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Testimony

of Patrick Hedren

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before the Committee on Small Business
U.S. House of Representatives

on Regulatory Reform and Rollback: The Effects on Small Businesses

March 7, 2018



COMMENTS OF THE NATIONAL ASSOCIATION OF MANUFACTURERS

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Chairman Chabot, Ranking Member Velázquez, and members of the Committee on Small Business, thank you for the opportunity to testify about the impact of regulatory reform on small manufacturers in the United States.

My name is Patrick Hedren, and I am the vice president of labor, legal and regulatory policy for the National Association of Manufacturers (NAM). The NAM is the nation's largest industrial trade association and voice for more than 12 million men and women who make things in America. The NAM is committed to achieving a policy agenda that helps manufacturers grow and create jobs. Manufacturers very much appreciate your interest in, and support of, the manufacturing economy.

State of Manufacturing

The NAM's most recent quarterly outlook survey from the end of 2017 showed the manufacturing sector on the upswing, with business leaders more upbeat about demand and production and more confident in their overall outlook. Indeed, 94.6 percent of NAM's members said that they were positive about their own company's outlook—an all-time high in the survey's 20-year history.

It is important to note that the vast majority of manufacturers, 98.6 percent, have 500 or fewer employees. Three quarters of manufacturing firms have fewer than twenty employees.

In the most recent data, manufacturers in the United States contributed \$2.25 trillion to the economy in 2016. (or 11.7 percent of GDP). For every \$1.00 spent in manufacturing, another \$1.89 is added to the economy, the highest multiplier effect of any economic sector. In 2016, the average manufacturing worker in the United States earned \$82,023 annually, including pay and benefits.

Beyond providing economic signals in the manufacturing center, the quarterly NAM survey also highlights other points of interest among our 14,000 members. Last year's fourth quarter survey results were illuminating.

- Over 37 percent of respondents indicated they spent at least seven hours per week on paperwork to comply with regulations, and almost a quarter spend over ten hours.
- Under 41 percent felt they had enough guidance on how to comply with the regulations that their company must follow.
- About the same percentage indicated they felt that regulatory agencies are primarily concerned with issuing fines, and
- Over half of respondents need to retain a law firm to help them keep up and comply with paperwork requirements.

At the same time, manufacturers are not anti-regulation. Over three quarters of respondents told us that smart regulations are necessary to ensure a level playing field. Almost 45 percent felt that regulatory agencies were primarily concerned with ensuring compliance or with working alongside companies to reduce risk.

Regulatory Environment

Democrats and Republicans often agree on the need for simpler, less burdensome, and more effective regulation, even when the rhetoric often fails to match that consensus. Similarly, the business community is often misunderstood about its views on regulation. Manufacturers believe regulation is critical to protect worker safety, public health, and our environment. Regulation is also a critical tool to promote more efficient markets by addressing externalities and

correcting market failures. Indeed, some critical government objectives can only be achieved through regulation, and that is a powerful argument for improving the process by which regulations are developed.

The core challenge of regulatory policy is this: the benefits of regulation are often diffuse to society while the burdens of regulation are concentrated. Certain sectors, such as manufacturing, bear a sizeable portion of overall regulatory costs in the economy and therefore are able to provide good estimates of those costs during the course of a typical rulemaking. The benefit side of the ledger is much tougher to estimate, however, because individual parties may receive a de minimis share of the overall benefit, or because regulation may be intended to prevent so-called “black swan” events. As a result, it is no surprise that our public discourse on regulation tends to involve each side talking past the other.

Rulemaking by its nature contemplates a balance between the goals to be achieved and the price to be paid. Reforming the regulatory system in many ways is about putting in place basic procedures to ensure that agencies do their best to achieve that balance. We believe they create better rules when they understand the parties they are regulating (who oftentimes may even share the agencies’ goals), when they evaluate meaningful alternatives that could achieve the same or better regulatory outcome, and when they seek to maximize the net benefits to society of their actions.

Small and Medium-Sized Manufacturers

Small and medium-sized manufacturers experience the burdens of regulation in a different way than larger businesses, primarily because they lack the economies of scale that larger businesses rely on to spread the costs of compliance. Those costs include the burden of monitoring new or changing requirements, implementing new or different processes, completing paperwork, and working directly with regulatory agencies to resolve disputes. Each dollar

that a small or medium-sized manufacturer spends on regulatory compliance is a dollar that it cannot spend to grow its business or expand its workforce.

Executive Order 13771

Executive Order 13771, often referred to as President Trump's "one-in, two-out" or "net-zero regulatory budget" order, has now been in effect for a little over a year. This Executive Order marks a significant change in regulatory philosophy compared to that of past Presidents from both parties. In President Trump's first year, according to the federal register, federal agencies issued roughly half as many rule documents deemed significant under Executive Order 12866 than Presidents Bush and Obama issued in their respective first years.

In President Trump's first year in office, the administration published 23 deregulatory actions with estimated annualized cost savings, excluding those nullified under Congressional Review Act resolutions. Through the end of fiscal year 2017, the administration completed 67 actions classified as deregulatory, including rules without estimated annualized cost savings. While these numbers are dramatic, they do not indicate a slash-and-burn approach to deregulation. Instead, they indicate a more methodical approach taking place through the rulemaking process. Perhaps the most noteworthy number through the end of fiscal year 2017 is *three*; the number of new final rules with over \$100 million in burdens on industry – a historic low.

This methodical approach, and dramatic slowdown in new rulemaking, has likely been an important component in record-high manufacturing optimism. Manufacturers do best when regulatory conditions are certain and stable, because fast-paced and dramatic regulatory or deregulatory actions may introduce new variables and risks into their operations. Simply slowing down discretionary agency actions appears to have had a greater impact than the projected net-decrease in per capita regulatory burdens.

Opportunities for Executive Branch Reform

Presidents of both political parties have engaged in efforts over the years to retrospectively review regulations and amend or rescind them as appropriate. The NAM has supported these efforts, and we remain impressed that each subsequent round of retrospective review identifies even more regulations in need of a fresh look. Executive Order 13771 structurally incentivizes an ongoing process of retrospective review, as agencies attempt to meet their burden reduction targets each fiscal year.

Beyond retrospective review, we believe there are several important opportunities to improve the rulemaking process overall and across each agency. For example, through an Executive Order or further guidance to agencies, the administration could:

- *Ensure stronger cost-benefit analysis.* Unless prohibited by law, agencies should seek to maximize net benefits by requiring full cost-benefit balancing when implementing regulatory statutes. This may take the form of a rebuttable presumption that a regulation should not proceed if the benefits do not justify the costs. Agencies could further encourage the public to submit their own cost-benefit analyses into the rulemaking record for the agency to review.
- *Require robust analysis of small business effects.* The administration may require each agency to analyze the effects of high-impact rules on small businesses, and when appropriate should invite greater engagement with the Small Business Administration's Office of Advocacy. Under the Regulatory Flexibility Act, agencies are required to prepare a regulatory flexibility analysis to determine the impact of proposed or final rules on small entities and to consider regulatory alternatives that would accomplish the rule's objective with minimal burden on those entities. Agencies frequently avoid this analysis by simply asserting that the rule at issue will not significantly impact small entities.

- *Promote better information quality.* Agencies should use the best available science for agency risk assessments, and should provide more significant transparency to the public on any data upon which the agency relied when deciding among regulatory alternatives.
- *Conduct oversight or peer-review of independent agency rulemaking.* Prior Presidents have stopped short of requiring independent agencies to submit their rules to the White House Office of Information and Regulatory Affairs for review, a step traditionally expected of executive agencies. As a result, independent agencies have issued rules that were later struck down in court because of deficient analysis and a failure to fully consider the consequences of agency action, an outcome that creates risk and implementation burden without a countervailing public benefit.
- *Require advanced notices for economically significant proposed rules.* Major rulemakings should give the public ample opportunity to provide early input to agencies as they evaluate the most cost-effective approaches to meet their statutory goals.
- *Allow response comments for significant rules.* Perhaps the single best way to improve the quality comments submitted to agencies would be to allow commenters to reply to arguments made by other commenters. A 30-day response period may ultimately save agencies time. This step would be especially impactful for significant rulemakings, and could be waived if exigent circumstances do not allow for it.
- *Build in smart, prospective lookback criteria.* No new major rule should be issued without a plan for future review. Rather than rely on ex post judgments on how a rule is performing once finalized, agencies could set forth a set of bellwether measurements by which each major rule will be measured to determine if it is working as intended, or should be amended or rescinded in the future.
- *Provide fresh guidance on guidance.* Non-binding guidance documents can help regulated parties better understand federal requirements, but they can also impose burdens when the public views them as mandatory.

Compounding this issue, agencies typically do not issue draft guidance documents for public comment. Providing more access to, and transparency around, these documents will improve the ability of small businesses to comply while simultaneously lowering the risk of improper or unpredictable enforcement actions.

Each of these reforms would benefit small and medium-sized manufacturers by promoting smarter rules that are fit for purpose.

Priorities for Congress

Last year was noteworthy in terms of the role of Congress in the regulatory process. Before 2017, Congress had only used the Congressional Review Act (CRA) to overturn one rule (the so-called “ergonomics” rule in 2001). In 2017, by comparison, Congress overturned fifteen rules across a range of industries and subjects. Each of these rules was by definition a “midnight regulation” completed late in the prior administration, and some of them would have had outsized impacts on small businesses. The CRA is only useable in limited and specific circumstances, however, so the NAM continues to advocate for substantive regulatory reform that will lead to smarter rules going forward.

This committee has done admirable work this year, and in prior years, to propose needed reforms that would close loopholes in the Regulatory Flexibility Act. This work is critical for small and medium-sized manufacturers, because too many regulations that have significant effects on small businesses escape the process that Congress intended agencies to follow to ensure their rules make sense as-applied to those businesses.

Beyond legislation such as the *Small Business Regulatory Flexibility Improvements Act of 2017*,¹ Congress should also focus on meaningful and

¹ S. 584, originally sponsored by Senators Lankford (R-OK), Risch (R-ID), and Grassley (R-IA); *see also* H.R. 33, originally sponsored by Representatives Chabot (R-OH-1), Goodlatte (R-VA-6), Marino (R-PA-10), Radewagen (R-AS-At Large), Knight (R-CA-25), Cuellar (D-TX-28), Graves (R-MO-6), Sessions (R-TX-32), King (R-IA-4), Kelly (R-MS-1), Tipton (R-CO-3), Curbelo (R-FL-26), Hultgren (R-IL-14), and Luetkemeyer (R-MO-3).

bipartisan reforms that may not be explicitly focused on small businesses, but would nevertheless have an important impact on those businesses by driving better regulatory outcomes overall. These efforts certainly include bills that would:

- *Require standards of rigor that match the impact of rules.* The NAM supports legislation such as the *Regulatory Accountability Act of 2017*² that would require agencies to conduct a robust analysis and then truly evaluate alternative ways to address each regulatory problem, but commensurate with the level of impact anticipated from each rule. Greater analytical requirements need not slow down agency rulemaking efforts, and the NAM opposes restrictions on rulemaking that serve no other purpose than to delay necessary protections. Rules with billions of dollars in economic impacts deserve careful consideration and analysis, and the NAM commends the House of Representatives for passing its version of this bill last year as part of the broader H.R. 5 package.
- *Promote earlier participation in major rulemakings.* Public engagement is an important driver of good regulatory outcomes, and is a critical component of both transparency and predictability. The NAM supports legislation such as the *Early Participation in Regulations Act of 2017*³ that would require agencies to solicit earlier public participation in major rulemaking. That engagement will result in more effective rules that provide the regulated public with better predictability.
- *Require agencies to lay out the standards by which their rules will be measured in the future.* Often called “prospective retrospective review,” legislation such as the *Smarter Regs Act of 2015*⁴ would ask agencies to set out up-front performance metrics for their intended regulatory goals. If

² S. 951, originally sponsored by Senators Portman (R-OH), Heitkamp (D-ND), Hatch (R-UT), and Manchin (D-WV); *see also* H.R. 45, originally sponsored by Representatives Goodlatte (R-VA-6), Peterson (D-MN-7), Smith (R-TX-21), Marino (R-PA-10), Sessions (R-TX-32), and Franks (R-AZ-8).

³ S. 579, sponsored by Senators Heitkamp (D-ND), Hatch (R-UT), and Roberts (R-KS).

⁴ S. 1817 (2015), originally sponsored by Senators Heitkamp (D-ND), and Lankford (R-OK).

a rule proves to be ineffective in achieving its stated goal, agencies should look to update, restructure, or rescind it.

- *Agencies should provide their guidance documents in one easy-to-access place online.* As above, guidance documents are an important tool that agencies use to provide information to the regulated public but can become regulatory in their own right because they may lay out expectations that appear mandatory. Legislation such as the *GOOD Act*⁵ would require agencies to put guidance documents online in one location, enabling both oversight and easier compliance for the public.
- *Independent agencies should be held to the same standards as executive agencies.* Independent agencies are responsible for a significant portion of high-impact rules, but they often fail to conduct robust analyses of their regulatory proposals and they seldom conduct an inter-agency review process to identify areas in which their rules may overlap or conflict with other agencies' requirements. Bills like the *Independent Agency Regulatory Analysis Act of 2017*⁶ would establish a basic, flexible, and non-binding OIRA review process that would provide valuable insight among agencies, and uncover opportunities for more effective and efficient rules.

The NAM urges the committee to continue developing and promoting sensible, bipartisan legislation that will give small business a true voice and seat at the table. Thank you for your invitation to speak to you today, and for your attention on small and medium-sized manufacturers across the country.

⁵ S. 2296, sponsored by Senator Johnson (R-WI); *see also* H.R. 4809, sponsored by Representative Walker (R-NC-6).

⁶ S. 1448, sponsored by Senators Portman (R-OH), Collins (R-ME), Lankford (R-OK), Ernst (R-IA) and Johnson (R-WI).