

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

NFIB
The Voice of Small Business.®

**House of Representatives Committee on the Judiciary
Subcommittee on Regulatory Reform, Commercial and
Antitrust Law**

On the date of

July 15, 2015

On the subject of

“Oversight Hearing on the Office of Information and Regulatory Affairs”

Dear Chairman Marino and Ranking Member Johnson:

On behalf of the National Federation of Independent Business (NFIB), I appreciate the opportunity to submit for the record this testimony for the Subcommittee on Regulatory Reform, Commercial and Antitrust Law's hearing entitled the "Oversight Hearing on the Office of Information and Regulatory Affairs."

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 represents about 350,000 independent business owners who are located throughout the United States.

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 requirements 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 within the small business problem clusters identified by *Small Business Problems and Priorities* report, "regulations" rank second behind taxes.²

Despite the devastating impact of regulation on small business, federal agencies continue to churn out approximately 10 new regulations each day.³ According to the Administration's spring 2015 regulatory agenda, there are 3,260 federal regulations in the pipeline, waiting for implementation.⁴

When it comes to regulations, small businesses bear a disproportionate amount of the regulatory burden. Regulatory costs are now nearly \$12,000 per employee per year,

¹ NFIB Research Foundation, *Small Business Economic Trends*, at p. 18, June 2013. <http://www.nfib.com/research-foundation/surveys/small-business-economic-trends>

Wade, Holly, *Small Business Problems and Priorities*, at p. 18, August 2012. <https://www.nfib.com/Portals/0/PDF/AllUsers/research/studies/small-business-problems-priorities-2012-nfib.pdf>

³ Data generated from www.regulations.gov

⁴ <http://www.reginfo.gov/public/do/eAgendaMain>

which is 30 percent higher than regulatory cost burden larger businesses face.⁵ This is not surprising, since it's the small business owner, not one of a team of "compliance officers" who is charged with understanding new regulations, filling out required paperwork, and ensuring the business is in compliance with new federal mandates. The small business owner is the compliance officer for her business and every hour that she spends understanding and complying with a federal regulation is one less hour she has to service customers and plan for future growth.

The Importance of the Office of Information and Regulatory Affairs to America's Small Businesses

Understanding the impact regulations have on small business owners nationwide, the NFIB is pleased that this Subcommittee is taking the time to ensure that the Office of Information and Regulatory Affairs is effectively carrying out its mission to, among other things, ensure that before an agency promulgates a regulation it

has adequately defined the problem that it intends to address; considered alternatives; assessed available information, risks, costs, and benefits (both qualitative and quantitative); consulted affected parties and promoted transparency and participation; and tailored the regulation to focus on the problem in a simple and clear way that does not conflict with other rules or statutes. OIRA seeks to ensure, to the extent permitted by law, that the benefits of agency regulations justify the costs and that the chosen approach maximizes net benefits to society.⁶

When reflecting on her time as OIRA Administrator under President George W. Bush, Susan Dudley stated that the first lesson she learned as administrator was that OIRA has no constituency.⁷ From the perspective of the OIRA administrator, that may indeed be true. OIRA is the proverbial "skunk at the picnic." As Ms. Dudley explains, it's the one member of the federal branch that checks the "agencies' natural proclivity to want more (whether it's more budget resources or more regulatory authority)."⁸

I have great respect for Ms. Dudley and the wonderful work she has done throughout her career communicating to the public the importance of the regulatory process, in general, and the need for honest analysis of the cost and benefits of regulation, in particular. But from NFIB's perspective, OIRA does have a very important constituency – small business.

⁵ Crain, Nicole V. and Crain, W. Mark, *The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business*, September 10, 2014. <http://www.nam.org/Data-and-Reports/Cost-of-Federal-Regulations/Federal-Regulation-Full-Study.pdf>

⁶ https://www.whitehouse.gov/omb/organization_mission/

⁷ Dudley, Susan E., "Is there a constituency for OIRA? Lessons Learned, Challenges Ahead," *Regulation*, at 6, Summer 2009.

⁸ *Id.*

During my thirteen 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 manufacturer in White Oak, Texas or Bismarck, North Dakota. As a result, small businesses rely heavily on the Office of Advocacy at the Small Business Administration and OIRA to check agency power so that they are doing what the Regulatory Flexibility Act requires – ensuring that agencies don’t impose costly new mandates on small business when viable and less expensive alternatives to achieve regulatory objectives exist.

Small Business Concerns with Recent Regulations that Survived OIRA Review

Over the last six and a half years, a number of costly rules have been issued despite stakeholders raising significant cost concerns about them. Given the impact these regulations will have on small business and the economy as a whole, NFIB is concerned that OIRA is not performing the rigorous independent analysis needed to ensure that the proposed benefits of a new rule truly out-weigh the negative economic impacts. Two recent examples are of particular concern to small business.

Waters of the U.S. Rule

On June 29, the Clean Water Rule: Definitions of “Waters of the United States” was published in the Federal Register.⁹ The “Waters of the United States Rule” radically expands federal regulatory powers over hundreds of thousands of privately owned properties throughout the United States. In practical terms it means that ordinary landowners—homeowners, farmers, ranchers and other small businesses—must now pursue costly federal permits in order to make almost any use of affected portions of their lands, even for something as basic as landscaping. And these permits are tremendously expensive, costing tens of thousands of dollars.

In *Rapanos v. United States*¹⁰ and *Solid Waste Agency of Northern Cook County (SWANCC) v. Army Corps of Engineers*¹¹, the Supreme Court rejected two previous attempts by EPA and the Army Corps to dramatically expand their jurisdiction over private wetlands. The Court explained that the Constitution prohibits federal regulation of private property unless the government can demonstrate a meaningful connection to interstate commerce. Yet, with the Waters of the U.S. rule, the agencies are once more asserting jurisdiction over lands that Congress did not intend to be covered by

⁹ 80 Fed. Reg., 37,054 (<http://www2.epa.gov/sites/production/files/2015-06/documents/epa-hq-ow-2011-0880-20862.pdf>)

¹⁰ 547 U.S. 715 (2005)

¹¹ 531 U.S. 159 (2001)

the Clean Water Act, and in a manner that mischaracterizes the *Rapanos* and *SWANCC* decisions to justify expansion of CWA jurisdiction.

The Administration has consistently touted this rule as one that will give small businesses and other property owners more certainty in determining whether a federal permit will be required. Yet the only certainty that small businesses will see from this rule is the certainty of more costs.

Under this new rule, a small business with property over which water occasionally flows will be confronted with one of three costly choices before they can landscape or make other alterations to land: (1) pay hundreds, if not thousands, of dollars to a consultant to determine whether or not an EPA/Army Corps of Engineers permit is required; (2) assume CWA jurisdiction and pay tens of thousands dollars to obtain the appropriate permit; or (3) assume no jurisdiction and risk ruinous daily penalties of \$37,500 in the event EPA should assert the property to be jurisdictional. But in reality, these staggering costs and potential liabilities will result in a chilling effect; in practical terms, the new rule makes most land use projects—except for the most massive of development projects—economically unfeasible. It will result in further adverse economic impacts in the devaluation of affected lands, which will, as a practical matter, be rendered nature reserves in most cases.

Property is one of the biggest assets many small business owners have. Many small business owners have invested substantial personal assets into acquisition of land, as real property is essential for their business operations and their overall economic well-being. Yet the Waters of the U.S. rule encumbers this asset in uncertainty for millions of small businesses across the country.

Remarkably, EPA had the audacity to certify the Rule as not having a significant economic impact on small business—notwithstanding NFIB’s objections and near unanimous calls from the few small business interests whom the Agencies reached out to informally. Of course this certification is a farce. NFIB has repeatedly raised concerns over Regulatory Flexibility Act compliance in the past, when agencies have failed to give serious consideration to how their regulations might impact small businesses; however, we’ve never seen a more blatant case of contempt for small business than the Environmental Protection Agency and Army Corps’ certification that this Rule will not impact small businesses.

Even the Small Business Administration’s Office of Advocacy publically called on the Environmental Protection Agency to withdraw the rule and to perform a Regulatory Flexibility Act analysis before moving forward.¹² Despite this rare act by the Office of Advocacy, OIRA did not require the agencies to perform the required Regulatory Flexibility Act compliance. OIRA’s lack of engagement truly was astounding and begs the question, “Is anyone minding the regulatory ‘store’?”

¹² <https://www.sba.gov/advocacy/1012014-definition-waters-united-states-under-clean-water-act>

Department of Labor “White Collar” Exemption to Fair Labor Standards Act

On July 6, the Department of Labor’s Wage and Hour Division (DOL) published its proposed rule, which would amend the Fair Labor Standards Act (FLSA) regulations governing the “white collar” exemption from overtime pay for executive, administrative and professional employees.

Under the proposed rule the salary threshold for employees who are eligible to receive overtime pay would more than double from \$23,660 to \$50,440 and would be updated every year in the Federal Register. Although, the proposed rule would not change existing duties tests, which require employees to perform certain primary duties to qualify for an overtime exemption, DOL is asking whether these duties tests should be revised.

According to DOL’s own estimate, the rule would directly affect 4.6 million U.S. workers at an estimated total direct employer costs for the first year of \$592.7 million. Small business will pay, on average, \$100 to \$600 in direct costs and \$320 to \$2,700 in additional payroll costs to employees in the first year after the proposed rule becomes effective. DOL also estimates each small business would spend one hour of time familiarizing itself with the regulatory requirements; one hour per each affected worker in adjustment costs; and five minutes per week scheduling and monitoring each worker expected to be classified as overtime eligible as a result of the proposed rule.

Even according to DOL’s numbers, NFIB is concerned that the proposed rules will make it harder for small employers to promote workers up to management level by creating additional costs and record-keeping headaches for America’s small businesses.

The proposed rule would be particularly expensive for small businesses in small markets where wages are commensurate with the cost of living. Promoting someone to manager is going to be a costly proposition for many small businesses, and the result will be less mobility and fewer opportunities for workers at the bottom.

That’s a very big expense for small restaurants and retailers, and the businesses that will be hit hardest are in parts of the country where the cost of living is low. Employers will be forced to limit hours for their workers and eliminate management positions.

The proposed rule is the latest in a string of well-meaning regulations advocated by politicians and bureaucrats who don’t know the first thing about running a business.

OIRA Should Work to Prevent “Midnight Regulations”

As the Obama Administration is in its final 18-month stretch, OIRA should be proactive in discouraging agencies from promulgating “midnight regulations.” “Midnight regulations” are regulations promulgated at the end of an Administration, particularly those that issue post-election. These regulations generally are rushed with inadequate analysis and opportunity for public comment.

NFIB appreciates Administrator Shelanski’s efforts to encourage agencies to start prioritizing regulatory objectives now.¹³ However, we think it imperative that Administrator Shelanski and the White House demonstrate their commitment to good government and transparency by establishing and enforcing firm deadlines for regulatory actions in the final months of the Obama Administration. Former White House Chief of Staff, Joshua B. Bolton, famously sent a memorandum to agency heads setting a deadline of June 1, 2008 for proposed rules and November 1, 2008 for final rules.¹⁴ At a minimum, NFIB believes similar deadlines should be imposed on agencies in 2016. We are concerned that, to date, Administrator Shelanski has been unwilling to define exactly when “midnight” will be when it comes to regulation for this Administration. At a minimum, we strongly believe all final rules should issue by November 1, 2016.

“Subregulatory” Activities Skirt OIRA Review Process to the Detriment of Small Business

Finally, NFIB is very concerned about the efforts of agencies to subvert OIRA and the rulemaking process altogether. Agencies are increasingly imposing new regulatory burdens on small business outside of the formal rulemaking process. The NFIB Small Business Legal Center has conducted significant research and analysis of the “subregulatory” activities by federal agencies. In the coming weeks, we will issue a report detailing how these “subregulatory” activities, like regulation through amicus, are hurting small business. When the report is finalized, we look forward to sharing it with the Subcommittee.

Conclusion

Small businesses are drowning in a sea of regulation. Small business owners are spending more and more time trying to understand new regulatory requirements, complying with them and filling out the paperwork that seems to accompany every new regulation.

OIRA plays a critical role in ensuring new regulations undergo rigorous analysis so

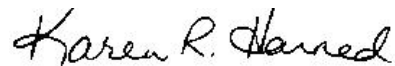
¹³ Bolen, Cheryl, “To Avoid Midnight Regulations in 2016, Obama Tells Agencies to Set Priorities Now,” BNA’s Daily Report for Executives (Feb. 11, 2015).

¹⁴ Memorandum of Joshua B. Bolton to the Heads of Executive Departments and Agencies and the Administrator of the Office of Information and Regulatory Affairs, May 8, 2008.

that the benefits of a new regulation are maximized and costs are reduced. NFIB is concerned that in the last several years OIRA has given final approval to new regulations that have significant costs and few benefits. NFIB appreciates this Subcommittee holding this hearing. We hope that the members of this Subcommittee and Congress continue aggressive oversight of OIRA and administrative agencies.

NFIB and the NFIB Small Business Legal Center stand ready to assist the Subcommittee in its efforts to hold OIRA and agencies accountable to small business.

Sincerely,

A handwritten signature in black ink that reads "Karen R. Harned". The signature is written in a cursive style with a large initial 'K' and 'H'.

Karen R. Harned, Esq.
Executive Director
NFIB Small Business Legal Center