The Heritage Foundation

Prepared Statement of Paul J. Ray

Paths for Reform: How Congress Can Improve the Federal Regulatory System for Small Businesses

Testimony Before the House Committee on Small Business

May 22, 2024

Chairman Williams, Vice Chairman Luetkemeyer, Ranking Member Velázquez, and distinguished members of the Committee, thank you for inviting me to testify today on ways to improve the regulatory environment for small businesses. I am the director of The Heritage Foundation's Roe Institute for Economic Policy Studies, where we focus on research and education about economic and regulatory issues. From June 2018 through January 2021, I served in the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB); for the last year of that period, I had the honor to serve as Administrator of the office. Before that, I served as Counselor to the U.S. Labor Secretary and practiced administrative appellate law at Sidley Austin LLP here in Washington. The views I express in this testimony are my own and should not be construed as representing any official position of The Heritage Foundation.

As this Committee's hearings have recently documented, America's regulatory system fails small businesses. In particular, the system does not provide the predictable, pro-growth environment that small businesses need to thrive.[1] The story of that failure is too long to tell here; suffice it to say that each of the three branches of government bears some responsibility for the regulatory system's disappointing performance, and there are remedies that each branch can offer. Today, I would like to focus on legislative initiatives that would help small businesses as they navigate the regulatory system, while acknowledging that without reform by the executive and judicial branches, legislative reforms will not be enough to help America's small businesses.

Congress is no stranger to reforms to ameliorate the plight of small businesses facing a difficult regulatory environment. But the principal piece of legislation on point, the Regulatory Flexibility Act (RFA) of 1980,[2] leaves much to be desired. Reforms to the RFA, such as to make its retrospective review requirement[3] more meaningful and enforceable, are much needed. But reforms to the RFA are not nearly enough; America's small businesses need a more comprehensive suite of changes to the way government regulates them. The purpose of my testimony today is to discuss several important potential statutory amendments outside the RFA context. While some of the proposals I discuss here would effect sweeping transformations of the regulatory landscape, others are more limited, yet nevertheless important, repairs to the system.

I. The Regulations from the Executive in Need of Scrutiny (REINS) Act

One major problem with today's regulatory system is that it allows regulations to be issued, amended, and rescinded relatively easily, with the result that agencies issue, amend, and rescind them often and in large numbers. These frequent changes to governing law are tremendously disruptive for small businesses. As James Madison put it, rapid and extensive changes to governing law give an

> unreasonable advantage…to the sagacious, the enterprising, and the moneyed few over the industrious and uninformed mass of the people. Every new regulation…presents a

[1] See, for instance, testimony of Paul J. Ray before the House Committee on Small Business, October 19, 2023.
[2] 5 U.S. Code §§ 601 et seq.
[3] Ibid., § 610.

> new harvest to those who watch the change, and can trace its consequences; a harvest, reared not by themselves, but by the toils and cares of the great body of their fellow-citizens.[4]

Small businesses, which generally lack access to sophisticated lobbyists and lawyers, are at a significant disadvantage compared to their larger peers when it comes to predicting and preparing for regulatory change.

One of the main reasons for the regulatory system's mutability is that the system reverses the roles of Congress and the executive. The Founders designed Congress to be slow and deliberative, the executive to be decisive and swift.[5] Critical to the constitutional balance of powers was Congress's first-mover advantage: Congress possessed the initiative in setting policy, with the President and his veto cast in a fundamentally responsive role. But the regulatory system reverses things. Executive agencies can push through regulations far more easily, and faster, than Congress can legislate. While the Administrative Procedure Act[6] and internal executive practice together impose a number of procedural demands that prevent agencies from acting as swiftly and easily as at the administrative state's inception,[7] regulating nevertheless remains far less costly and subject to far fewer obstacles than legislating. All this effectively makes the executive branch the first mover in many policy areas, leaving Congress to counteract any regulations to which it objects. But Congress is simply not set up for the repeated mustering of legislative will that would be necessary to exercise effective control over the many regulations that the energetic executive branch can issue. Congress has attempted to keep up with the executive by streamlining the process for disapproving rules in the Congressional Review Act,[8] but that act's utility has proven extremely limited because under it, regulations go into effect unless Congress acts (and the President signs) a resolution of disapproval. In other words, the executive retains its first-mover advantage under the Congressional Review Act.

The Regulations from the Executive in Need of Scrutiny (REINS) Act[9] would be an important step toward restoring the Constitution's original roles for Congress and the executive and thus stabilizing the regulatory system. The REINS Act would require affirmative congressional approval of major agency rules.[10] The bill, which applies to executive branch and independent agencies alike,[11] defines major rules as those that either OIRA or the regulating agency has determined are likely to result in an annual economic effect of $100 million or more; a major increase in costs or prices; or significant adverse effects on certain other desiderata, such

[4] Alexander Hamilton, John Jay, and James Madison, *The Federalist* No. 62.
[5] Ibid., No. 70.
[6] 5 U.S. Code § 551 et seq.
[7] James M. Landis, *The Administrative Process* (New Haven, CT: Yale University Press, 1938) ("I have seen as little as twenty minutes elapse between the drafting and promulgation of a permissive rule where the exigencies of the situation called for quick action").
[8] 5 U.S. Code § 801 et seq.
[9] The REINS Ac has been introduced many times in recent years. See, for example, REINS Act of 2023, H.R. 277 (2023).
[10] Ibid., proposed § 801(b)(1).
[11] Ibid., § 804(1).

as competition.[12] The bill also contains provisions for expedited congressional review of pending regulations.[13]

The REINS Act would in some measure revive the legislative process for the most important regulations, thus layering the robust deliberative procedures specified in Article I of the Constitution atop the much less stringent procedures employed by agencies today. In addition to protecting the separation of powers, such an arrangement would recover a measure of stability of the sort that the Founders hoped to achieve when they designed the Constitution's rigorous legislative process. To be sure, the REINS Act is imperfect. The most recent draft contains loopholes of which agencies would surely avail themselves.[14] And under it, agencies would retain something of a first-mover advantage as the drafters of regulations. Nevertheless, the bill would materially improve the regulatory system's present mutability and thus help small businesses to achieve the stability they need.

II. The All Economic Regulations Are Transparent Act

To survive and succeed under a regulatory system as mutable as the current one, businesses need to be able to predict future regulatory changes as far in advance as possible; doing so allows them to adopt more efficient strategies for managing compliance and helps them to avoid business decisions that are unwise in light of pending regulatory changes. But small businesses often lack the resources to monitor future regulatory developments as closely as their larger competitors. After all, the government announces pending regulatory changes only twice a year in the Unified Agenda of Regulatory and Deregulatory Actions, a massive publication that many small business owners would find difficult to navigate. Moreover, the anticipated timelines for many of the rulemakings covered by each Unified Agenda are notoriously unreliable. Specialist trade publications and lobbyists can provide much more accurate and granular information about the timeline for development of pending regulations, but many small businesses lack access to these sources of information. Further, some regulations move swiftly from commencement to completion within the interval between publications of the Unified Agenda.

The All Economic Regulations Are Transparent (ALERT) Act[15] would help to rectify this problem. The bill would require agencies to submit to OIRA monthly information about each pending rule.[16] The submitted information would include a summary of the rule and its legal basis; for rulemakings in the final rule phase and for which the agency anticipates finalization within a year, the bill would require disclosure of the rule's anticipated costs and economic effects as well.[17] Crucially, the bill would require that agencies provide "an approximate

[12] Ibid., § 804(2).
[13] Ibid., §§ 802 and 803.
[14] For instance, agencies could circumvent the bill's reach by breaking their economically significant regulations up into clusters of rules, each with only a modest impact on the economy or other relevant metrics.
[15] H.R. 262 (2023).
[16] See ibid., proposed § 651.
[17] Ibid., § 651(1) and (2).

schedule for completing action on" any proposed rule to be finalized within a year.[18] OIRA must publish online the information received from agencies within 30 days of its receipt,[19] and agencies are forbidden to give effect to a final rule until the author agency's information submission to OIRA has been available online for at least six months.[20]

By requiring online publication of frequent updates to anticipated rulemaking timelines, the ALERT Act would level the playing field between large and small businesses, ensuring that all businesses can plan efficiently in light of the most recent developments in ongoing rulemakings. And by requiring publication at least six months in advance of effectiveness, the bill would prevent small businesses from being blindsided by fast-moving regulatory changes.

III. The Renewing Efficiency in Government by Budgeting Act

Another major problem that small businesses face is that today's regulatory system fails to provide the pro-growth environment they need to thrive. Federal agencies impose enormous costs on business owners and consumers. Indeed, the American Action Forum, using agency-provided data, estimates regulatory costs from 2021 to the present day at about $1.6 trillion[21]—a staggering figure larger than the annual gross domestic product of all but the 13 largest economies.[22] And while some of these costs are doubtless reasonable ones for the benefits they purchase, there is reason to believe that agencies place a higher value on the benefits they create than the American people do.

That is because agencies tend to overemphasize the worth of their own specialized goals. After all, an "agency succeeds by accomplishing the goals Congress set for it as thoroughly as possible—not by balancing its goals against other, equally worthy goals."[23] From their statutory missions to the metrics by which their success is evaluated to the priorities of their staff,[24] agencies tend to prioritize achieving their specialized goals more highly than the median member of the public would, which is one reason to think that the costs of federal regulation are higher than the people would be willing to pay. Another reason is that agencies generally do not coordinate with respect to the costs they impose on the public, so costs that seem reasonable to each agency that imposes them may together total far more than the people would choose to pay. Excessively costly regulations can be especially burdensome for small businesses, which often

[18] Ibid., § 651(2)(A).
[19] Ibid., § 652.
[20] Ibid., § 653.
[21] American Action Forum, "Regulation Rodeo: Explore the Data," https://www.regrodeo.com/ (accessed May 16, 2024).
[22] The World Bank, Data, GDP (using GDP estimates from 2022), https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?most_recent_value_desc=true (accessed May 7, 2024).
[23] Christopher C. DeMuth and Douglas H. Ginsburg, "White House Review of Agency Rulemaking," *Harvard Law Review*, Vol. 99 (1986), p. 1081.
[24] See, for example, David B. Spence, "Administrative Law and Agency Policy-Making: Rethinking the Positive Theory of Political Control," *Yale Journal on Regulation*, Vol. 14 (1997), p. 424.

lack the margins and economies of scale that give their larger competitors room to respond efficiently to the imposition of new regulatory costs.

One solution to this problem is for politically accountable actors to set a regulatory budget. The Renewing Efficiency in Government by Budgeting (REG Budgeting) Act[25] would direct the OMB Director to set an annual regulatory budget (specifically, a limit on additional unfunded regulatory costs) for the federal government as a whole and for each agency.[26] It would forbid agencies to make a rule effective if doing so would push the author agency over its budget, unless the agency first obtains permission from Congress.[27] The bill would require congressional approval of any positive regulatory budget, that is, a budget allowing agencies to impose additional unfunded regulatory costs.[28]

The REG Budgeting Act of course bears a strong resemblance to President Trump's Executive Order 13771,[29] though EO 13771 included a "2-for-1" requirement that the REG Budgeting Act lacks. EO 13771 achieved a large measure of success; under its guidance, agencies eliminated $198.6 billion in regulatory costs.[30] While the debt that the REG Budgeting Act owes to EO 13771 is obvious, one should not overestimate it. After all, EO 13771 itself drew on regulatory budgeting efforts in other countries, and in the United States the idea of regulatory budgeting is neither new nor the exclusive province of the federal government; the REG Budgeting Act thus takes its place in a history larger and longer than the story of EO 13771.[31] Further, the bill departs from EO 13771 in some important (and, to my mind, helpful) ways. Most significantly, by requiring congressional approval for positive regulatory budgets and for agency exceedances of their budgets, the bill would introduce Congress into the regulatory budgeting process in a way that EO 13771 did not.

All told, the REG Budgeting Act would represent an important step toward getting regulatory costs under control by those most likely to understand the negative impact of these costs on small businesses.

IV. The Unfunded Mandates Accountability and Transparency Act

Too often, agencies issue regulations that impose unnecessary costs or costs that are not justified by corresponding benefits. Among the most promising ways to prevent such wasteful

---

[25] H.R. 7867 (2024).
[26] See ibid., proposed § 210(a)(1)(A).
[27] See ibid., § 210(b)(1).
[28] See ibid., § 210(a)(1)(C).
[29] *Reducing Regulation and Controlling Regulatory Costs*, 82 Fed. Reg. 9339 (2017).
[30] Office of Information and Regulatory Affairs, "Regulatory Reform under Executive Order 13771: Final Accounting for Fiscal Year 2020," https://www.reginfo.gov/public/pdf/eo13771/EO_13771_Final_Accounting_for_Fiscal_Year_2020.pdf (accessed May 17, 2024).
[31] See, for example, James Broughel, "The Regulatory Budget in Theory and Practice: Lessons from the U.S. States," *Harvard Journal of Law & Public Policy*, Vol. 25 (2022) (describing regulatory budget proposals in the United States in the 1970s and 1980s as well as regulatory budgeting efforts in the United Kingdom and Canada and several U.S. states).

regulations is cost-benefit analysis (CBA). CBA is one of the cornerstones of OIRA review under EO 12866.[32] Under that executive order, agencies must identify and compare (and quantify where possible) the benefits and costs of proposed and final regulations, as well as the benefits and costs of feasible alternative approaches (for economically significant regulations).[33] CBA prepared under EO 12866 leads agencies to propose and finalize regulations that are more efficient and less costly than alternative regulatory approaches.

EO 12866 exists, like all executive orders, only at the discretion of the sitting President. And while every President since the order's issuance under President Clinton has endorsed EO 12866, its continuing existence under future administrations is by no means guaranteed. Further, EO 12866's demand for CBA is not binding at law; agencies can disregard it at the President's command or with his dispensation or forgiveness. These facts point to the need for a statutory command to conduct CBA.

The Unfunded Mandates Reform Act (UMRA) of 1995[34] was a step in this direction, but it suffers from a number of weaknesses. First, its focus is on states, cities, and tribes rather than the private sector, though analysis under UMRA must anticipate costs and benefits to the private sector.[35] Second, while it requires consideration of feasible alternatives, it does not require the preparation of CBA for them.[36] And third, it gives agencies wide leeway to prefer qualitative (and thus less informative) CBA over quantitative CBA.[37]

The Unfunded Mandates Accountability and Transparency Act (UMATA)[38] would remedy these weaknesses. It would require CBA for alternatives, potentially greatly assisting agencies as they choose between regulatory options.[39] It would also instruct agencies to quantify anticipated costs and benefits to the extent feasible.[40] These changes would serve as a helpful backstop to EO 12866 and lend Congress's imprimatur to the order's CBA requirements, in turn impeding issuance of wasteful or unjustified regulations that can impose excessive burdens on small businesses.

Perhaps most important for present purposes, UMATA would put the private sector, and small businesses in particular, at the front and center of legislative concern. It would extend UMRA's regulatory intergovernmental consultation provisions[41] to the private sector, and it would specifically require agency officials to consult with small businesses and affirmatively seek out their input.[42] UMATA would further improve on UMRA's consultative process,

---

[32] *Regulatory Planning and Review*, 58 Fed. Reg. 51735 (1993).
[33] Ibid., § 6(a)(3).
[34] 2 U.S. Code §§ 1501 et seq.
[35] Ibid., § 1532(a)(2).
[36] Ibid., §§ 1532 and 1535.
[37] Ibid., § 1532.
[38] H.R. 3230 (2023).

[40] Ibid., proposed § 202(c)(1)(A).
[41] 2 U.S. Code § 1534.
[42] H.R. 3230 § 3.

requiring that consultations begin before issuance of a notice of proposed rulemaking (thus ensuring that the agency has small business input when the agency's own thinking is maximally malleable).[43] The bill would also require agencies to hear from parties to the consultations about the "cumulative impact of regulations" on them.[44] These improvements stand to amplify the voice of small business in the rulemaking process and so foster the pro-growth regulatory environment that small businesses need to thrive.

V. The Guidance Out of Darkness Act and the Guidance Clarity Act

Issuing regulations is not the only way agencies shape private-sector conduct. They also issue guidance documents which, though they lack the force and effect of law, can powerfully influence regulated parties. That is often less because they represent the best interpretation of the law and more because they indicate a path for avoiding litigation with the author agency: regulated parties who follow the agency's guidance are unlikely to be the objects of enforcement action, whereas those who go their own way are more likely to have to prove the lawfulness of their conduct in administrative or judicial proceedings. For many regulated parties, the mere prospect of litigation is sufficiently concerning to make compliance with agency guidance the best course of action.

But there is no equivalent of the Code of Federal Regulations for guidance, which historically has been housed on websites, or even in filing cabinets, scattered across the federal government. During my time leading OIRA, I discovered that even agencies themselves were uncertain where, or even how, to find all their guidance. Difficulty finding guidance, of course, bears most severely on individuals and small entities, who often cannot afford to hire sophisticated counsel with specialized knowledge of all the guidance a particular agency has issued over the years. In 2019, President Trump addressed this problem by issuing EO 13891, which required each agency to put all its guidance online on a single, searchable website; all guidance omitted from the website would be rescinded.[45] President Biden, though, revoked that order in January 2021.[46]

The Guidance Out of Darkness (GOOD) Act[47] would ameliorate the difficulties of small businesses by requiring each agency to post its effective guidance on a single website. The guidance must be suitably subcategorized, which would allow the public to browse guidance by topic.[48] Guidance not featured on an agency's guidance portal is to be rescinded.

Finding guidance is not the only difficulty small businesses have; unlike more sophisticated competitors, they may not understand the difference between non-binding guidance and binding regulations. EO 13891 required agencies to provide a disclaimer on their guidance

[43] Ibid.
[44] Ibid.
[45] *Promoting the Rule of Law Through Improved Agency Guidance Documents*, 84 Fed. Reg. 55235 (2019).
[46] *Revocation of Certain Executive Orders Concerning Federal Regulation*, EO 13992, 86 Fed. Reg. 7049 (2021).
[47] H.R. 890 (2023).
[48] Ibid., § 3.

documents clarifying that they are non-binding.[49] The Guidance Clarity Act[50] would require agencies to provide such a disclaimer on the first page of each guidance document.

VI. The Information Quality Assurance Act

The content of a regulation is, of course, heavily influenced by the information on which the regulator relies in crafting it. That is why large businesses and trade associations invest significantly in educating their regulators, supplying them with studies and other sources of data that can profoundly shape the requirements of final regulations. But small businesses are at a disadvantage in this regard. Often, they lack the sophistication and resources to prepare thorough-going evidentiary submissions. By the same token, they are less likely than their larger peers to be able to survey for themselves the extant scholarly literature on which agencies draw in regulating and so less likely to be able to engage that literature effectively in their comments submitted under 5 U.S.C. § 553. They are also less likely than their peers to be able to critique the data sources on which agencies rely.

The Information Quality Assurance Act (IQAA)[51] would help small businesses to understand and engage the sources of information on which agencies rely in rulemaking. The IQAA would mark significant progress in information quality control for federal rulemakings, which at present is governed by the very sparse requirements of the Information Quality Act and by the OMB and agency guidelines issued thereunder.[52] The bill would require OMB's guidelines to demand that, where influential information is concerned, agencies use the "best reasonably available information and evidence" in rulemakings.[53] It would also require disclosure in the public docket for each rulemaking of "any model, methodology, or source of scientific, technical, demographic, economic, or statistical information or evidence" on which the agency relied or plans to rely in regulating.[54]

These new provisions would help small businesses in several ways. First, they would give small businesses access to the information universe relevant to an agency's regulatory decisions, something that larger businesses can already obtain for themselves in some measure through hiring experts familiar with the relevant scholarship. Second, by requiring that agencies use the best reasonably available information, the IQAA would diminish the ability of larger entities to influence the content of regulations by submitting thinly supported, outcome-driven studies. This provision would push agencies to investigate the reliability of the studies on which they intend to rely—something small businesses are often unable to do for themselves.

[49] Ibid., § 4(a)(1).
[50] H.R. 4428 (2023).
[51] H.R. 7219 (2024).
[52] Public Law 106-554 § 515.
[53] H.R. 7219, proposed § 3522(b)(1).
[54] Ibid., § 3522(c).

Conclusion

The regulatory system's failures make it much more difficult than it should be for small businesses to survive and thrive. Fixing the system's many deficiencies will require a comprehensive set of legislative reforms. The legislative proposals I have discussed above would constitute important steps toward a regulatory system that provides the predictable, pro-growth environment that small businesses need.

APPENDIX

The Heritage Foundation is a public policy, research, and educational organization recognized as exempt under section 501(c)(3) of the Internal Revenue Code. It is privately supported and receives no funds from any government at any level, nor does it perform any government or other contract work.

On information and belief, Heritage Foundation is the most broadly supported think tank in the United States. During 2023, it had hundreds of thousands of individual, foundation, and corporate supporters representing every state in the U.S. Its 2023 operating income came from the following sources:

Individuals 82%

Foundations 14%

Corporations 1%

Program revenue and other income 3%

The top five corporate givers provided The Heritage Foundation with 1% of its 2023 income. The Heritage Foundation's books are audited annually by the national accounting firm of RSM US, LLP.

Members of The Heritage Foundation staff testify as individuals discussing their own independent research. The views expressed are their own and do not reflect an institutional position of The Heritage Foundation or its board of trustees.