Testimony of

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On Behalf Of the
National Association of Home Builders

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On behalf of the more than 140,000 members of the National Association of Home Builders (NAHB), I appreciate the opportunity to submit this testimony. My name is Carl Harris. I am a builder from Wichita, Kansas, and co-founder of Carl Harris Co., Inc. As a specialty contracting firm founded in 1985 we employ approximately twenty individuals and are engaged in a variety of residential and light-commercial construction applications. I also serve as a national area chairman for the National Association of Home Builders and am the 2013 President of the Kansas Building Industry Association.

As a small businessman operating in a heavily regulated industry, I understand how difficult (and often costly) it can be to comply with the myriad of government regulations that apply to my day-to-day work. As a frequent industry representative in the statutorily-mandated small business feedback portion of the regulatory rulemaking process, I am well aware of the role small businesses play in informing regulators of the potential burdens borne by small business with new regulations. I am also aware of the strengths and weaknesses inherent to the process.

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 is focusing today on the impacts of regulation on small businesses.

The Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA)[1] 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. Such analysis shall describe the impact of the proposed rule on small entities."[2]

The RFA states that an initial regulatory flexibility analysis (IRFA) shall address the reasons that an agency is considering the action; the objectives and legal basis of the rule; the type and number of small entities to which the rule will apply; the projected reporting, record keeping, and other compliance requirements of the proposed rule; and all federal rules that may duplicate, overlap, or conflict with the proposed rule. The agency must also provide a

[1] 5 U.S.C. 601-612
[2] 5 U.S.C. 603(a).

description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes which minimize any significant economic impact of the proposed rule on small entities.[3]

Section 605 of the RFA allows an agency, in lieu of preparing an IRFA, to certify that a rule is not expected to have a significant economic impact on a substantial number of small entities. If the head of the agency makes such a certification, the agency must publish the certification in the Federal Register along with a statement providing the factual basis for the certification.[4] The agency must then prepare a final regulatory flexibility analysis (FRFA) for publication with the final rule.[5] The FRFA must include a succinct statement of the need for, and the objectives of, the rule, a description of and the estimate of the number of small entities to which the rule will apply, a description of the projected reporting, recordkeeping, and other compliance requirements of the rule, and a description the steps the agency has taken to minimize the significant economic impacts on small entities consistent with the stated objectives and the factual, policy, and legal reasons why the selected option was chosen and the alternatives rejected.[6]

In addition, under the 1996 amendments to the RFA, known as the Small Businesses Regulatory Enforcement Fairness Act (SBREFA)[7], when the Occupational Safety and Health Administration (OSHA) or Environmental Protection Agency (EPA) is required to prepare an IRFA[8], they must first notify the Chief Counsel for Advocacy of the Small Business Administration ("Advocacy") and provide Advocacy with information on the potential impacts of the proposed regulation on small entities and the type of small entities that may be affected. Advocacy must then identify individual representatives of affected small entities for the purpose of obtaining advice and recommendations about the potential impacts of the proposed rule, and the agency must convene a review panel made up of the agency, Advocacy, and the Office of Management and Budget 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 shall modify the proposed rule, the IRFA, or the decision on whether an IRFA is required.[9] While there are exceptions to the requirement to conduct a SBREFA panel,

[3] 5 U.S.C. 603(c).
[4] 5 U.S.C. 605.
[5] 5 U.S.C 604.
[6] 5 U.S.C. 604(a).
[7] 5 U.S.C. 609.
[8] Section 1100G of Dodd-Frank amended § 609(b) to add CFPB to the list of agencies.
[9] 5 U.S.C. 609(b) (1) through (6).

these are limited to situations where the agency certifies that the rule will have a minimal impact.[10]

Small Entity Input Considered After the Negotiated Rule

In 2008, OSHA proposed the Cranes and Derricks Rule, which was intended to protect workers from the hazards associated with hoisting equipment in construction. For the development of this rule, OSHA relied on the negotiated rulemaking process, wherein the rule is developed by a committee comprised of individuals who represent the interests of those who will be significantly affected by the rule.

Unfortunately it wasn't until after the negotiated rulemaking process was complete that OSHA convened a Small Business Advocacy Review Panel to evaluate the potential impact of the rule on small entities. I was fortunate to have participated as a small entity representative in the review of the proposed Safety Standard for Cranes and Derricks in Construction. Several Small Entity Representatives (SERs), myself included, raised concerns at the time that the Cranes and Derricks proposal did not differentiate between crane applications on residential construction sites and large commercial construction sites. As a result, any rule issued with this fundamental oversight would disproportionately impact small entities.

I use cranes almost every day for our residential and light commercial work. We use cranes to set large trusses, steel framing for greater clear heights and greater open spaces, and precast concrete pieces including floors over basements and safe rooms.

I personally put forward an effective, feasible alternative that would save lives and reduce injuries in a more cost-effective way by developing regulations for crane operator certification which are appropriate to the equipment that is being used and the risks presented by that equipment. This included principles of what should be required for crane operators: employer training for the specific equipment in use, employer assessment of the conditions of the job site, and the equipment and certification by the employer that the training has been completed.

Again, it is unfortunate that small businesses were not brought in until after the rule had already been developed through the negotiated rulemaking process. As it was, the process seemed little more than a procedural hurdle with little interest from OSHA to make changes based on the feedback received.

[10] 5 U.S.C. 609(c).

Poor Economic Analysis and the True Costs to Small Entities

In 2010, OSHA proposed revising its Occupational Injury and Illness Recordkeeping regulation to include additional reporting requirements on work-related musculoskeletal disorders (MSDs).

While OSHA certified, in accordance with the Regulatory Flexibility Act (RFA), that the proposed recordkeeping rule would "not have a significant impact on a substantial number of small entities," industry groups urged OSHA to solicit further input on the impact of the proposed rule on small businesses by convening Small Business Advocacy Review Panel, as mandated by the RFA. However, in lieu of a proper small business panel, OSHA convened a series of teleconferences in 2011, which I participated in, to reach out to the small business community for input on the proposal.

During the teleconferences, I raised the concern that the proposed rule would result in additional costs to small employers which OSHA had not yet considered. Recording MSDs entails far more than simply placing a check mark in the MSD column. It requires a thorough investigation to correctly classify MSDs. Most employers in the home building industry are generally not qualified to assess such work-related illnesses. Only qualified medical personnel can analyze MSD injuries—I certainly do not have this medical expertise and very few home builders have medical degrees. Therefore, evaluating each MSD case would be very time consuming for employers, particularly small ones. This evaluation would likely take several hours to several days—not minutes as OSHA suggests—to consult with qualified medical personnel, review medical records and reports, and determine whether the MSD is new, work-related, or otherwise recordable. This would result in significantly increased costs to small businesses.

As a result of not engaging small businesses earlier and in a more comprehensive manner, OSHA failed to account for the true impact this proposed rule would have on small entities and their employees. OSHA has since temporarily withdrawn the proposed Recordkeeping rule citing the need for "greater input from small businesses on the impact of the proposal."[11] I, along with NAHB, welcome the prospect of partnering with OSHA on the proposed rule in the hopes of developing a better, more workable rule for small entities that takes into account the true costs associated with compliance.

[11] http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=19158

Failure to Engage Small Entities in a Meaningful Way

Improving the way the agencies conduct the required reviews of proposed regulations under RFA would result in far more efficient regulations and reduced compliance costs for small businesses.

Unfortunately, agencies often either fail to comply with the RFA by ignoring the statutory obligation to convene a small entity review panel or convene a panel but fail to provide SERs sufficient information concerning the proposed rule to allow them to evaluate regulatory options or provide alternatives.

This was the case for a small entity review panel on which I recently served that reviewed a proposed federal regulation covering stormwater discharges from developed sites. EPA, in preparation for the panel, failed to provide sufficient detailed information about the upcoming rule.[12] As a result, NAHB members serving as SERs were unable to estimate compliance costs or identify ways to reduce the regulatory burden upon small businesses. Several SERs provided written comment that the lack of information made providing meaningful input difficult and noted that the agency's failure to provide sufficient information was a violation of SBREFA. Despite these concerns, EPA concluded the small entity review panel in December 2010.

This experience highlights a reoccurring limitation of the current RFA/SBREFA process – namely that the federal agencies often view compliance as largely a procedural function during the federal rulemaking process and not – as Congress intended – an opportunity to reduce the burden of regulations on small businesses. When agencies are unprepared to provide small entity review panelists with the information and data necessary to evaluate the costs and compliance obligations, the process breaks down. Not only do the participants question the value of their participation, but the entire regulatory program loses its legitimacy and clearly undermines Congress's intent.

Failure to Comply with the SBREFA Panel Requirements

While going through the procedural motions and failing to provide the small business community with the necessary tools to provide meaningful, constructive feedback is a significant problem, far more problematic are the occasions when agencies obviate their responsibility to convene review panels, thus removing small business entirely from the equation. This was the case when EPA failed to convene a review panel as the agency sought to amend its Lead Renovation, Repair, and Painting (RRP) rule.

[12] EPA's stormwater rule was identified in the December 2010 Unified Agenda notice as "Stormwater Regulations Revisions To Address Discharges From Developed Sites." See 75 Fed. Reg. 79851, December 20, 2010.

The RRP Rule requires for-hire contractors that conduct renovation activities in residences built before 1978 to obtain certification from EPA; use "lead-safe work practices" designed to contain and minimize dust created during the renovation activity; and maintain records on these activities. Shortly after finalizing the RRP Rule in 2008, as a result of a settlement agreement EPA reached with public interest advocates, EPA proposed amending the regulation to remove the "Opt-Out Provision." The opt-out provision allowed homeowners to authorize their contractor to use traditional work practices under certain circumstances, resulting in significant cost savings.

Removing the opt-out provision more than doubled the number of homes subject to the RRP Rule to 78 million and EPA estimated the cost of this action to be $500 Million annually.[13] However, the costs are far greater because of EPA's flawed economic analysis, which significantly underestimated the true compliance costs. The agency initially estimated that compliance costs would add $35 to a typical remodeling job; yet for a typical window replacement project the cost ranges from $90 to $160 per window opening, easily adding more than $1,000 to each project. Moreover, an EPA Inspector General's (IG) report, published on July 25, 2012, found that the EPA failed to use accurate or even reliable information on the likely costs of changes to the RRP rule on small entities. More specifically, the report called on EPA to review both the original RRP rule and the removal of the Opt-Out provisions using RFA Section 610 authorities:

> "*We have identified only a few aspects of EPA's complex benefits-costs analysis that are limited. However, we believe these aspects limit the reliability of EPA's estimates of the rule's costs and benefits to society. The Administration's 2011 Executive Order [E.O. 13563] and Section 610 of the Regulatory Flexibility Act provide EPA an opportunity to review the Lead Rule to determine whether it should be modified, streamlined, expanded, or repealed in light of the known limitations in the rule's underlying cost and benefit estimates.*"

EPA acknowledged during the initial rulemaking that the Opt-Out Rule substantially impacted a significant number of small entities and complied with the RFA's regulatory flexibility analysis reporting requirements. However, EPA refused to convene a new panel. Instead, EPA relied on a panel convened more than a decade earlier for the original RRP Rule. EPA stated "that

[13] 75 Fed. Reg. 24802, 24812 (May 6, 2010). The agency estimated that the removal of the Opt-Out provision would result in $500 million in costs in the first year, but projected this amount would decrease to $200 million each year once the agency certified a test kit that satisfied the RRP Rule's criteria for accurately measuring the presence of lead in paint at regulated levels. However, no such test kit has been identified and therefore these cost savings have not been realized.

reconvening the Panel would be procedurally duplicative and is unnecessary given that the issues here were within the scope of those considered by the Panel."[14]

In the 17 years since the RFA was amended by SBREFA to include the panel requirement, EPA has convened approximately 43 panels. According to a recent report issued by the Congressional Research Service (CRS), EPA issued **nearly the same number** of significant regulations during the first Obama Administration.[15] It defies belief that so few EPA regulations have met the threshold under SBREFA and these numbers illustrate how reluctant agencies are to comply with the law.

Contributing to the lack of EPA's compliance with the RFA is the absence of an enforcement mechanism. 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.[16] NAHB believes that the RFA should be amended to include judicial review of the panel requirement to ensure agencies adhere to the law.

Many of the deficiencies found in EPA's RRP rule could have been addressed if EPA complied with both the letter and spirit of the RFA. Ultimately, because they didn't convene a panel, EPA was unable to produce a workable rule and has unnecessarily burdened small entities.

Underestimating Impacts to Avoid Statutory Requirements

Under the Endangered Species Act (ESA), the U.S. Fish and Wildlife Service and National Oceanic and Atmospheric Administration (collectively referred to as "the Service") can prohibit the issuance of any federal permit if the Service determines the proposed activity may result in the "adverse modification" of critical habitat.[17] Congress, recognizing the potential economic impact of critical habitat designations, requires the Service to perform an economic analysis whenever the Service proposes to designate critical habitat. Congress also gave the Service the authority to exclude any area from a "final" critical habitat designation, provided the Service determines the economic costs resulting from critical habitat designation outweighs the

[14] *Id.* at 24815.
[15] The Congressional Research Service examined 45 regulations it characterized as satisfying OMB's "significance" threshold of $100 million annual effect on the U.S. economy in a report addressing the rate of issuing regulations during the first Obama Administration. *Regulations: Too Much, Too Little, or On Track?*, http://www.fas.org/sgp/crs/misc/R41561.pdf (last visited Mar. 5, 2013).
[16] Section 611(a)(1)states: "For any rule subject to this chapter, a small entity that is adversely affected or aggrieved by final agency action is entitled to judicial review of agency compliance with the requirements of sections 601, 604, 605(b), 608(b), and 610 in accordance with chapter 7. Agency compliance with sections 607 and 609(a) shall be judicially reviewable in connection with judicial review of section 604."
[17] 16 U.S.C. §1636(2)

biological benefits to the species.[18]

While the Service is required to comply with the RFA, they frequently will adopt the stance that small entities are not significantly impacted by a proposed critical habitat designation, and certify as such. The designation of critical habitat directly impacts land developers, builders, states, and local governments by restricting their ability to undertake otherwise lawful land use activities. The designation of critical habitat by the Service is unlike other ESA regulatory restrictions in that the Service can designate private property as critical habitat regardless of whether a federally protected species will ever occupy the property in question. For NAHB members, the designation of critical habitat by the Service has a significant economic impact on their land development projects and their businesses. As explained further below, the designation of critical habitat triggers a complex federal permitting process known as the ESA Section 7 consultation process that can result in the Service prohibiting otherwise lawful land use activities if the Service determines proposed activities may result in adverse modification of critical habitat.

The ESA's Section 7 consultation process often significantly impacts small businesses and is fraught with permitting delays, increased costs and land use extractions. While the Service's regulations say the ESA Section 7 formal consultation process should take no longer than four and half months (135 days) to complete, the Service routinely fails to complete the consultation process within its own prescribed permitting deadlines.[19] For example, the U.S. General Accounting Office (GAO) conducted an audit of ESA Section 7 consultations permits performed in the Pacific Northwest in 2003 following the Service's decision in the late 1990's to list as "endangered" over 20 subpopulations of salmon species. GAO's audit found the Service routinely exceeded the Section 7 permitting timeframes for formal consultation by many months and in some cases years.[20] Homeowners living near Seattle, Washington waited over two years for the Service and the Army Corps of Engineers (Corps) to complete ESA Section 7 formal consultations for a CWA Section 404 wetland permits (needed to install private boat docks on Lake Washington.[21] In the case of the homeowners, GAO estimated the economic impact from the Section 7 permitting delay for the federal wetlands permits to be approximately $10,000 per homeowner.[22] While understandably outrageous, these types of permitting delays are common for NAHB members whose projects occur in areas designated by

[18] 16 U.S.C. § 1533(b)(2)
[19] 50 CFR §402.14 (2012)
[20] GAO Report (2003) *Endangered Species: Despite Consultation Improvement Efforts in the Pacific Northwest, Concerns Persist about the Process*, GAO-03-949T, Executive Summary.
[21] GAO Report (2003) *Endangered Species: Despite Consultation Improvement Efforts in the Pacific Northwest, Concerns Persist about the Process*, GAO-03-949T, page 12
[22] GAO Report (2003) Endangered Species: Despite Consultation Improvement Efforts in the Pacific Northwest, Concerns Persist about the Process, GAO-03-949T, page 12

critical habitat and require a Section 404 permit.

Despite these examples of significant economic impacts on small entities, the Service routinely claims that the RFA does not apply when designating critical habitat. Three examples of past critical habitat designations where the Service has certified the RFA does not apply are:

- *Vernal Pools* (crustaceans and plants) - FWS finalized the designation of over 800,000 acres of land across San Diego and Riverside counties in California.[23] According to FWS's ESA §4(b)(2) economic analysis the potential economic impact on residential construction activities could be upward of $800 million dollars. However, the FWS "certified" the RFA does not apply because "not a substantial number of small entities" will be impacted by the proposed rule.[24]

- *California Coastal Gnatcatcher* (bird) - FWS proposed to designate as critical habitat about 200,000 acres located across Los Angeles, Orange, San Bernardino, Riverside, and Ventura counties.[25] Again under economic analysis required under the ESA §4(b)(2) FWS found an economic impact of greater than $880 million dollars – a majority of the economic impact occurring due to future residential development. However again FWS "certified" the RFA does not apply since "not a substantial number of small entities will be impacted."[26]

- *Cactus Ferruginous Pygmy-Owl* (bird) - FWS proposed to designate as critical habitat over 1.2 million acres encompassing the entire Tucson, Arizona metropolitan area.[27] The Service's sweeping critical habitat designation for the pygmy-owl was outrageous considering only 18 known owls existed in the entire area. That meant each of the 18 known owls would have greater than 66,000 acres of critical habitat much of it located on private lands. Biologists have since shown that these owls typically require anywhere between 50 – 290 acres each.[28] Once again the Service's own ESA economic analysis found staggering economic impacts upon NAHB members and local governments including $545 million dollars decline in housing production, a loss of $68 million dollars in local taxes and fees from reduced residential construction, and most importantly the loss of 2,748 of construction jobs all over a ten year period. Shockingly the Service again certified the RFA did not apply since not a substantial number of small entities would be impacted.

[23] 70 Fed. Reg. § 46934 (August 11, 2005)
[24] 70 Fed. Reg. § 46954 (August 11, 2005)
[25] 72 Fed. Reg. § 72010 (December 19, 2007)
[26] 72 Fed. Reg. § 72067 (December 19, 2007)
[27] 67 Fed. Reg. § 71032 (November 27, 2002)
[28] FWS. 2000. Chapter 1: The Cactus Ferruginous Pygmy-Owl: Taxonomy, Distribution, and Natural History. Retrieved on March 11, 2013. Available at: http://www.fs.fed.us/rm/pubs/rmrs_gtr043/rmrs_gtr043_005_015.

Conclusion

Congress, in crafting the RFA, clearly intended for all covered federal agencies to carefully consider the proportional impacts of federal regulations on small businesses.

> "*It is the purpose of this Act to establish as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulations. To achieve this principal, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration*."[29]

Unfortunately, all too often federal agencies view RFA compliance as either a technicality of the federal rulemaking process or, worse yet, as unnecessary. In an effort to ensure that regulations are crafted in accordance with the Congressional intent of the RFA, I urge Congress to seek out ways to improve agency compliance with the Regulatory Flexibility Act.

[29] Regulatory Flexibility Act of 1980 (P.L. 96-354)