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Congress of the United States

U.S. House of Representatives

Committee on Small Business

2361 Rayburn House Office Building
Washington, DC 20515-6315

MEMORANDUM

To:	Members, Subcommittee on Economic Growth, Tax, and Capital Access
From:	Andy Kim, Chairman
Date:	July 21, 2019
Re:	Subcommittee hearing: "How Regulations Stifle Small Business Growth"

The House Committee Subcommittee on Economic Growth, Tax, and Capital Access on Small Business will meet for a hearing titled "How Regulations Stifle Small Business Growth." The hearing is scheduled to begin at **9:00 A.M. (CDT) on Monday, July 22, 2019 at Oklahoma State University – Tulsa, North Hall Conference Center, Room 150, 700 N. Greenwood Ave. Tulsa, OK, 74106.** The hearing will enable the Committee to generally examine the regulatory landscape small businesses and entrepreneurs must navigate, including its impact on their ability to successfully operate a business, and the effect on their communities at large. Members will hear from a variety of witnesses who will address how regulations impact their businesses and their local communities. The witnesses will be:

- Mr. Chad Selman, Owner, Selman Farms, LLC, Skiatook, OK
- Mr. Chris Jordan, President and CEO, The Farmers State Bank, Stigler, OK
- Mr. Howard L. Ground, Director of Regulatory Affairs, The Petroleum Alliance of Oklahoma, Oklahoma City, OK
- Ms. Elizabeth Osburn, Senior Vice President of Government Affairs, Tulsa Regional Chamber, Tulsa, OK

Background

Federal agencies continue to release tens of thousands of pages of regulations each year as a result of Congress delegating rule making and implementing authority via legislation. Each year agencies usually issue more than 3,000 final rules on topics ranging from the timing of bridge openings to the permissible levels of arsenic and other contaminants in drinking water.

Small businesses tend to bear a disproportionate share of the federal regulatory burden. When it comes to regulations, small businesses do not have the same resources as the bigger companies to comply. They lack the compliance departments of their larger counterparts, and the costs of hiring outside consultants and counsel to assist with regulatory compliance are expensive. The disparity in regulatory costs between large and small businesses occurs across nearly every industry. In addition, The Office of the National Ombudsman at the Small Business Administration (SBA) releases an annual report grading the agencies on their responsiveness, regulatory fairness, and

compliance assistance for small businesses. In Fiscal Year 2017, the Departments of Interior received an overall grade of "C" and the Department of Veterans Affairs received a "D".[1]

Federal regulation, like taxing and spending, is one of the basic tools of government used to implement public policy. The process of developing and framing rules is central to the implementation of public policy. However, in order to promote small business growth and development, policy makers should ensure that regulations are not overly burdensome on small employers.

Costs and Benefits of Regulation

According to the Office of Management and Budget (OMB), the estimated annual benefits of major Federal regulations reviewed by OMB from October 1, 2006, to September 30, 2016, for which agencies estimated and monetized both benefits and costs, are in the aggregate between $219 billion and $695 billion, while the estimated annual costs are in the aggregate between $59 billion and $88 billion, reported in 2001 dollars.[2] In 2015 dollars, aggregate annual benefits are estimated to be between $287 and $911 billion and costs between $78 and $115 billion.[3] These ranges reflect uncertainty in the benefits and costs of each rule at the time that it was evaluated.[4]

Statutory Rulemaking Requirements

The rulemaking process begins when Congress passes a statute either requiring or authorizing an agency to write and issue certain types of regulations. An initiating event (e.g., a recommendation from an outside body or a catastrophic accident) can prompt either legislation or regulation (where regulatory action has already been authorized). The statutory basis for a regulation can vary greatly in terms of its specificity, from (1) very broad grants of authority that state only the general intent of the legislation and leave agencies with a great deal of discretion as to how that intent should be implemented, to (2) very specific requirements delineating exactly what regulatory agencies should do and how they should take action.

Implicit within the steps is an elaborate set of procedures and requirements that Congress, and various Presidents have developed during the past 60 to 70 years to guide the federal rulemaking process. Some of these rulemaking requirements apply to virtually all federal agencies, some apply only to certain types of agencies, and others are agency-specific. Together, these rulemaking provisions are voluminous and require a wide range of procedural, consultative, and analytical actions on the part of rulemaking agencies. Some observers contend that the requirements have resulted in the "ossification" of the rulemaking process, causing agencies to take years to develop final rules.[5] At the same time, while these congressional and presidential rulemaking requirements

[1] Small Bus. Admin., Office of the National Ombudsman, 2017 Annual Report to Congress, Lifting the Weight of Burdensome Regulations and Revitalizing the Spirit of American Entrepreneurship.

[2] Office of Management and Budget, Office of Information and Regulatory Affairs, 2017 Draft Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act, 2017, available at https://www.whitehouse.gov/wp-content/uploads/2017/12/draft_2017_cost_benefit_report.pdf.

[3] *Id*.

[4] *Id*.

[5] *See, e.g.,* Thomas O. McGarity, "Some Thoughts on 'Deossifying' the Rulemaking Process," Duke Law Journal, vol. 41 (June 1992), pp. 1385-1462; Richard J. Pierce, Jr., "Seven Ways to Deossify Agency Rulemaking," 47 Administrative Law Review, vol. 47, winter 1995, pp. 59-93; Paul R. Verkuil, "Rulemaking Ossification—A Modest Proposal," Administrative Law Review, vol. 47 (summer 1995), pp. 453-459.

are numerous, it is not clear whether they or some other factors (e.g., lack of data, congressionally imposed delays, court challenges, etc.) are the primary cause of the long time-frames that are sometimes required to develop and publish final rules.

Discussed below are the cross-cutting requirements that are applicable to more than one agency. Some of these rulemaking requirements have been in place for more than 70 years, but most have been implemented within the past 30 years. Some of these statutory requirements apply to Cabinet departments and independent agencies; others apply to those agencies as well as the independent regulatory agencies.

Federal Register Act

To establish a central repository for regulations, Congress enacted the Federal Register Act, which became law in July 1935 (44 U.S.C. Chapter 15). The act established a uniform system for handling agency regulations by requiring: (1) the filing of documents with the Office of the Federal Register; (2) the placement of documents on public inspection; (3) publication of the documents in the Federal Register; and (4) (after a 1937 amendment) permanent codification of rules in the Code of Federal Regulations. Publication of a rule in the Federal Register provides official notice of its existence and contents. Other documents that are generally published in the Federal Register include presidential proclamations and executive orders, notices, and documents that the President or Congress require to be published.

Administrative Procedure Act

The most long-standing and broadly applicable federal rulemaking requirements are in the Administrative Procedure Act (APA) of 1946 (5 U.S.C. §551 et seq.). The APA was written to bring regularity and predictability to agency decision-making, by providing for both formal and informal rulemaking. Formal rulemaking is used in ratemaking proceedings and in certain other cases when rules are required by statute to be made "on the record" after an opportunity for a trial-type agency hearing. However, few statutes require such on-the-record hearings. Informal rulemaking, also known as "notice and comment" rulemaking, is used much more frequently.

In informal rulemaking, the APA generally requires that agencies publish a notice of proposed rulemaking (NPRM) in the Federal Register. The notice must contain: (1) a statement of the time, place, and nature of public rulemaking proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms/substance of the proposed rule or a description of the subjects and issues involved. After giving "interested persons" an opportunity to comment on the proposed rule, and after considering the public comments, the agency may then publish the final rule, incorporating a general statement of its basis and purpose. Although the APA does not specify the length of this public comment period, agencies commonly allow at least 30 days. Public comments as well as other supporting materials (e.g., hearing records or agency regulatory studies but generally not internal memoranda) are placed in a rulemaking "docket" which must be available for public inspection. Finally, the APA states that the final rule cannot become effective until at least 30 days after its publication unless: (1) the rule grants or recognizes an exemption or relieves a restriction; (2) the rule is an interpretative rule or a statement of policy; or (3) the agency determines that the rule should take effect sooner for good cause, and publishes that determination with the rule.

National Environmental Policy Act

The National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. §§4321-4347) was the first statute to require an "impact statement" as a way to ensure that federal agencies give special consideration to certain issues during the rulemaking process. NEPA requires all federal agencies to include in every recommendation or report related to "major Federal actions significantly affecting the quality of the human environment" a detailed statement on the environmental impact of the proposed action. Initially, though, agencies make a threshold determination (known as an "environmental assessment") as to whether the rule or other action represents a significant impact on the environment. If not, the agency issues a "finding of no significant impact." If the agency concludes that there is a significant impact, the agency then prepares a full "environmental impact statement" describing the likely effects of the rule.

According to the act and its implementing regulations developed by the Council on Environmental Quality (CEQ), the environmental impact statement must delineate the direct, indirect, and cumulative effects of the proposed action.[6] Before developing any such environmental impact statement, NEPA requires the responsible federal official to consult with and obtain comments of any federal agency that has jurisdiction by law or special expertise regarding any environmental impact involved. Agencies must make copies of the statement and the comments and views of appropriate federal, state, and local agencies available to the President, the CEQ, and to the public. The adequacy of an agency's environmental impact statement is subject to judicial review.

Paperwork Reduction Act

The Paperwork Reduction Act (PRA) (44 U.S.C. §§3501-3520) was originally enacted in 1980. One of the purposes of the PRA is to minimize the paperwork burden for individuals, small businesses, and others resulting from the collection of information by or for the federal government. The act generally defines a "collection of information" as the obtaining or disclosure of facts or opinions by or for an agency by 10 or more nonfederal persons. Many information collections, recordkeeping requirements, and third-party disclosures are contained in or are authorized by regulations as monitoring or enforcement tools. In fact, these paperwork requirements are the essence of many agencies' regulatory provisions. The PRA requires agencies to justify any collection of information from the public by (1) establishing the need and intended use of the information, (2) estimating the burden that the collection will impose on respondents, and (3) showing that the collection is the least burdensome way to gather the information.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) of 1980 (5 U.S.C. §§601-612), requires federal agencies to assess the impact of their forthcoming regulations on "small entities," which the act defines as including small businesses, small governmental jurisdictions, and certain small not-for-profit organizations. Under the RFA, Cabinet departments and independent agencies as well as independent regulatory agencies must prepare a regulatory flexibility analysis at the time certain proposed and final rules are issued. The analysis for a proposed rule is referred to as an "initial regulatory flexibility analysis" (IRFA) and the analysis for a final rule is referred to as a "final regulatory flexibility analysis." The RFA requires the analysis to describe, among other things: (1) the reasons why the regulatory action is being considered; (2) the small entities to which the proposed rule will apply and, where feasible, an estimate of their number; (3) the projected

[6] NEPA regulations are codified at 40 CFR Parts 1500-1508.

reporting, recordkeeping, and other compliance requirements of the proposed rule; and (4) any significant alternatives to the rule that would accomplish the statutory objectives while minimizing the impact on small entities.

However, these analytical requirements are not triggered if the head of the issuing agency certifies that the proposed rule would not have a "significant economic impact on a substantial number of small entities." The RFA does not define "significant economic impact" or "substantial number of small entities," thereby giving federal agencies substantial discretion regarding when the act's analytical requirements are initiated. Also, the RFA's analytical requirements do not apply to final rules for which the agency does not publish a proposed rule.[7]

The RFA initially did not permit judicial review of agencies' actions under the act. However, amendments to the act in 1996 as part of the Small Business Regulatory Enforcement Fairness Act (SBREFA) (110 Stat. 857, 5 U.S.C. §601 note) permitted judicial review regarding, among other things, agencies' regulatory flexibility analyses for final rules and any certifications that their rules will not have a significant impact on small entities. As a result, a small entity that is adversely affected or aggrieved by an agency's determination that its final rule would not have a significant impact on small entities could seek judicial review of that determination within one year of the date of the final agency action. In granting relief, a court may remand the rule to the agency or defer enforcement against small entities. The addition of judicial review in 1996 is generally viewed as a significant strengthening of the RFA and is believed to have improved agencies' compliance with the act.

Small Business Regulatory Enforcement Fairness Act

As noted above, certain provisions in SBREFA amended the RFA to permit judicial review and to permit small entities to participate in EPA and OSHA rulemaking before a proposed rule with a significant impact on small entities is published. Other provisions in SBREFA did not amend the RFA but imposed new rulemaking-related requirements on federal agencies. For example, Section 212 of SBREFA requires agencies to develop one or more compliance guides for each final rule or group of related final rules for which the agency is required to prepare a regulatory flexibility analysis. Section 213 of SBREFA required federal agencies regulating the activities of small entities to establish a program for responding to inquiries concerning compliance with applicable statutes and regulations. These are just a few examples of changes made to the RFA to improve small business regulatory procedures.

Small Business Paperwork Relief Act

In June 2002, Congress enacted, and the President signed the Small Business Paperwork Relief Act of 2002 (P.L. 107-198). The act amended the Paperwork Reduction Act to, among other things, require each agency to establish a single point of contact to act as a liaison for small business concerns with regard to information collection and paperwork issues. It also directed agencies to make a special effort to reduce information collection burdens for small businesses with fewer than 25 employees. OMB was directed to publish in the Federal Register and make available on the Internet an annual list of the compliance assistance resources available to small businesses.

[7] Many agencies are apparently aware of this limitation; GAO estimated that in more than 500 final rules published in 1997, the agencies specifically stated that the RFA was not applicable or that a regulatory flexibility analysis was not required because the action was not preceded by an NPRM. See GAO/GGD-98-126, p. 31.

The act also required agencies to report to Congress the amount of penalty relief provided to small businesses and established a task force to study the feasibility of streamlining information collection requirements on small businesses.

Conclusion

During the past several decades, Congress and various Administrations have made numerous attempts to add structure, economy, efficiency, accountability, public access, and transparency to the regulatory process. In this regard, Congress has enacted many laws that require some type of procedure, review, or analysis of draft rules by the rulemaking agencies themselves or by outside parties. Presidential rulemaking requirements have often focused on coordination of agency regulatory efforts with the President's priorities and attempts to improve the quality of regulations through cost-benefit analysis, risk assessment analysis, and the consideration of specific factors in the rulemaking process. One of the main goals of these requirements is to ensure any regulations ultimately promulgated by agencies are not too burdensome on small businesses.