unfair surprise' against which this Court has long warned." *SmithKline Beecham Corp.*, 132 S. Ct. at 2159.
[37] *Id.* at 2166.
[38] *Id.* at 2163-64.
[39] *Id.* at 2163.
[40] *Id.*
[41] *Id.* at 2167.

have imposed "massive liabilit[ies] on [employers] for conduct that occurred well before [the new] interpretation was announced."[42] The Court based its decision on equitable concerns over the lack of notice to the regulated public. This suggests that due process concerns can, and should, trump an agency's discretion on matters for which the agency has already spoken, at least where individuals or businesses have acted in reliance on the agency's orginal posisition. More broadly, NFIB believes that regulation by amicus is the type of sub-regulatory, opaque regulation that agencies should be prohibited from using.

Congressional Solutions

NFIB appreciates this committee's efforts to find solutions that will shine light on the regulatory process, particularly when it comes to guidance documents and the other "sub-regulatory" activities I have outlined above. In particular, NFIB believes H.R. 4809, the "Guidance Out Of Darkness Act" or "GOOD Act," would be a positive step forward in providing transparency of agency "sub-regulatory" activities. We also think Congress should consider requiring agencies to organize guidance materials in some manner that is easily navigable and user-friendly.

Additionally, NFIB respectfully offers one over-arching principle for Congress to consider as it explores other legislative solutions: the regulated public should have a right to voice concerns over any newly announced rule, policy, or administrative interpretation of law that may impose affirmative regulatory burdens on individuals or businesses. We would call this a moral imperative in a liberal democratic system.

Indeed, if government exists to serve the people, it has fiduciary-like duties to ensure transparency and provide concerned citizens with an opportunity to be heard. Otherwise, there is an undue risk that government serves its institutional interests or may be captured by the interests of politically powerful factions. Thus, we maintain that government necessarily violates its fiduciary duties to the public when the President, or an agency, adopts burdensome rules outside the light of an open and deliberative notice-and-comment process.

The principle is straight-forward. Regardless of whether the rule in question might be characterized as either a "legislative" or "interpretive" one, we maintain that it should only be adopted and enforced if it has gone through some form of notice-and-comment process. This is a normative argument -- a matter of good governance.

As the law currently stands, only "legislative rules" must go through notice-and-comment. But perhaps it is time consider tweaking that rule. For one, it is notoriously difficult to distinguish between legislative and interpretive rules. Yet, more fundamentally, liberal democratic principles demand that institutions should be reformed to at least ensure transparency and the opportunity for public comment on "important" or "significant" rules, which we would define as those imposing substantive regulatory burdens, including added compliance costs.

[42] *Id*.

We submit that a "guidance" should more properly be viewed as a substantive regulation if it imposes new compliance costs or otherwise exposes individuals or businesses to new liabilities. If the interpretation is not already well settled, it should not be applied unless and until concerned citizens have had an opportunity to voice their concerns. Under this framework, only controversial "guidance documents" would need to go through notice-and-comment procedures because guidance on settled questions would not be viewed as imposing any new regulatory burden. Of course, the APA currently exempts "interpretive rules" from notice-and-comment procedures. But maybe it is time to reconsider that exemption, considering the reality that agencies frequently pronounce changes in regulatory policy in a manner that imposes new burdens on the public without giving any opportunity for citizens to voice concerns. At least notice-and-comment would encourage public participation, awareness and perhaps meaningful dialogue.

NFIB, therefore, commends Attorney General Sessions for essentially doing just what we suggest regarding the operations of the Department of Justice in a November 16, 2017, memorandum entitled "Prohibition on Improper Guidance Documents." The memorandum to all department components instructed, "[e]ffective immediately, Department components may not issue guidance documents that purport to create rights or obligations binding on persons or entities outside the Executive Branch (including state, local, and tribal governments.)" [43] Attorney General Sessions' memorandum was followed by a memorandum from then Associate Attorney General Rachel Brand instructing heads of civil litigating components and U.S. Attorneys "not to use its enforcement authority to effectively convert agency guidance documents into binding rules" in affirmative civil enforcement litigation.[44]

NFIB encourages other agencies in the federal government to follow course and Congress to consider legislative solutions that would codify this practice.

Conclusion

NFIB applauds this Committee for highlighting the need to bring transparency to regulation in all its forms, including agency guidance documents and other regulatory pronouncements. Such transparency is critical for America's small business owners who struggle to keep up with the myriad of federal regulations on the books while they run and work to grow their businesses.

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

[43] Memorandum from U.S. Attorney General Jeff Sessions for "all components," regarding "Prohibition on Improper Guidance Documents" (November 16, 2017), *available* online at: https://www.justice.gov/opa/press-release/file/1012271/download

[44] Memorandum from U.S. Associate Attorney General Rachel Brand for "heads of civil litigating components and U.S. Attorneys" regarding "Limiting Use of Agency Guidance Documents In Affirmative Civil Enforcement Cases" (January 25, 2018), *available* online at: https://www.justice.gov/file/1028756/download