



1250 Connecticut Ave, NW, Suite 200
Washington, DC 20036

March 16, 2009

Kevin F. Neyland, Acting Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
NEOB Room 10102
725 17th St, NW
Washington, DC 20503
[Submitted Via Electronic Mail]

Re: OMB/OIRA Request for Comments on Executive Order for Federal Regulatory Review, 74 Fed. Reg. 8819

Dear Mr. Neyland:

On behalf of the millions of small-businesses found across the United States, thank you for the opportunity to discuss with you how a centralized White House regulatory review can address the burden of regulatory paperwork imposed by the federal government. Please consider the Institute for Liberty's insights about how to improve the way in which the federal government can reduce the amount of paperwork filled out by America's small businesses each year.

At this time of economic crisis, we must do everything possible to help create jobs, build communities, and lift our country up by thoughtful and transparent policies. Entrepreneurs have rescued our economy out of past recessions through job creation and innovation unique to the small business sector. We are relying on that same strength and ingenuity that is woven into the fabric of American heritage to solve some of our current financial problems. This means every government policy must be closely scrutinized for whether it helps small business or hurts them because as small business prospers, so does our economy. A centralized planning and review process for regulations should be governed by a strong executive order that pronounces the gravity of how regulations impact the small business community and what is at stake if

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entrepreneurship is stifled by unnecessary federal mandates. The new executive order on regulatory planning and review must hold all facets of the government accountable through a transparent and data-driven process that is acutely sensitive to how governmental action impacts large and small businesses differently.

Introduction

The Institute for Liberty (IFL) is a non-profit, 501c(4) advocacy organization, focused primarily on executive branch policy. Specifically, we provide a small-business perspective in the public policy debate, and take a particular interest in the impact of the federal regulatory state on small business. IFL believes that small businesses are the engine of the American economy, and that the federal government's role is to promote, and not hinder, the creation and growth of these small businesses. Andrew Langer, IFL's President, has been an advocate for small business for nearly a decade. Before coming on board at IFL, he served as the Senior Manager for Regulatory Affairs at the National Federation of Independent Business, the nation's largest small business association. While there, he worked closely with federal officials to craft policies that were small-business friendly, analyzing proposals and making recommendations on how best small businesses could be served, while at the same time offering initiatives aimed at getting career civil servants to better understand the day-to-day operations of small businesses.

Tom Sullivan, IFL's Senior Fellow in Regulatory Studies served as Chief Counsel for Advocacy at the U.S. Small Business Administration from 2002-2007. In his role as Chief Counsel, Tom relied on a transparent centralized regulatory review by the Office of Information and Regulatory Affairs to ensure that small business had a voice in the regulatory process. SBA's Office of Advocacy issues public statements on how agencies can best meet their regulatory goals while minimizing the cost to small business. That office's success depends in large part on an effective and transparent White House review of regulations by the Office of Information and Regulatory Affairs (OIRA).

It is important to lay out just who IFL talks about when discussing small business: we are generally not talking about businesses which fit into the larger end of the Small Business Administration's definitions for small business. Ninety percent of small businesses have fewer

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than 20 employees. Moreover, the typical small business employs ten people and reports gross sales of between \$350,000 and \$500,000 per year. These span the spectrum of business operations, ranging from one-person cottage enterprises to firms with hundreds of employees.

Clearly, we are talking about the truly small businesses—businesses whose priorities and abilities to handle regulatory challenges are greatly different from their larger counterparts. Being a small-business owner means, more times than not, you are responsible for everything (ordering inventory, hiring employees, and dealing with the mandates imposed upon your business by the federal, state and local governments). That is why government regulations, and the paperwork they generate, should be as simple as possible. The less time business owners spend with “government overhead,” the more they can spend growing their business, employing more people and growing America’s economy.

Unreasonable government regulation, especially onerous paperwork burdens, continues to be a top concern for small businesses¹. Regulatory costs per employee are highest for small firms, and small businesses consistently rank those costs as one of the most important issues for elected officials to address. On several occasions, we have testified before Congress on the most recent report commissioned by the Small Business Administration’s Office of Advocacy, estimating the regulatory compliance costs for firms with fewer than 20 employees.

Nine years ago, that cost averaged \$6,975 per employee, per year, but now that figure has been updated with a peer review process that lends even greater credence to the research.

Unfortunately for small-business owners, however, the new data does not convey good news — the cost of regulation for small businesses has risen by nearly 10 percent, to \$7,647 per employee, per year.²

¹ In NFIB’s publication, *Problems and Priorities*, paperwork ranked 8th out of 75 major problems faced by small business.

² Crain, W. Mark, *The Impact of Regulatory Costs on Small Firms*, 2005, <http://www.sba.gov/advo/research/rs264.pdf>

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This means that for an average small business, with ten employees, those costs now approach a total of \$80,000 annually. For a business operating on a shoestring, such costs can be devastating.

But those numbers drop when you get above 20 employees—on average by as much as a full third. Why such a stark contrast? The National Federation of Independent Business' Research Foundation has done numerous surveys on paperwork and regulatory compliance, and it has found that businesses with between 20 and 35 employees hire a regulatory professional. Usually, this is someone with expertise in labor regulations and human resources, as these are the rules with the most general application. Also, as the business grows, measures taken to comply with federal regulations can have their cost spread around a larger pool of employees. These “economies of scale” reduce those per-employee costs as well.

However, until those businesses reach that magic number, it is generally the small business owner, that owner's spouse, or some trusted employee within the business who is responsible for ferreting out regulatory obligations and figuring out what needs to be done in order to be in compliance. Because these individuals do not have the prior regulatory experience or training, it takes far longer for them to become aware of their obligations under the law, and just what those obligations entail.

The Macroeconomic Costs and the “Context” of Regulation

The average small business cost of nearly \$80,000 per year for regulations, the approximately \$7,700 per employee per year cost, those are the microeconomic figures—what each individual small business faces. But the problem is truly staggering when one looks at the general regulatory state.

While the Office of Information and Regulatory Affairs reports a cost of \$44 billion³ for all major rules, this presents only a part of the regulatory snapshot. OIRA only reviews major rules, the dozen or so rules from a previous 10-year period whose annual cost is in excess of \$100 million. But it's not the “major” rules that are most damaging. We have testified before on

³ http://www.whitehouse.gov/omb/inforeg/2006_cb/2006_cb_final_report.pdf

regulation being “death by a thousand pinpricks” for small business. It’s not one single rule that is the culprit, but the thousands of smaller rules with incremental impacts that present a slow-bleed for America’s small business. Those rules add up to an annual regulatory cost of \$1.14 trillion annually, according to Wayne Crews at CEI—an amount essentially equivalent to the entire federal budget!

Paperwork itself is a tremendous culprit. In the Office of Management and Budget’s 2005 report on paperwork, the Information Collection Budget (ICB),⁴ they denote an increase of the paperwork burden faced by all Americans of 441 million hours.

In terms of the paperwork burden imposed by regulations themselves, The NFIB Research Foundation has conducted in-depth studies of the problem being faced by small businesses. They concluded overall that the cost of paperwork averages roughly \$50 per hour. In addition, the following conclusions were reached⁵:

1. The individual(s) completing and maintaining paperwork and records in a small business is dependent on the subject matter of the paperwork and the size of the firm. Owners most frequently handle paperwork and record-keeping related to licenses and permits (55 percent of firms), purchases (46 percent), and clients/customers (46 percent). They least frequently deal with financial (27 percent) and tax (12 percent) records. Three of four pay to have someone (another firm) outside handle their tax paperwork. Paid employees customarily do most of the paperwork and record-keeping in about 25 – 30 percent of firms. Employees are much more likely to do so in larger, small businesses than in the smallest ones regardless of subject matter (except tax). Unpaid family members do the paperwork in less than 10 percent of cases.
2. The cost of paperwork also varies by subject matter and firm size. The more paperwork and record-keeping that must be sent outside, the more expensive the paperwork and record-keeping. Owners of larger small firms pay higher average prices per hour because they are more likely to send their paperwork to outside professionals and because the value of their time on average is higher.
3. The estimated average per hour cost of paperwork and record-keeping for small businesses is \$48.72. By subject matter the average per hour cost is: \$74.24 for tax-

⁴ <http://www.whitehouse.gov/omb/inforeg/infocoll.html>

⁵ NFIB Research Foundation National Small Business Poll, Vol. 3, Issue 5, *Paperwork and Recordkeeping*, 12-03, http://www.nfib.com/PDFs/sbpoll/sbpoll12_2003.pdf

related, \$62.16 for financial, \$47.96 for licenses and permits, \$43.50 for government information requests, \$42.95 for customers/clients, \$40.75 for personnel, \$39.27 for purchases, and \$36.20 for maintenance (buildings, machines, or vehicles).

4. The typical small business employs a blend of electronic and paper record-keeping. Less than 10 percent use paper exclusively and a handful use only electronic means. The type of record most frequently completed and maintained on paper is licenses and permits.
5. No single difficulty creates the government paperwork problem. The most frequently cited problem is unclear and/or confusing instructions (29 percent). The second most frequently cited difficulty is the volume of paperwork (24 percent). Duplicate information requests (11 percent) place third, followed by maintenance of records that ordinarily would not be kept (10 percent) and requests for inaccessible or non-existent information (9 percent). Twenty (20) percent could not decide.

While the use of computers by small businesses and small-business owners has certainly helped reduce the burden of regulations, technology alone cannot solve the problem. More than filing forms and storing copies, paperwork requirements involve understanding what the government wants and how they want it, gathering the necessary information and organizing it properly, determining what to keep and for how long, etc. Then there is the cost. Even with the most efficient computer equipment, documentation is not cheap. People must organize and input the necessary data, and people are expensive. According to additional research by the NFIB Research Foundation, 92 percent of small businesses use computers in some aspect of their business. Eighty-two percent of small businesses have internet access, and of those, 57 percent have high-speed internet access. Half of the businesses that use the internet use it to find out regulatory information, and the smaller of small businesses are more likely to use the internet to educate themselves. They use it for specific searches, and to sift through information.⁶

But taken in the context of the ICB, the costs continue to be startling. The cost of the increase in paperwork alone amounts to nearly \$21.5 billion annually!⁷ The total cost of paperwork therefore is nearly half a trillion dollars (roughly \$409 billion).⁸

⁶ NFIB National Small Business Poll Volume 4, Issue 8, "Telecommunications,"
<http://www.nfib.com/object/telecomm.html>

⁷ \$48.72 X 441 million hours equals \$21,485,520,000

⁸ \$48.72 X 8.2 billion hours equals \$409,248,000,000

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Some people might argue that the increase in paperwork from the ICB is only 5.5 percent overall. But that only serves to mask the real issue: 441 million hours is an enormous amount of time—time that drags on everyday Americans, and \$21.5 billion is real money for real small businesses.

While some might quibble that this is only a marginal increase—one cannot deny that the baseline number is a huge one. A system that measures its paperwork burdens in the billions of hours and in which citizens' spending on paperwork is roughly equivalent to 85 percent of what the nation spends on defense each and every year is a system doomed to collapse⁹. It requires careful examination—a recognition that a serious problem exists and then taking the appropriate steps to see that problem solved. But there is no “magic bullet” here. While tax paperwork is responsible for a substantial portion of the paperwork burden, there is no single regulation responsible for the lion's share of that burden.

As we said earlier, it's the thousands of regulations, with their incremental costs, that create this “weight”. Because regulations are created and expanded without regard to their context, this is simply going to continue. What is meant by context? Regulations are, essentially, created in a vacuum—generally without regard to overall regulatory burdens created by the agency, certainly without regard to pre-existing regulatory costs. Each regulation is measured and judged based on its own individual costs.

The problem is that taken individually, each incremental cost can appear inconsequential. A new regulation by an agency might add 7.5 hours of training time per employee per quarter of a year, and taken alone, that might seem to be a harmless mandate. But let's assume for a moment that this agency already has regulatory requirements that cumulatively require 150 hours of time. Assuming a 7.5 hour work day, that's already 20 days of time that one agency's regulatory

⁹ In FY2005, DOD actually spent just over \$475 billion – about \$66 billion more than it cost Americans to fill out their paperwork for the federal government.

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burden consumes. Another 30 hours of training per year amounts to another 4 days of time—a twenty percent increase.

Further, if we assume that a full-time equivalent's "work year" is roughly 250 days, we're talking nearly ten percent of an employee's time is being taken up for the mandates of one agency. But no small business is regulated by only one federal agency, of course. There could be EPA, OSHA, Transportation, Labor, and a variety of other federal regulators. If four of these agencies each pose time burden of 24 days, that's 96 days that have now been lost to federal regulatory mandates—leaving 154 days for the business of the small business.

Time is one of a small business' most-precious and most-finite resources. Every day, every hour is important. But because, by comparison, federal agencies have nothing but time, they have no compunction against taking an hour here, and an hour there. And like the Washington proverb, "a billion here, a billion there, pretty soon you're talking about real money," the hours that the federal government robs from these businesses does add up.

We therefore believe, and will discuss in our recommendations, that some measure of accounting for this needs to be done.

Recommendations for an Executive Order for Regulatory Planning and Review

In dealing with regulatory burdens, there are two ways of looking at the problem: you can reduce the number and scope of proposed and existing regulations themselves (the supply side); and at the same time you have to look at how to change the time needed to figure out how to comply with them (the demand side).

On that former side, we have a series of recommendations dealing with proposed regulations, the burdens they impose, as well as for reviewing agency practices with regards to new regulations and regulations already on the books. We believe that the following are the basic principles that ought to be contained in an executive order:

1. **Review of Existing Rules:** Section 610 of the Regulatory Flexibility Act (RFA) mandates that federal agencies develop a plan for the periodic review of regulations that have or will have a significant economic impact on a substantial number of small entities.¹⁰ Unfortunately, agencies either fail to engage in the proper reporting, or when they do, their reports do not have any useful information. We recommend that the new executive order on regulatory planning and review include a process for agencies to propose revisions to existing rules that can meet the original regulatory intent while lessening the cost on small businesses. We recommend that as part of OMB's annual report on regulatory costs, a specific section be devoted to an accounting of agencies' review of existing regulations and steps taken to achieve better results.¹¹

2. **Include Indirect Economic Impacts in Regulatory Review:** One of the ongoing deficiencies in OMB's review of regulations is that information on the real impact on small business remains hidden. Either ancillary impacts aren't taken into account, or industries not directly affected but nevertheless impacted by the rulemaking are ignored. In a hearing on regulatory burdens held by the Small Business Committee on November 15, 2007, Joe Rajkovicz from the Owner-Operator Independent Driver Association testified on this very issue. He suggested that Congress ought to require, "agencies to consider the impact of its actions on small businesses who are not those in the regulated community" but who are impacted by the agency action.¹²

3. **Executive Order 13272:** Among other things, Executive Order 13272 strengthened small business protections under the RFA by setting out a formal working relationship between OIRA and SBA's Office of Advocacy, creating additional responsibilities for federal agencies in complying with laws protecting small entities, and laying out reporting requirements for compliance with the Executive Order. The provisions in Executive Order 13272 should be part of the new executive order on the regulatory planning and review.

¹⁰ 5 U.S.C. Section 610. For summary of the section, see: http://www.sba.gov/advo/laws/attachment08_0730.pdf .

¹¹ Section 624 of the Regulatory Right to Know Act (Pub. L. No. 106-554) requires OMB to report annually on costs and benefits of rules reviewed by OMB.

¹² Testimony of Joe Rajkovicz before the House Small Business Committee, November 15, 2007 at 3.

4. **Require Compliance Guides:** Small businesses continue to be frustrated with the instructions they are supposed to follow in figuring out how to comply with new regulations. Section 212 of the Small Business Regulatory Enforcement Fairness Act (SBREFA) enacted by President Clinton was supposed to help alleviate this problem by requiring agencies to publish small business compliance guides with each new final rule.¹³ We recommend that OMB not allow any major rules to be finalized unless the information submitted by the agency, as part of the time line established, includes the complete text of the small business compliance guide.
5. **Expand Small Business Protections to the IRS:** As discussed above, the IRS accounts for the largest share of the regulatory and paperwork burdens faced by small businesses. We recommend that IRS rules be subjected to the same transparency, scrutiny, analysis, and sensitivity to small business as all rules subjected to the process of the new executive order on regulatory planning and review.
6. **Include Small Business Representation in a Regulatory Working Group:** Currently, there exists no body of senior agency officials who are directly accountable for the government's impact on the cost of doing business in the United States. We suggest that the new executive order on regulatory planning and review reinvigorate the Regulatory Working Group established by President Clinton's Executive Order 12866 (section 4(d)). We further recommend that each government official who serves on the Regulatory Working Group established by the new executive order should be the point of contact for their respective agency's responsibilities under the RFA.
7. **Mandate That Each Agency Annually Publish an Accounting of Their Total Regulatory Cost:** As mentioned earlier, currently the only annual accounting of regulatory costs done by the federal government is performed by OIRA, and it only looks at the costs of major regulations for the previous 10 years. If we want to get an honest, accurate look at regulatory burdens, then each agency ought to be accounting for

¹³ Pub. L. No. 104-121 (March 29, 1996).

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agencies to assess costs and create good tools to help small businesses fulfill their obligations under the law.

We applaud the President for soliciting views on these important issues so early in his Administration. We stand ready to assist OMB in its efforts to ensure that the White House review of regulations is transparent and helps lift out economy by unbridling entrepreneurs from regulatory mandates that may not be cost effective. Thank you for the opportunity to comment on this matter of extreme importance. If you have any questions, or require any additional information, do not hesitate to contact us.

Sincerely,

Andrew M. Langer,
President

Thomas M. Sullivan
Senior Fellow, Regulatory Affairs