

NSBA Regulatory Reform

Issue Briefs

NSBA is a tireless advocate against unfair, unnecessary and disproportionately burdensome regulations. Leading efforts to bolster the SBA Office of Advocacy, NSBA has, for years, worked toward broad process improvements to simplify and streamline the federal regulatory process as well as the U.S. litigation system.

Strengthen SBA Office of Advocacy*

NSBA is calling on Congress to support and sufficiently fund the SBA Office of Advocacy and its important objectives of ensuring regulatory fairness for small business.

Regulatory Reform and Paperwork Reduction*

NSBA urges Congress to ease regulatory burdens by requiring cost-benefit analyses, improving assistance, streamlining paperwork and simplifying regulatory language.

Regulatory Budget

NSBA strongly supports efforts to curtail the ever-growing and overly burdensome web of federal regulations and urges lawmakers to endorse and enact a National Regulatory Budget.

Product Liability Reform

NSBA urges Congress to support product liability reform to address inconsistent and contradictory rules, as well as return common sense to our system of civil litigation.

Tort Reform

NSBA supports broad tort reform to end the unfair targeting of small businesses and bringing an end to frivolous lawsuits to bring back fairness, accountability and common sense to U.S. courts.

* The issue was voted one of NSBA's top priorities for the 112th Congress.

SBA Office of Advocacy

America's small businesses need an independent, active and fully funded SBA Office of Advocacy

NSBA supports the U.S. Small Business Administration (SBA) Office of Advocacy (Advocacy) and its important objectives. Charged with analyzing the role of small business in the U.S. economy, pursuing policies that support small-business growth, and ensuring that the needs and concerns of small firms are considered by the federal government, the responsibilities of Advocacy are far-reaching and vital. Devoted solely to serving America's small businesses, Advocacy is essential for small-business regulatory parity and remains a consistent resource for reliable information about the status and role of small business in the U.S. economy.

Since they have been granted considerable leeway over how to interpret and enforce laws passed by Congress, federal agencies and departments enjoy something of a free reign over too many of the regulations that govern small businesses. Unfortunately, agencies too often interpret and enforce legislation in such a way as to seriously harm America's small businesses. For example, a recent report from the SBA found that, since 2005, the per-employee cost for all regulations for the smallest businesses (those with fewer than 20 employees) increased from \$7,647 to \$10,585. For large companies, the increase was less dramatic, from \$5,282 to \$7,755. This accounts to a 36 percent higher cost per-employee for small firms than large firms.

While various regulatory reform initiatives—such as the *Regulatory Flexibility Act of 1980*, the *Small Business Regulatory Enforcement Fairness Act* in 1996, and the *Small Business Paperwork Relief Act* in 2002—have precluded the implementation of a range of onerous rules and alleviating some of the federal regulatory and paperwork burden, these laws are only as strong as the agency dedicated to their enforcement. Although Advocacy reports that its interventions resulted in foregone, first-year regulatory cost savings of \$11.7 billion in Fiscal Year 2011 and reoccurring annual savings of \$10.7 billion, the federal regulatory and paperwork burden has ballooned and is still growing.

A top priority for NSBA for several years, Congress recently approved language providing Advocacy with a line-item budget. This relatively small move provides a great deal more transparency for Advocacy and enables supporters—such as NSBA—a more clear way of identifying Advocacy's funding. The line-item budget also enhances Advocacy's freedom to actively seek regulatory fairness and ensure small-business concerns are taken into consideration.

However, more must be done. Congress must ensure that it allocates the financial resources required for Advocacy to achieve its lofty and far-reaching objectives.

Regulatory Reform & Paperwork Reduction

The crushing federal regulatory and paperwork burden must be lifted from the backs of small business

The current system of placing constraints on regulation by the federal government is both complex and largely ineffective. While legislation has passed—such as the *Regulatory Flexibility Act*, the *Paperwork Reduction Act* all and the *Small Business Regulatory Enforcement Fairness Act*—with some positive effect, the scope, cost and intrusiveness of federal regulations continues to grow. That needs to change.

Federal regulations and paperwork continue to plague small businesses across the country. In 2008, the American public spent \$1.75 trillion complying with federal regulations and roughly eight billion hours complying with regulations and paperwork demands. This crushing burden must be lifted from the backs of the small-business owners who disproportionately bear it.

Unlike big corporations—which have legions of accountants, benefits coordinators, attorneys, personnel administrators, and the like at their disposal—small businesses often are at a loss to keep up with, implement, or afford the overwhelming regulatory and paperwork demands of the federal government. A 2010 report from the U.S. Small Business Administration (SBA) found that, since 2005, the per-employee cost for all regulations for the smallest businesses (those with fewer than 20 employees) increased from \$7,647 to \$10,585. For large companies, the increase was less dramatic, from \$5,282 to \$7,755. This accounts to a 36 percent higher cost per-employee for small firms than large firms.

Therefore, until a National Regulatory Budget is implemented, NSBA proposes the following:

Require that Agencies Consider Indirect Costs and Detailed Alternatives - The largest loophole in the federal regulatory framework is that agencies are only required to consider the direct impact of proposed regulations. The indirect economic impact of proposed regulations also must be considered. Additionally, each Initial Regulatory Flexibility Analysis required under the Regulatory Flexibility Act also should contain detailed alternatives, which would minimize any significant adverse impact.

Require Regulatory Flexibility Analyses - The performance of Regulatory Flexibility Analyses should be a prerequisite to a final rule being issued. According to the Mercatus Center at George Mason University, federal agencies are conducting fewer economic analyses and the Office of Information and Regulatory Affairs (OIRA) has reduced its oversight: “Compared to 2007, in which every single economically significant regulation had a Regulatory Impact Analysis; in 2009 one of five had no analysis. Meanwhile, OIRA has reduced the amount of time they are spending on reviewing individual regulations - down about 35 percent in 2009 from the previous two years. And finally, after having reviewed 900 regulations [in the last two years]..., they have decided that not one rule needs to be returned to the agencies.”

Require that Agencies Use Plain Writing When Revising or Drafting New Regulations - Federal agencies should be required to use “clear, concise and well-organized language” when revising or drafting new government regulations.

Increased Flexibility and Exemptions - Federal agencies must be permitted increased enforcement flexibility and the ability to grant common-sense exemptions for first-time offenders.

Streamlined Paperwork - Agencies must seek ways to consolidate forms and eliminate the duplication of paperwork, harmonize data, and coordinate due dates.

Cost-Benefit Analysis - Federal agencies should be required to perform and submit cost-benefit analysis on proposed regulations and paperwork. This is a routine business practice that federal agencies would be well-served to emulate.

Improved Information Collection - The Paperwork Reduction Act requirement that agencies’ chief information officers review and certify information collection requests is ineffective. This provision should be strengthened or OIRA should develop stricter criteria for approval. If all else fails, Congress should consider limiting the number of information requests an agency can issue each year.

National Regulatory Budget

Congress should enact a national regulatory budget to ensure fairness and common sense in regulation

Estimates of the total cost of regulation in the economy as a whole are unreasonably high. A September 2010 study from the U.S. Small Business Administration (SBA) estimated that the total cost of federal regulations in 2008 was \$1.75 trillion or about 12 percent of GDP. This represents a substantial increase over time and, given the current regulatory environment, it is virtually certain that costs are higher relative to GDP now.

To date, while a number of positive steps have been taken, efforts to restrain regulation by the federal government have been ineffective. The Administrative Procedure Act, Executive Orders 13258, 13422 and 13563, Office of Management and Budget Circular A-4, the Regulatory Flexibility Act of 1980, the Small Business Regulatory Enforcement Fairness Act of 1996 and the Paperwork Reduction Act all have had some positive effect. On the whole, however, agencies have become quite proficient at evading their strictures when they wish to pursue a regulatory agenda. The scope, cost and intrusiveness of federal regulations continues to grow. That needs to change.

The potential savings and positive impact on economic growth and living standards created by imposing meaningful restraint on the regulatory actions of federal agencies is significant.

Establishing a National Regulatory Budget (NRB) would impose strict, enforceable constraints on the ability of the federal government to impose regulatory costs on the public.

A National Regulatory Budget should entail the following:

1. Obtain independent, rigorous, fact-based estimates of the cost of all existing regulations by agency. This could be accomplished by the formation of an independent agency (e.g. a National Economic Laboratory) or assigning the task to an existing agency with a record of independence (e.g. the Bureau of Economic Analysis at the Commerce Department). This need not be terribly costly. It would probably require about \$30 million annually and these costs could be offset to some degree by terminating all of the existing positions throughout the government that, in principal, conduct cost-benefit analyses currently.
2. Provide the independent estimating agency with the authority to compel all agencies to provide relevant information.
3. Congress would then establish a National Regulatory Budget setting a cap on the cost that each agency's regulations could impose.
4. If the agency was imposing costs above the NRB cap, it would be required to withdraw regulations until it was below the NRB cap.
5. If issuing a new regulation would place the agency over the cap it would be prohibited from issuing the new regulation unless it withdrew other regulations so that it remained under the NRB cap.
6. All new regulations would be required to receive an estimate from the independent estimating agency before they could be implemented.
7. Non-compliance by the agency would be subject to judicial review and the courts would be required to invalidate regulations that caused agencies to exceed their NRB caps.

NSBA strongly supports efforts to curtail overly burdensome federal regulations, and the NRB should be broadly endorsed by lawmakers.

Product Liability Reform

The nation's inconsistent and often contradictory product liability regulations need reform

America's civil justice system is the most expensive in the world. In 2008, lawsuits cost small businesses a staggering \$105.4 billion. The entrepreneurs who comprise NSBA warn that the costs and risks of frivolous lawsuits, outrageous punitive damages, and unfair product liability regulations continue to threaten their small businesses. Common sense must be returned to our system of civil litigation, especially in regard to product liability.

The inconsistent and often contradictory product liability regulations that exist across the country impose widely varying statutes of limitations, create uncertainty for businesses selling in a national marketplace, and too often allow for absurdly large awards.

The product liability regulations in most states do not differentiate between the manufacturers and suppliers of defective goods and obligate both to compensate users for injuries resulting from the use of those goods. The result is that many small, retail businesses unfairly are included in lawsuits against the manufacturers of defective goods—despite the fact that as suppliers they were unaware of the defects and had no way of discovering them. The risk associated with these lawsuits is severe and disproportionate.

NSBA supports the creation of a federal product liability reform law. This would restore predictability and fairness to the marketplace.

NSBA supports product liability reform that would create nationally uniform statutes of limitations and “standards of repose,” which would disallow lawsuits over products over a certain age.

NSBA supports product liability reform that explicitly defines the standards on what constitutes a defect and clearly stipulates that damages only are to be granted when a plaintiff demonstrates that a product was actually defective and that the defect resulted in harm.

NSBA believes that courts should be required to take the personal behavior of plaintiffs into account when determining liability—businesses should not be liable for injuries resulting from the misuse or alteration of their products.

Finally, NSBA supports a product liability standard that differentiates between manufacturers and suppliers and apportions damages based on the actual level of responsibility of each defendant.

Tort Reform

Frivolous lawsuits and unfair liability regulations are imperiling America's small businesses

The increasingly litigious nature of American society is undermining its economic well-being. Small businesses spent \$105.4 billion on tort liability in 2008—and more than a third of that was paid out of pocket and not through insurance. This means that small-business dollars represent 81 percent of the total business tort liability costs, but small firms only received 22 percent of the revenue. It is clear that common sense must be returned to our system of civil litigation.

NSBA urges Congress to address the following areas of vital importance:

Punitive Damages: The lack of guidelines or limitations on the imposition of punitive damages results in an arbitrary decision-making process—as juries may impose awards based on the emotional impact of the case rather than the conduct of the defendants—and unpredictable and outrageously large awards. NSBA supports the placement of a cap on the awarding of punitive damages.

Product Liability: The inconsistent and often contradictory product liability regulations that exist across the country impose widely varying statutes of limitations, create uncertainty for businesses selling in a national marketplace, and too often allow for absurdly large awards. To restore predictability and fairness to the marketplace, NSBA supports the creation of a federal product liability reform law, which would create nationally uniform statutes of limitations and “standards of repose,” which would disallow lawsuits over products over a certain age. NSBA also supports reform that explicitly defines the standards on what constitutes a defect and differentiates between manufacturers and suppliers and apportions damages based on the actual level of responsibility of each defendant.

Frivolous Lawsuits: Legal liability costs have skyrocketed in recent years, due to the fact that it requires little effort or money to file lawsuits—and the awards to “victims” can be huge. Given the exorbitant legal and court fees associated with a typical lawsuit that goes to trial, individuals and businesses must spend huge sums of money just to defend themselves in court. Faced with such debilitating fees, not to mention the bad publicity of a trial, many small businesses are being forced to settle out of court, even when they have done nothing wrong. NSBA supports holding individuals and attorneys who file frivolous lawsuits accountable for their actions.

Equal Access to Justice: Loopholes in the *Equal Access to Justice Act* have allowed agencies to avoid compensating small entities for attorneys' fees and other expenses stemming from the small entity's successful challenges to charges that they violated federal laws and regulations. NSBA supports eliminating the cap on reimbursable attorneys' fees and closing the loophole that allows government agencies to avoid following the spirit of the law. Small businesses and other small entities should be reimbursed for the legal costs of defending themselves against wrongful prosecution.