



July 31, 2013

Office of Information and Regulatory Affairs
Office of Management and Budget
725 17th Street NW
Washington, DC 20503

RE: Draft 2013 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities

These comments are submitted for the record to the Office of Information and Regulatory Affairs (OIRA) on behalf of the National Federation of Independent Business (NFIB) in response to the Draft 2013 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities (report). A notice of availability and request for comments regarding the report was published in the May 21, 2013, edition of the *Federal Register*.

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.

Federal regulation, and the burden it imposes, is one of the most important issues to our small business members. In our most recent *Small Business Economic Trends*, "government requirements and red tape" ranked as the most frequent response to a question regarding the single most important problem our members face, in a tie with taxes.¹

Section 624 of the FY 2001 Treasury and General Government Appropriations Act, also known as the Regulatory Right-to-Know Act, requires the Office of Management and Budget (OMB) to submit a report on the costs and benefits of Federal regulations together with recommendations for reform. The act states that the report should contain estimates of the costs and benefits of regulations in the aggregate, by agency and agency program, and by major rule, as well as an analysis of impacts of Federal regulation on State, local, and tribal governments, small businesses, wages, and economic growth.

NFIB believes that OIRA plays an important role in ensuring that the rules it reviews adhere to sound analysis — including but not limited to costs and benefits, whether the agency has adequately defined a market failure or other problem that requires a regulatory fix, and consideration of less burdensome alternatives for small businesses.

Accordingly, we are concerned with two particular aspects of this report. The first is that the report appears to call into question whether or not small businesses are disproportionately impacted by regulation. The second is the limited scope and data of major rules reviewed by OIRA included in

this report. These concerns are explained in more detail below, followed by suggestions to make the final report a more useful tool.

Regulation disproportionately impacts small businesses

In the section of the report that addresses the impact of regulation on small businesses, the report says the following regarding disproportionate impact: “[t]he evidence in the literature, while suggestive, remains preliminary, inconclusive, and mixed.”

NFIB is surprised that the report calls into question whether or not small businesses are disproportionately affected by regulation. And to a greater extent, we are significantly concerned that such a misperception might affect OIRA’s effort to adequately analyze the impacts of regulation on small businesses as specified in the Regulatory Right-to-Know Act and other relevant executive orders.

Without a doubt, regulation disproportionately impacts small businesses. Small businesses, in most cases, lack dedicated regulatory compliance staff. The task falls to the small business owner, who is an expert in the business he or she owns – not in the technical and complex requirements of federal regulation. This simple fact alone means that small businesses spend more time finding, reviewing, and understanding regulatory requirements than their larger counterparts. In addition, when training or capital equipment costs are required to comply, small businesses have fewer employees over which to spread these costs – meaning that cost per employee is higher. This reality is shown in the Crain and Crain study for the U.S. Small Business Administration’s Office of Advocacy, which the report cites.

Furthermore, lawmakers from both parties have long believed that regulation affects small businesses in unique ways and that agencies need to consider this. The disproportionate impact of regulation on small businesses is one of the most significant reasons that Congress passed, and President Carter signed, the Regulatory Flexibility Act in 1980.

In 1996, when it became clear the RFA did not go far enough to protect small companies, Congress passed the Small Business Regulatory Enforcement Fairness Act subsequently signed by President Clinton. The last three presidents – Clinton, Bush and Obama – have all supported flexible approaches for small businesses in their respective executive orders on regulatory policy.

It is further troubling that OIRA bases its ambiguous view of the effect of regulation on small businesses from a single study that looks at air pollution regulation. This study finds that for some types of hazardous pollutants it examined, larger firms realized a higher cost. Frequently regulations regarding air pollutants are aimed at larger emitters of those pollutants (i.e. larger firms). Therefore it is no surprise that this study reached these conclusions. However, NFIB believes that to use this study as a basis for questioning whether federal regulation, in sum, disproportionately impacts small businesses seems careless at best.

In its final report OIRA should clarify a statement that runs counter to a number of studies and more than 30 years of congressional and presidential support. NFIB believes that OIRA must play a critical role in ensuring that agencies take their small business impact analyses seriously. Without this check, agencies do not have an incentive to complete thorough reviews of their own rules’ impact on small businesses.

Limited scope and data of major rules reviewed by OIRA included

According to the report, only 14 of 47 major rules issued by executive agencies included costs and benefits and were reviewed by the agency for the report. Of the 33 not included, 22 were “transfer” rules. These are rules that “primarily caused income transfers, usually from taxpayers to program beneficiaries.” The report does not include these because, it is implied, OIRA believes they may not have a significant cost on the private sector.

NFIB respectfully disagrees. According to an analysis by the American Action Forum, six of the transfer rules imposed costs of \$1.4 billion and more than 25.7 million hours of paperwork.² Simply omitting these rules from this report does not reflect the true burden these rules have on small businesses.

The rest of the rules not reviewed had either only costs or benefits. While we understand the difficulty of identifying costs and benefits, these are critical to understanding the effects of rules on society. We believe that is one of the primary reasons Congress requires this report. OIRA should require more of agencies, particularly on major rules that have such a heavy economic impact.

Other suggestions for improving the report

NFIB hopes that in the final report OIRA will address the concerns laid out above. However, we believe there is additional information that should be included in these reports on an annual basis. The following items should be included in future reports to help paint a complete picture of the federal regulatory burden. These suggestions may not be covered by existing law and could require Congressional action in order to be implemented. However, OIRA should consider, to the extent possible, implementing these suggestions in future reports.

Include independent regulatory agencies

OIRA reviewed 47 major rules for this report; all from the executive agencies whose rules are subject to review under executive orders 12866 and 13563. However, independent agencies are not covered and therefore not included. For fiscal year 2012, this means that 21 major final rules are not accounted for in this report. NFIB supports S. 1173, the Independent Agency Regulatory Analysis Act, which would make rules issued by independent agencies subject to OIRA review.

This change would lead to the costs and benefits of these rules being included in this report. Rules from independent agencies impose costs just the same as rules from executive agencies and Congress should require that these costs be accounted for.

Include all rules reviewed by OIRA

OIRA should expand this report to cover the costs and benefits of all rules it reviews under executive order 12866 to provide a much more complete picture of the overall impact of federal regulation.

As an example, in calendar year 2012 OIRA reviewed more than 420 rules, according to its website.³ Yet in this report, covering FY 2012, only 47 rules were included. While calendar years and fiscal years do not align perfectly, assuming they are average years, that means this report only includes about 10 percent of the rules OIRA has data on. Looking at all rules reviewed would be extremely helpful.

The fact is that non-major rules can have meaningful costs and benefits. The public is shortchanged by the fact that this report only covers major rules – and not even all major rules. We believe that OIRA should expand the scope of this report to further Congress’s understanding of the impact of federal regulations.

Conclusion

The federal regulatory burden is a significant issue for small business owners, and this report can be an important tool in helping to measure that burden. However, we have serious concerns with this report that should be addressed in the final version. The first is that OIRA should clarify its section on the impact of federal regulation on small businesses. The current section concludes that OIRA is not certain whether or not small businesses are disproportionately burdened by regulation, compared to their larger counterparts. NFIB believes this conclusion is misguided given the facts presented in the report and three decades of federal law designed to address this disproportionate impact.

We also believe that OIRA should include transfer rules in its analysis because these rules still impose significant costs on small businesses, and they account for nearly half of the major regulations this report is intended to cover. It should also demand more complete costs and benefits of the rules it receives from agencies.

In addition, the report would be improved if OIRA were able to review rules issued by independent agencies, whose rules impact the economy in the same way as rules issued by executive agencies. OIRA should also expand the scope of this report to include all of the rules it reviews under Executive Order 12866, because major rules only account for about 10 percent of all rules OIRA reviews in a given year.

We appreciate the opportunity to comment on the report. Should OIRA require additional information, please contact NFIB’s manager of regulatory policy, Daniel Bosch, at 202-314-2052.

Sincerely,



Susan Eckerly
Senior Vice President
Public Policy

¹ NFIB Research Foundation. *Small Business Economic Trends*. July 2013.

<http://www.nfib.com/Portals/0/PDF/sbet/sbet201307.pdf>

² American Action Forum. *Comments of the American Action Forum on the 2013 Draft Report to Congress*. July 9, 2013.

<http://americanactionforum.org/topic/comments-2013-report-congress-benefits-and-costs-federal-regulations>

³ <http://www.reginfo.gov/public/do/eoHistoricReport>