

TESTIMONY BEFORE THE UNITED STATES CONGRESS
ON BEHALF OF THE
NATIONAL FEDERATION OF INDEPENDENT BUSINESS

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Testimony of Mark Faulkner, Vireo Systems

THE HOUSE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
Field Hearing, Murfreesboro, TN

*“Tennessee Job Creation: Do Federal Government Regulations Help or Hinder
Tennessee’s Economic Development?”*

June 18, 2012

Chairman Issa, Ranking Member Cummings and members of the Committee,

On behalf of the National Federation of Independent Business (NFIB), I appreciate the opportunity to submit for the record testimony to the Committee on Government Reform, for the field hearing, "*Tennessee Job Creation: Do Federal Government Regulations Help or Hinder Tennessee's Economic Development?*"

I am the owner of Vireo Systems, a small manufacturing plant that produces various chemical compounds, and I currently employ twenty-two people. As a small business, we often feel the pain of government over-regulation. Although some regulations may be necessary or well-intended, American businesses suffer from many regulations (and regulators) that are illogical and illogically applied - especially to small business.

Although this is a simplification, our current interaction with a regulatory agency boils down to audit, review, fine and then potential for some combination of hindrance, threats and seizing of property, all in an adversarial manner. The agencies succeed because most business owners are scared of the authorities. As small-business owners, we do not have the financial resources to defend ourselves. We know the punitive power agencies wield, and with effectively little recourse for us, the victim.

Overzealous regulation is a perennial cause of concern for small business owners, and is particularly burdensome in times like these when the nation's economy remains sluggish. Unfortunately, the regulatory burden on small business has only grown. A recent study by Nicole and Mark Crain for the U.S. Small Business Administration Office of Advocacy (Office of Advocacy) found that the total cost of regulation on the American economy is \$1.75 trillion per year¹. If that number is not staggering enough, the study reaffirmed that small businesses bear a disproportionate amount of the regulatory burden. The study found that for 2008, small businesses spent 36 percent more per employee on regulation than their larger counterparts.

Job growth in America remains stagnant. Small businesses create two-thirds of the net new jobs in this country yet in the NFIB Research Foundation's most recent edition of *Small Business Economic Trends*, released last Tuesday, small-business owners cited government requirements to be the third most important problem facing small businesses, just behind taxes and poor sales². Reducing the regulatory burden is a step the government could take that would go a long way toward giving entrepreneurs the confidence they need to expand their workforce in a meaningful way.

There are two specific agencies I want to bring to the committee's attention today – the Occupational Safety and Health Administration and the Department of Transportation. I would also like to address comprehensive regulatory reform. While my experiences focus on OSHA and DOT, I believe actions of many agencies continue to have a negative impact on small businesses and our ability to create new jobs.

In fact, I have held off hiring people because I do not know what a recent OSHA audit may hit us with in the way of fines – fines for things that have otherwise been safe and within code for years. I could easily add a minimum six new jobs to my payroll but I'm unwilling – unable, actually – to do so because the fear of continual audits and fines by OSHA make job creation too costly and risky.

OSHA

Recently I was told by a representative of OSHA that my business had been chosen for a routine audit. The auditor alleged that I was out of compliance in a few minor areas. While I have found the auditor himself to be professional, it has become clear to me that the main goal of the agency is to get me to

¹ Crain, Nicole V. and Crain, W. Mark, *The Impact of Regulatory Costs on Small Firms*, September 2010. <http://www.sba.gov/advo/research/rs371tot.pdf>

² NFIB Research Foundation. *Small Business Economic Trends*. June 2010. <http://www.nfib.com/Portals/0/PDF/sbet/sbet201206.pdf>

admit to some of the alleged violations so they can collect their fines and try to make an example of my business.

OSHA has implied fines for what they allege my business is out of compliance with and "fine adjustments" if we agree to their stipulations of payment and avoiding "appeals" and legal entanglements. With the potential of large fines hanging over our head for issues that are quite arguable, we have been in a lengthy holding pattern on hiring new positions that we need since we don't know if the money for payroll may be needed to stop the agency from punitive action. This has severely interrupted our business as we have seen agencies do to other businesses that resist their enforcement efforts. And while a couple jobs at our little business might be small potatoes, if that is multiplied across the nation by thousands of small businesses, it adds up to a serious squelching of the economic, job-creating activity of the very small businesses that the government "says" it is counting on and "supporting" to be the job creators to lead us out of recession.

Department of Transportation

As bad as my experience with OSHA has been, my time dealing with DOT has actually been worse. In fact, I'm now convinced as a result of this experience that agency auditors may be feeling pressure to augment tightening departmental budgets with revenue-generating compliance efforts. This auditor's only finding from his visit with my business was that we had a torque wrench that the agency wasn't sure was calibrated correctly. If it is not calibrated correctly, there is a chance a leak could occur – although I will clarify that we have never had any leak issues.

In an act of good faith, we went out and replaced the wrench at a cost of \$40. The auditor still indicated that we would be fined of at least \$5,000 for the "infraction". I strongly objected and said that I would refuse to pay such a large amount. The auditor then indicated that he was authorized to reduce the fine amount if we agreed to pay about \$2,500 and sign an acknowledgement of the infraction. He then warned that if we didn't accept his offer that day, we would be liable for the full amount. I politely refused and asked to have his manager call me.

The manager did so and reiterated all the auditor had said and indicated that if I accepted a lower amount (about half of the auditor's lowest offer) that he would settle it that day, but if I didn't I would be still liable for the full fine. Again I refused and so he offered a yet lower amount which was still in the hundreds of dollars and as I continued to feel like I was on "Let's make a deal." I again refused and reminded them that their "issue" with us was all imagined, the wrench was working fine, and that we bought a new one and that frankly I thought this felt like a government "shake down".

When I threatened to get my lawyer involved OSHA backed off and said that if I'd pay about \$200 or so they would call it a done deal. To get rid of them I accepted that and washed my hands of it but it left me feeling very jaded about the government's motivation for these agencies. Unfortunately, it seems as though staff that need to justify their existence and generate some of their own job-survival revenue as opposed to a more helpful "educate and support for safety viewpoint". I believe this should be the mandate and culture in agencies since most businesses want to comply and be safe. I believe agencies should get tough with businesses that are blatantly ignoring regulations or that don't make good faith efforts to comply and improve, but they should not treat every small business as a bad actor.

Regulatory Reform

When the president announced in January 2011 that he was signing an executive order requiring agencies to explore how to streamline regulations, small-business owners were optimistic that we may actually see meaningful relief. Unfortunately, that has not been the case. The executive order has identified existing regulations that could be streamlined and simplified, but it has had little impact on new regulations and the uncertainty we feel over planned regulations. There are still over 2,600 planned regulations in January's regulatory agenda that will affect small businesses in nearly every industry.

In the meantime, Congress must take actions to level the playing field. I would like to see Congress hold on-the-ground agency regulators accountable for situations like I just described above. My experiences show that when left unchecked, their impact on small businesses and job creation can be significant.

In addition, the following ideas will help improve regulatory conditions for small businesses.

Expansion and oversight of SBREFA

The Small Business Regulatory Enforcement and Fairness Act (SBREFA) — when followed correctly — can be a valuable tool for agencies to identify flexible and less burdensome regulatory alternatives. Congress should expand SBREFA's reach into other agencies and laws affecting small businesses. SBREFA and its associated processes, such as the Small Business Advocacy Review (SBAR) panels, are important ways for agencies to understand how small businesses fundamentally operate, how the regulatory burden disproportionately impacts small businesses, and how the agency can develop simple and concise guidance materials. Furthermore, Congress should take steps to require independent agencies to follow SBREFA requirements. Last year, Congress took an important initial step to do this by requiring the new Consumer Financial Protection Bureau to conduct SBAR panels on the rules that will affect small businesses. Now more than ever, the rules promulgated by independent agencies have a considerable impact on small businesses. Congress should hold these independent agencies accountable for their effect on the small business economy.

While SBREFA itself is a good first step, in order for it to provide the regulatory relief that Congress intended the agencies must make good-faith efforts to comply. As an example, the Environmental Protection Agency's (EPA) proposed Boiler MACT rule failed to heed the recommendation of its SBAR panel to adopt a health-based standard and instead proposed a much higher standard that is virtually impossible to attain at any reasonable cost. This higher standard provided little, if any, additional benefit to the public over the health-based standard.

Committees with oversight authority should hold agencies accountable to the spirit of the law, and the Office of Advocacy should uphold its obligation to ensure that agencies consider the impacts of their rules on small businesses. There are plenty of instances where both EPA and the Occupational Safety and Health Administration (OSHA) have declined to conduct an SBAR panel despite developing significant rules, or a rule that would greatly benefit from small business input.

Congress should require agencies to perform regulatory flexibility analyses. Agencies should also be required to list all of the less-burdensome alternatives that it considered, and in the final rule, provide an evidence-based explanation for why it chose a more burdensome alternative versus a less-burdensome option— or why no other means were available to address a rule's significant impact. Agencies should also address how their rule may act as a barrier to entry for a new business.

Finally, when SBREFA was enacted it required all agencies to perform a one-time report on how it had reduced penalties for violations from small businesses. Congress should explore making such reports an annual requirement. Many of the original reports occurred at least a decade ago. Congress should investigate ways to make agencies provide updated information and require that information on an annual or biannual basis.

Indirect costs in economic impact analyses

Regulatory agencies often proclaim indirect benefits for regulatory proposals, but decline to analyze and make publicly available the indirect costs to consumers, such as higher energy costs, jobs lost, and higher prices. Agencies should be required to make public a reasonable estimate of a rule's indirect impact. This requirement exists if agencies follow the Regulatory Impact Analysis (RIA) mandate contained in Executive Order 12866 signed during the Clinton Administration. Congress should hold agencies accountable and clarify the agencies' responsibility for providing a balanced statement of costs and benefits in public regulatory proposals.

Strengthen the role of the Office of Advocacy

The Office of Advocacy plays an important role within the government to ensure that federal agencies consider the impact of regulations on small businesses. This role was further strengthened by executive order 13272. This order required agencies to notify the Office of Advocacy of any draft rules that may have a significant impact on small businesses, and “[g]ive every appropriate consideration to any comments provided by Advocacy regarding a draft rule.” Despite this executive order, agencies frequently fail to give proper consideration to the comments of the Office of Advocacy. In addition, there is no mechanism for resolving disputes regarding the economic cost of a rule between the agency and the Office of Advocacy.

Conclusion

Simply put, the government can and should update its consumer-relations culture and change the process of regulatory implementation and policing. In addition, a few of the basic regulatory reforms I mentioned would help alleviate a significant amount of the regulatory burden that saddles the ability of small businesses to create jobs.

I thank you for the opportunity to share my concerns with you, and I urge the committee to take a hard look at how the regulatory environment stifles small business job creation and growth.

Committee on Oversight and Government Reform
Witness Disclosure Requirement – “Truth in Testimony”
Required by House Rule XI, Clause 2(g)(5)

Name:

1. Please list any federal grants or contracts (including subgrants or subcontracts) you have received since October 1, 2009. Include the source and amount of each grant or contract.

NONE.

2. Please list any entity you are testifying on behalf of and briefly describe your relationship with these entities.

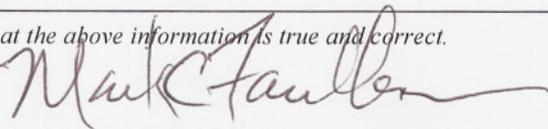
VIREO SYSTEMS, INC. }
BESWAY SYSTEMS, INC. } OWNER

3. Please list any federal grants or contracts (including subgrants or subcontracts) received since October 1, 2009, by the entity(ies) you listed above. Include the source and amount of each grant or contract.

NONE.

I certify that the above information is true and correct.

Signature:



Date:

6/14/12

**BIOGRAPHICAL SKETCH
OF
MARK C. FAULKNER**

Professional: President, Vireo Systems, Inc.
Manufacturer of specialty nutraceuticals and supplements.

Member of the Board of Directors for several area non-profit agencies serving youth, education, behavioral health, and substance abuse prevention and treatment.

EDUCATION

1980-1984 University of Dallas
Dallas, Texas
Undergraduate degree: Bachelors in Physics

1985-1987 University of Texas, School of Business
Tyler, Texas
Graduate studies: Business Law, Accounting

1989-1990 Northwestern University, Kellogg School
Chicago, Illinois
Graduate studies: Marketing, Advertising

PROFESSIONAL EXPERIENCE

- In Brief:**
- Diagnostics Specialist with Abbott Labs
 - Co-founded Aegis Analytical Labs (forensic toxicology lab) in 1990
 - Became an expert in doping control and athletic drug related issues
 - Started Vireo Systems, Inc. in 2002 to manufacture safe, legal nutraceuticals and dietary supplements as alternatives to drugs and toxic medications
 - Has started and operated 8 businesses in the last 20 years, 7 of which are still operating successfully.
 - Board of Directors and volunteer for Project Reflect, Inc. (Board Chair, Interim Executive Director), Williamson County Council on Drug Abuse (Board President), Camp Marymount (Board President), Aquinas College Board of Trustees (LRP Committee Chair), Centerstone of TN (Board Vice Chair), Centerstone Ambassadors Council (Chair), Boys Prep Charter School (Board Chair), Fr. Ryan High School, and other non-profits