



Written Testimony of
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“Reauthorization of the SBA Office of Advocacy”

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Chairman Rubio, Chairman Lankford, Ranking Members Cardin and Sinema, Members of the Committee and Subcommittee, I would like to thank you for the opportunity to testify before you today. My name is Jeanette Hernandez Prenger and I am the President and CEO of ECCO Select, a technology talent and acquisition consulting firm that I founded 24 years ago, based in Kansas City, Missouri. I also sit on the board of directors of Women Impacting Public Policy (WIPP). WIPP is a national nonpartisan policy organization that advocates on behalf of women-owned businesses nationwide.

Complying with regulations is a never-ending concern for small business owners. Small businesses bear a disproportionate amount of the regulatory burden, with costs at nearly \$12,000 per employee per year, which is 30 percent higher than the costs for larger businesses.¹ At ECCO, I have less than 300 employees and yet have three full time employees dedicated to regulatory compliance for federal, state and local. At least 50 percent of all my human resource department labor costs are associated with compliance and reporting requirements. Beyond the burden of employee time and money, excessive regulation can create substantial frustration and stress for small business owners and impact the ability to expand and hire workers. The uncertainty associated with new burdensome regulations also significantly hampers the ability to plan for future growth and expansion.

¹ Crain, Nicole V. and W. Mark, The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business, September 10, 2014. Available at <https://www.nam.org/data-and-reports/cost-of-federal-regulations/federal-regulation-full-study.pdf>.

Small businesses are the backbone of our nation’s economy, making up 99.9% of U.S. employer firms.² Further, there are nearly 10 million women-owned businesses in the United States, generating \$1.4 trillion in receipts and employing nearly 9 million Americans.³ Early engagement in the regulatory process is not easily accessible for small business owners. Therefore, small businesses rely on protections in the Regulatory Flexibility Act (RFA) and internal checks from the Small Business Administration (SBA) Office of Advocacy to ensure federal agencies do not impose expensive new mandates on small businesses when viable and less expensive alternatives to achieve regulatory objectives exist.

I. Regulatory Flexibility Act (RFA)

Under the Regulatory Flexibility Act, agencies are required to thoughtfully consider small businesses and other small entities when developing regulations. If an agency determines that a regulation is likely to have a “significant economic impact on a substantial number of small entities,” the agency must engage in additional analysis and seek less burdensome regulatory alternatives. When the RFA was originally signed into law nearly 40 years ago, it sought to improve small business participation in rulemaking by requiring agencies to publish an agenda semiannually listing expected rulemakings that impact small business, as well as conduct “lookback” reviews. Over time, issues have surfaced with these processes and we applaud the Committee and Subcommittee for its attention to reform. One prevalent issue is that agencies can determine when a regulatory flexibility analysis is triggered – the RFA does not define

² SBA Office of Advocacy, 2018 Small Business Profile of the United States, available at <https://www.sba.gov/sites/default/files/advocacy/2018-Small-Business-Profiles-US.pdf>.

³ SBA Office of Advocacy, Survey of Women-Owned Businesses, available at https://www.sba.gov/sites/default/files/SBO_Facts_WOB.pdf.

“significant economic impact” or “substantial number of small entities.” Additionally, when the RFA does apply, it only requires basic analytical requirements, which are easily ignored by federal agencies. The Office of Advocacy’s authority, however, is limited on enforcing the RFA because it does not have the power to promulgate regulations. Over the past twenty years, the Government Accountability Office (GAO) has recommended four times that Congress delegate rulemaking authority to the Office of Advocacy in order to strengthen implementation of the RFA.⁴ WIPP supports this recommendation. Expansion of Advocacy’s rulemaking authority would result in increased enforcement of the RFA that agencies often avoid.

A problematic component of the RFA is that agencies disclose the impact only on businesses that are directly regulated, and do not disclose publicly the foreseen ripple effects on the small business community. Advocacy Chief Counsels under the past three Administrations have argued that agencies do not adequately evaluate impact on small businesses because of this glitch. For instance, when EPA issues rules on blending gasoline with ethanol or other emission reduction additives, the RFA only requires that EPA consider the cost of its rules on petroleum producers and blenders. This means that it solely looks at the businesses that must comply directly with EPA’s rules for gasoline blending. The RFA does not require that EPA publicly consider what impact its rules will have on the cost of gas or other transportation fuels on which small businesses rely. WIPP recommends that public, transparent consideration of indirect impact be considered for small businesses under regulatory proposals.

⁴ Office of Advocacy Needs to Improve Controls Over Research, Regulatory, and Workforce Planning Activities, GAO-14-525 (July 2014); Regulatory Reform: Implementation of the Small Business Advocacy Review Panel Requirements, GAO-98-36 (March 1998).

In 1996, Congress amended the RFA with passage of the Small Business Regulatory Enforcement Fairness Act (SBREFA) with the goal of improving agency compliance with the RFA. SBREFA requires the Environmental Protection Agency (EPA), the Occupational Safety and Health Administration (OSHA), and the Consumer Financial Protection Bureau (CFPB) to create a Small Business Advocacy Review Panel (SBAR), comprised of a group of small business representatives to assist in assessing impact before the rule is proposed.⁵

While these panels have proven to be effective in improving compliance, they only exist at the EPA, OSHA and CFPB. Given that 99.9% of the businesses in the U.S. are considered small, it seems outdated that regulatory impact is only taken into consideration at three federal agencies. Therefore, WIPP supports expanding SBREFA panels to include all agencies, as proposed in S. 1120, the “Small Business Regulatory Flexibility Improvements Act,” introduced by Senator Lankford. Expanding the panels to all agencies would put the federal government in a better position to understand how small businesses operate and are impacted by regulations.

While SBREFA review panels would strengthen the small business voice in agencies, there are two additional ways that the SBA Office of Advocacy’s role in rulemaking could be strengthened. The first is by requiring a third-party review when an agency and the SBA Office of Advocacy disagree on small business impact. Legislation introduced by Senator Ernst, the “Prove It Act,” would require a third-party review, instructing the Office of Information and Regulatory Affairs (OIRA) to make a determination of whether the agency must perform another RFA analysis. Although panels created by SBREFA add a small business voice into the rulemaking

⁵ The law was expanded to include the CFPB when the 111th Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act.

process, currently agencies have discretion over whether to adopt the panel's recommendations. WIPP supports legislation that would provide an additional layer of protection on the latter end of the rulemaking process.

My company spends a lot of time and money complying with employment laws and regulations. For example, if we are terminating an employee, every state has different rules of when to pay the last paycheck to that employee. If we are terminating someone in a state where we have no prior experience and want to validate the timetable or get legal advice on our interpretation, we must pay experts to document the company's interpretation of the law. The cost burden associated with navigating the many rules and reporting requirements is substantial for ECCO Select—75 percent of my company's legal bills are for employment law clarification. However, my company goes through this exercise to ensure compliance since potential damages can come at a much greater cost than seeking legal advice. Additionally, my company encounters many conflicting requirements driven by the various agencies and authorities imposing the regulations and compliance. State and federal regulations can be contradictory, such as when a contract requires paid time off and the agency issuing the contract has different regulations from the local jurisdiction mandating sick time. While legal fees are costly, the lost hours of productivity that employees spend focused on compliance issues also come at a substantial cost.

The second recommendation is to allow a retrospective review of existing regulations. Agencies often layer new rules on top of old rules, as well as additional rules on top of those promulgated by other agencies. It creates confusion for federal agencies issuing new rules, as well as frustration for small businesses. WIPP supports the Setting Manageable Analysis Requirements in Text (SMART) Act, which would direct agencies to issue advanced notices for

rules costing more than \$100 million annually, as well as require agencies to set metrics for how a rule will be measured for success in the future. The SMART Act also directs the promulgating agency to review the rule with the stated metrics within 10 years, which will begin to address some of the ongoing regulatory issues faced by small businesses.

II. Statistics and Research

One role that is especially valued by the small business community is the relevant statistics and research published by the SBA Office of Advocacy. This research continues to bolster small businesses' ability to impact federal policy. For example, the recently released 2019 Small Business Profiles give an annual picture of each state's small businesses, with metrics such as job creation and overall economic health. This information gives lawmakers and businesses insight into the health of small businesses situated in diverse economic and geographical areas. Additionally, Advocacy recently completed a call for new research topics from the community. This solicitation gave small businesses and the organizations that represent them the ability to identify necessary research. We applaud Advocacy's continued effort to provide meaningful, reliable data on small businesses.

III. Strengthening the SBA Office of Advocacy

Although the Office of Advocacy is already a strong voice for small businesses within the federal government, we believe two fixes will further assist the office in achieving its mission. First, the office has operated without a Senate-confirmed Chief Counsel for lengthy periods of time, which limits its ability to advocate across the government. Congress should explore options that would minimize any decreased influence afforded to the Office of Advocacy during times of political transition. Options for consideration could include either a multi-person, staggered term

commission with a Senate confirmed chairperson; or, a specific-term appointment, with succession upon the Senate confirmation of a new appointment. Second, we recommend Congress should consider a name change for the Office of Advocacy. Federal agencies confuse the Small Business Administration (SBA) with the Office of Advocacy— failing to include Advocacy in meetings where it could add its regulatory expertise. Even within the Small Business Administration there is confusion on Advocacy’s role, seeing it as an internal office to do its regulatory analyses, even though that is not Advocacy’s primary responsibility. This change would provide clarity and make the office more impactful.

In closing, while small businesses and women entrepreneurs are the driving force of our nation’s economy, we are often saddled with the long-lasting effect of overburdensome regulations. We support the Administration’s efforts to limit new regulations and believe an additional layer of scrutiny provided by the Office of Advocacy is important. While I am out running my business, it gives me comfort that the Office of Advocacy is looking out for me. Given additional authority and an expanded role, Advocacy could accomplish even more for the small business community. Information is power—additional input from small businesses will result in shaping better regulations or prevention of moving harmful regulations forward.

Thank you for inviting me to testify at this important hearing and I look forward to answering any questions.