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CONGRESSIONAL TESTIMONY

**Assessing the Regulatory and
Administrative Burdens on
America's Small Businesses**

**Testimony before
The Senate Committee on Small Business and
Entrepreneurship**

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My name is James Gattuso. I am a Senior Research Fellow in Regulatory Policy at The Heritage Foundation. The views I express in this testimony are my own, and should not be construed as representing any official position of The Heritage Foundation.

Chairman Landrieu and members of the Subcommittee, thank you for the opportunity to testify today on this important topic.

Every year, Americans are reminded of the costs of federal taxation when they file their income tax returns with the IRS, and see a clear and specific bottom line telling them how much they paid to Washington. Not so with the cost of regulation. These costs are hidden - embedded in the prices of products and services, in reduced innovation, and in lost opportunities.

And, by any reckoning, these costs are substantial. According to a report by economists Nicole Crain and Mark Crain, recently released by the Small Business Administration, total regulatory costs amount to about \$1.75 trillion annually, nearly twice as much as all individual income taxes collected last year¹.

This regulatory burden falls disproportionately upon small businesses, which are less able than their larger competitors to spread the costs of regulation. According to Crain and Crain, the cost of regulation to firms with 20 or less employees is some \$10,500 per year, compared to an average of \$8,000 for all firms.

The impact on small businesses, moreover, goes beyond the direct costs of regulation on their own activities. Small businesses, like individual Americans, also pay “regulatory taxes” in the form of higher prices for goods and services, reduced economic activity and hindered innovation caused by excessive regulation generally.

Not all regulations are unwarranted, of course. Most Americans would agree on the need for protections against terrorism, although the extent of such rules is certainly subject to debate. Some rules, such as anti-fraud measures, are necessary for markets to work. But there is always a cost. And, for the same reasons that federal spending is reported, so, too, should regulatory costs.

And these costs are increasing. As outlined in a recent Heritage Foundation report, in fiscal 2010 alone, some 43 major new rules increasing regulatory burdens were issued by federal agencies. The total costs for these rules, based on estimates by the regulators themselves, topped \$26.5 billion, the highest level since at least 1981, the earliest date for which figures are available².

Fifteen of the 43 major rules issued during the fiscal year involved financial regulation. Another five stem from the Patient Protection and Affordable Care Act adopted by

¹ Nicole V. Crain and W. Mark Crain, “The Impact of Regulatory Costs on Small Firms,” Small Business Administration Office of Advocacy, September 2010,

² See, James L. Gattuso, Diane Katz, and Stephen A. Keen, “Red Tape Rising: Obama’s Torrent of New Regulation, Heritage Foundation Backgrounder No. 2482 (Oct. 26, 2010).

Congress in early 2010. Ten others come from the Environmental Protection Agency (EPA), including the first mandatory reporting of “greenhouse gas” emissions and \$10.8 billion in new automotive fuel economy standards (adopted jointly with the National Highway Traffic Safety Administration (NHTSA)). The bulk of the reported cost, over \$23 billion, came from the Environmental Protection Agency.

It should be noted that the actual cost of regulations adopted in FY 2010 is almost certainly much higher than \$26.5 billion. As a first matter, the cost of non-economically significant rules—rules deemed not likely to have an annual impact of \$100 million or more—is not calculated by agencies. Moreover, regulatory agencies did not quantify costs for 12 of the economically significant rules adopted in FY 2010.

Many of the rules lacking quantified costs involve financial regulation. The Federal Reserve Board, for instance, did not quantify any costs for its new “Truth in Lending” regulations—which impose fee and disclosure requirements for credit card accounts—although the new rules are generally expected to be costly. Similarly, costs were not calculated for new Federal Reserve Board regulations on prepaid electronic gift cards.

Moreover, even the best impact analyses will be unlikely to fully quantify the impact of rules. For many economic regulations, for instance, the major cost may not be any direct burden on consumers or businesses, but constraints on innovation. There simply is no way to assess such losses - you can't measure inventions that were never created. Such losses thus are not reported in the totals.

Many more rules are in the pipeline. According to one estimate, the financial regulation legislation recently adopted by Congress will alone require 243 new formal rule-makings by 11 different federal agencies³. A similarly large number of rulemakings will likely be required to implement the new health care law. Significant new regulation is also in the pipeline at EPA, as well as at independent agencies such as the Federal Communications Commission and the Consumer Product Safety Commission. Taken together, these initiatives embody a stunningly full regulatory agenda—indicating that this year’s record for regulatory increases may not stand for long.

One significant effect of regulation is reduced employment, and the estimated jobs effect of rules now in the pipeline is substantial. A pending EPA rule on boilers, for example, threatens some 71,000 jobs related to the paper and pulp industry. Another regulation, of cement kilns, could put over 11,000 jobs at risk.

Other proposed rules would hit the job market more broadly. According to one study, adoption of “net neutrality” rules by the FCC could reduce employment by hundreds of

³ Davis Polk, “Summary of the Dodd–Frank Wall Street Reform and Consumer Protection Act, Enacted into Law on July 21, 2010,” Davis Polk & Wardwell, LLP, July 21, 2010,

thousands of jobs.⁴ And, according to a report by the Manufacturer's Alliance, the EPA's proposed ozone rule could reduce employment by 7.3 million by 2020⁵.

There is no magic bullet that will stop the excessive growth of regulation, but there are steps that Congress can take to increase scrutiny of new and existing rules to ensure that each is necessary and that costs are minimized. Among these:

- Require a cost analysis of all legislation imposing new regulatory burdens. Although all proposed legislation must be scored by the Congressional Budget Office to determine likely fiscal costs, there is no similar requirement that regulatory costs be reported. Members should not be asked to vote on proposals without the best possible estimate of their likely costs. All bills proposing new or expanded regulation should undergo a regulatory impact analysis analyzing and quantifying (where possible) the likely costs and benefits. This "regulatory scoring" would ideally be performed by a new "Congressional Regulation Office," similar to the Congressional Budget Office. Such a step could be taken by Congress on its own initiative and without presidential approval.
- Establish a Sunset Date for New Federal Regulations. Once adopted, rules tend to be left in place, even if they have outlived their usefulness. Currently, under section 610 of the Regulatory Flexibility Act, rules that have a substantial effect on a significant number of small entities must be reviewed by the promulgating agency every 10 years. In practice, however, such review, if it occurs at all, is usually performed in a cursory manner. To ensure that substantive review occurs, regulations should automatically expire if not explicitly reaffirmed by regulators. This requirement should be applied to all rules, not just those affecting small business. Such "sunset" dates should also be included in legislation imposing new regulation.
- Consider requiring congressional approval of major regulations that place new burdens on the private sector. Under the 1996 Congressional Review Act Congress has the ability to veto new regulations coming from agencies. To date, however, that authority has only been used successfully once. Under legislation (S. 3826) introduced in the Senate by Senator Jim DeMint, and in the House by Congressman Jeff Davis (H.R. 3765), the review process would be strengthened by requiring congressional approval before regulation takes effect. Such a system would ensure a congressional check on regulators, as well as ensure the accountability of Congress itself. Such reform should be seriously considered.

In doing so, Congress should be careful to avoid two dangers. First, the process should apply only to the imposition of new burdens on consumers or the

⁴ Charles M. Davidson and Bret T. Swanson, Net Neutrality, Investment & Jobs: Assessing the Potential Impacts of the FCC's Proposed Net Neutrality Rules on the Broadband Ecosystem, Advanced Communications Policy and Law Institute, New York University, June 2010.

⁵ Donald A. Norman, "Economic Implications of EPA's Proposed Ozone Standard," Manufacturer's Alliance Economic Report (Sept. 2010).

economy. It should not be required in order to lift such burdens. Second, it should be clear that congressional approval under this process is conditional upon a prior grant of regulatory authority to the agency by Congress and that the congressional review process does not itself constitute a grant of authority.

While reforming the regulatory process is important, it is also important to note that such reforms will not by itself solve the problem of overregulation. No set of procedural reforms will be enough to stem the regulatory tide. Ultimately, regulatory burdens will rise until policymakers fully appreciate the burdens that regulations impose on Americans, and exercise the political will necessary to limit and reduce those burdens. I hope today's hearing provides a start towards that end.

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