



Testimony of

Randy Noel

**On Behalf Of the
National Association of Home Builders**

**Before the
United States Senate
Committee on Small Business and Entrepreneurship**

**Hearing on
“Examining How Small Businesses Confront and Shape Regulations”**

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Chairman Risch, Ranking Member Shaheen and Members of the Committee, thank you for the opportunity to testify today. My name is Randy Noel. I am a home builder and small business owner from LaPlace, Louisiana, and the First Vice Chairman of the Board of Directors of the National Association of Home Builders (NAHB).

NAHB is a federation of more than 700 state and local associations representing more than 140,000 members nationwide. NAHB's members are involved in home building, remodeling, multifamily construction, land development, property management, and light commercial construction. Taken together, NAHB's members employ more than 1.26 million people and construct about 80 percent of all new American housing each year.

The goal of today's hearing, "Examining How Small Businesses Confront and Shape Regulations," is an incredibly important one given small businesses are both the engine of growth for the American economy and disproportionately affected by regulations. According to U.S. Small Business Administration Office of Advocacy, small firms comprise 99.9% of all businesses in America and are responsible for 63% of net new jobs.¹

The majority of NAHB's home builder members are truly small businesses constructing 10 or fewer homes each year with fewer than 12 direct employees. These builders, in addition to building homes, must navigate an ever-increasing thicket of regulations. NAHB estimates, on average, regulations imposed by government at all levels account for nearly 25 percent of the final price of a new single-family home built for sale.²

The significant cost of regulations reflected in the final price of a new home is not just a problem for the small businesses that build them, it has a very practical effect on main street U.S.A. – it makes affording a home that much more difficult. According to NAHB research, approximately 14 million American households are priced out of the market for a new home by government regulations.³ It is therefore imperative that new and existing regulation must address policy objectives while recognizing the burdens of compliance, particularly for small businesses.

As a second-generation home builder with more than 30 years of experience, I understand how difficult (and often costly) it can be to comply with the many and varied government regulations that apply to my day-to-day work. And as an occasional industry representative in the regulatory rulemaking process, I am well aware of the role small businesses play in

¹ https://www.sba.gov/sites/default/files/Whats_New_With_Small_Business_Text_Version.pdf

²

http://www.nahbclassic.org/generic.aspx?sectionID=734&genericContentID=250611&channelID=311&_ga=1.255452874.358516237.1489032231

³ <http://eyeonhousing.org/2016/05/14-million-households-priced-out-by-government-regulation/>

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informing regulators of the potential burdens borne by small businesses with new regulations. I am also aware of the weaknesses inherent to the regulatory rulemaking process.

NAHB has long-supported three critical steps to address these weaknesses: restore congressional oversight authority to the rulemaking system; fix what is broken in the rulemaking process; and ensure that burdens on small businesses are a primary focus for existing and future regulations. Today, I will focus on how small businesses factor into the regulatory process.

The Good

The Regulatory Flexibility Act (RFA),⁴ passed in 1980, requires federal agencies to consider the effect of their actions on small entities, including small businesses, small non-profit enterprises, and small local governments. When an agency issues a rulemaking proposal, the RFA requires the agency to "prepare and make available for public comment an initial regulatory flexibility analysis (IRFA). Such analysis must describe the impact of the proposed rule on small entities."⁵

Considering the impact of regulations on small businesses is critical to informing balanced rulemaking that achieves statutory objectives while minimizing the burdens of regulation. But this is only part of the equation. Well-crafted regulations must consider the challenges of implementing new rules in the field. This can only happen with meaningful input from affected small businesses.

Under the 1996 amendments to the RFA, known as the Small Businesses Regulatory Enforcement Fairness Act (SBREFA),⁶ certain rulemaking agencies must notify the Chief Counsel for Advocacy of the Small Business Administration ("Advocacy") of a proposed new regulation who then identifies individual representatives of affected industries. The agency proposing the rule must then convene a review panel to review the materials the agency has prepared (including any draft proposed rule), collect advice and recommendations of the small entity representatives and issue a report on the comments of the small entity representatives and the findings of the panel. Following this process, the agency is supposed to modify the proposed rule, update the Initial Regulatory Flexibility Analysis (IRFA), or reconsider a decision not to conduct an IRFA.⁷

This process is designed to inform federal agencies on how to design a rule to work well for small businesses, but to be successful, input from the SBREFA process must be incorporated

⁴ 5 U.S.C. 601-612

⁵ 5 U.S.C. 603(a).

⁶ 5 U.S.C. 609.

⁷ 5 U.S.C. 609(b) (1) through (6).

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into the bill. Unfortunately, the feedback from small entity representatives is rarely heeded or incorporated in final rules.

The Bad

While the congressional intent of the RFA and the subsequent SBREFA amendments are to be lauded, the rulemaking process often goes off the rails with poorly informed and woefully inaccurate cost-benefit analyses. It is imperative that proposed rules consider the true cost, including indirect costs, of compliance for small businesses.

As an example, in 2013, the Occupational Safety and Health Administration (OSHA) issued a proposed new rule to regulate workers exposure to crystalline silica. Despite evidence of a significant decline in the instances of silica related deaths (down 93% from 1968-2010)⁸ and OSHA's inability to enforce the existing standard, the agency went forward with a new rule. This rule carried a cost estimate to the construction industry of approximately \$511 million per year.

The Construction Industry Safety Coalition (CISC), a coalition of construction groups of which NAHB is a founding member, commissioned an independent study⁹ of the proposed silica standard. This study demonstrated that the true cost to the industry would be nearly \$5 billion per year—roughly \$4.5 billion per year more than OSHA had estimated. If I provided my clients with quotes that were 9 or 10 times below the actual cost, I wouldn't be in a business very long.

Moreover, the study revealed a fundamental misunderstanding of the construction industry. Among other problems, the OSHA analysis had inexplicably omitted from their analysis some 1.5 million workers in the construction industry who routinely perform dusty tasks on silica-containing materials and failed to account for a variety of indirect costs associated with set-up, clean-up, materials, and productivity penalties.

The many glaring omissions and errors contributed to a fatally-flawed estimate of the true cost small businesses would bear in complying with the rule. The result was a rule that is both technologically and economically infeasible for businesses to comply with and, more importantly, one which will do little to improve the health and safety of my workers.

Congress must provide some direction to address the problem of poor or non-existent economic impact analyses. NAHB believes it is critical to include indirect costs as part of any

⁸ https://wwwn.cdc.gov/eworld/Data/Silicosis_Number_of_deaths_crude_and_age-adjusted_death_rates_US_residents_age_15_and_over_19682010/768

⁹ http://www.buildingsafely.org/wp-content/uploads/2015/06/CISC-New-Report-re-Occupational-Exposure-to-Crystalline-Silica_Docket-No....pdf

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economic impact analysis. Additionally, economic analysis should be reviewed by a non-partisan, third party. Implementing these changes will undoubtedly improve the analysis and provide a more accurate accounting of the burdens small businesses face in complying with regulations.

The Ugly

It is bad enough when agencies neglect the true cost of compliance with regulations. It is another thing entirely when agencies ignore and refuse to listen to the regulated community. Under the RFA and subsequent amendments of the SBREFA, an agency may certify that a rule is not expected to have a significant economic impact on a substantial number of small entities. This allows the agency to skip the SBREFA requirements. Unfortunately, there is no check on whether the agency certification of no impact on small businesses is correct. Increasingly, agencies have improperly claimed that small businesses were not affected by their proposed rule, even when that clearly was not the case.

For example, in 2014, the Environmental Protection Agency (EPA) proposed a rule changing the definition of “Waters of the United States” under the Clean Water Act. The agency certified the rule and, in so doing, avoided the initial economic analysis and small business panel requirements which are so critical to the rulemaking process.

I was quite surprised the agency had certified this rule given what I knew about how it would affect my industry. And I was not alone. The Small Business Administration’s Office of Advocacy publicly admonished EPA in a letter noting they had “improperly certified this rule” and stated the rule “will have a direct impact on small businesses.”

I told EPA that given the vast impacts stemming from the revised definition of waters of the United States, it was clear they should have conducted an IRFA to truly assess the impact this rule will have on small business entities. A more thorough analysis of the proposal would have revealed the disproportionate burdens that this rule places on small entities, including small home builders, and would have triggered the requirement to convene a SBREFA panel.

Clearly, EPA was not interested in hearing from the regulated community. Their only objective was to move the rule over the finish line. For a rule of this magnitude, small businesses should have had a voice in the rulemaking process.

Something must be done to ensure agencies are complying with both the letter and intent of the SBREFA requirements. While section 611 of the RFA provides for judicial review of some of the act’s provisions, it does not permit judicial review of section 609(b), which contains the panel requirement. NAHB believes that the RFA should be amended to include judicial review of

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the panel requirement to ensure that the agencies adhere to the law. Without a judicial backstop or other enforcement mechanism, there is no way to compel the agency to implement a clear congressional directive. When agencies evade their responsibility to convene review panels, they remove small business input entirely from the process.

Solutions

In addition to improvements to the RFA and SBREFA I have recommended today, there are other solutions currently under consideration in Congress which are critical components to any comprehensive regulatory reform effort. Specifically, the Regulations from the Executive in Need of Scrutiny (REINS) Act and the Regulatory Accountability Act (RAA).

The REINS Act restores much-needed congressional oversight to the rulemaking process, a desperately needed improvement given the growth of the regulatory state over the past few decades. Without meaningful congressional oversight, poorly-crafted rules often go into place and businesses are forced to divert precious resources to lengthy and uncertain legal challenges.

While the REINS Act returns control of the regulatory process to the people, the RAA repairs the decades-old, badly-broken system. Taken together, and in concert with changes to the RFA and SBREFA discussed today, these reforms will add fuel to the engine of economic growth that America's small businesses represent.

Conclusion

While the original congressional intent and subsequent additions/enhancements to the Regulatory Flexibility Act are to be lauded, the reality is that far too often agencies either view compliance with the Act as little more than a procedural "check-the-box" exercise or they artfully avoid compliance by other means. Agencies should seek to partner with small entities to help create more efficient, more effective regulations and, in so doing, reduce the compliance costs for small businesses. I am pleased that the Subcommittee has taken this opportunity to focus on the role of small businesses in shaping regulations and again thank you for the opportunity to testify today.