

## **Views and Estimates of the Committee on Small Business on Matters to be set forth in the Concurrent Resolution on the Budget for Fiscal Year 2017**

Pursuant to clause 4(f) of Rule X of the Rules of the House and § 301(d) of the Congressional Budget Act of 1974, 2 U.S.C. § 632(d), the Committee on Small Business is transmitting herein: (1) its views and estimates on all matters within its jurisdiction or functions to be set forth in the concurrent resolution on the budget for Fiscal Year 2017; and (2) recommendations for improved governmental performance. These recommendations will focus on creating pro-growth policies, job creation, reformation of outdated or ineffective programs, eliminating wasteful spending, and ensuring that taxpayers' funds are not placed at risk.

Since its founding, the United States has relied on small businesses. Some have, by choice, remained small and become pillars of their communities delivering the necessary services and goods required by residents. Others have grown into the giant companies of the 20<sup>th</sup> and 21<sup>st</sup> centuries that dramatically changed how Americans and the world go about their diurnal activities.

As Adam Smith observed, national governments can either institute policies that facilitate commerce or impose barriers thereto.<sup>1</sup> For much of its history, the United States created policies that focused on the facilitation of economic growth. As a result, most new jobs created in the United States were from small businesses and about 50 percent of America works for small businesses. That emphasis, with its evident benefit to America's entrepreneur, began to falter recently. Rather than enabling economic growth of small businesses, the government imposed burdens through a burgeoning regulatory regime that made it more difficult for small businesses to compete in an ever-expanding global economy. In fact, the single biggest problem facing America's entrepreneurs involve overly burdensome regulation.

### **I. Regulatory Reform**

Rule X, Cl. 1(q) of the Rules of the House provides that the Committee's jurisdiction includes protection of small business related to regulatory flexibility. This Rule is the recognition that the current regulatory regime may inhibit the ability of small business to conduct commerce.

Small business owners live in their communities; like their neighbors they want safe drinking water, clean air, toys that do not endanger their children, and food that will not make them sick. So it is clear that America's entrepreneurs want to comply with regulations; however, if the regulations are designed such that it makes it impossible for them do so, small businesses will be penalized and federal agencies will not achieve their regulatory objectives. That is an irrational decisionmaking process.<sup>2</sup>

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<sup>1</sup> A. SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 452 (Harvard Classics ed. 1988).

<sup>2</sup> If an agency promulgates a regulation that makes compliance difficult, if not impossible, for small businesses, the agency creates a Hobson's choice – the small businesses can either go out of business (due

In 1980, Congress tried to change that result with the enactment of the Regulatory Flexibility Act (RFA).<sup>3</sup> The premise of the RFA is that federal agencies need to tailor their regulations, to the extent possible, to reduce economic burdens on small business.

Congress subsequently amended the RFA twice (in 1996 and 2010) in an effort to improve agency compliance with the statute's analytical requirements. Those amendments made marginal changes in the RFA but failed to close the gaps that permit federal agencies to avoid real compliance. The Committee has been at the forefront of efforts to strengthen the RFA so that the regulatory process will work for America's entrepreneurs and objectives sought by federal agencies. That is exemplified by the Chairman's leadership in drafting and having the House pass H.R. 527, the Regulatory Flexibility Improvements Act of 2015. The legislation would significantly strengthen the RFA, reduce burdens on America's job creators, without undermining health, safety and environmental protections of the public.

Instituting a process to obtain more sensible regulations would be a necessary, but not sufficient, condition to reducing the barriers that small businesses face in conducting commerce and creating economic growth. Small businesses often face significant paperwork burdens providing information to the federal government outside of the context of an agency regulation. There is little doubt that the collection of information by the federal government is vital to providing accurate information on the economy and a variety of other activities which small businesses must incorporate into their decisionmaking processes.<sup>4</sup> However, when small businesses are overburdened by keeping records and reporting information to the federal government, it diverts scarce human and financial resources needed for business operations. Congress recognized this problem with the enactment of the Paperwork Reduction Act<sup>5</sup> in 1980. Despite this effort, it is unlikely that most small businesses during the past 35 years would say their paperwork (despite the near ubiquitous use of computers and mobile communication devices) has been reduced. The Committee has jurisdiction over the Paperwork Reduction Act pursuant to Rule X, Cl. 1(q) of the Rules of the House and the Committee will develop legislative proposals that strengthen agency compliance with the Paperwork Reduction Act by requiring that the information is of utility to the federal government and eliminates duplicative reporting or recordkeeping requirements.

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to the inability to comply) or not comply and absorb the risk of penalties for its lack of compliance. In either result, the agency fails to achieve its regulatory objective which constitutes irrational rulemaking. *E.g., Mourning v. Family Publications Serv. Inc.*, 411 U.S. 356, 369 (1973); *Sidell v. Commissioner*, 225 F.3d 103, 106 (1st Cir. 2000); *Texas Oil & Gas Ass'n v. EPA*, 161 F.3d 923, 935 (5th Cir. 1998); *American Paper Inst. v. EPA*, 996 F.2d 346, 351 (D.C. Cir. 1993).

<sup>3</sup> 5 U.S.C. §§ 601-12.

<sup>4</sup> Economic theory teaches that a competitive market (which then allocates resources most efficiently) requires producers and consumers to have full information. J. PERLOFF, MICROECONOMICS 222 (7<sup>th</sup> ed. 2015) (hereinafter "Perloff"). Even if they do not have full information but their information but consumers and producers have the same amount of imperfect information, a competitive market can exist which will produce an efficient allocation of resources. *Id.* at 627.

<sup>5</sup> 44 U.S.C. §§ 3501-21.

Efforts to reduce regulatory and recordkeeping costs will play a vital role in allowing America's entrepreneurs to focus on job creation and business expansion. A robust small business economy unshackled from the fetters of overregulation will generate jobs, catalyze economic growth, and ensure consumers benefit from the competitive markets created by a nimble robust small business sector.

## **II. Federal Procurement**

The federal government is the largest consumer on the planet, purchasing everything from aircraft carriers to paper clips from the private sector. Given the nearly half trillion dollars spent by the federal government, it, like any other consumer, benefits from a competitive market.<sup>6</sup> Congress recognized what economic theory teaches and made competition the touchstone of federal procurement.

This then necessitates that the federal government institute policies that ensures as many firms as possible are able to sell goods and services to the government. In turn, this strongly suggests that the government should maintain a robust small business sector that can provide goods and services to the government. These policies are encapsulated in the Small Business Act that establish a number of policies to ensure that small businesses are given their fair share of opportunities to sell their goods and services to the federal government. It established the Small Business Administration (SBA or Agency) to carry out these efforts.

This Committee has long been concerned with the lack of priority that the SBA gives to fulfilling its functions to promote and enforce the statutory standards associated with a robust small business procurement sector. These flaws include: 1) the failure to implement regulatory changes necessitated by Congress that enhances small business participation in the federal procurement marketplace 2) the lack of financial resources devoted to the hiring and retention of SBA personnel critical to maximizing federal procurement participation by small businesses; 3) the inadequacy of computer systems to accurately reflect small business participation in federal procurement; and 4) the absence of appropriate information technology security<sup>7</sup> to protect small businesses that participate in the federal marketplace.

First and foremost, the SBA must implement, with all deliberate speed, statutory changes that improve small business participation in the federal marketplace. The Committee will continue to perform oversight of the SBA's implementation efforts and may consider imposing even more onerous mandates that will force quick regulatory promulgation. Finally, the Committee will work closely with appropriators to ensure that sufficient priority is given to the statutory mandates rather than optional initiatives developed by SBA bureaucrats.

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<sup>6</sup> See Perloff, *supra* note 4, at 281-83 (noting that reduction in number of firms raises prices for consumers).

<sup>7</sup> To be fair, not all of the security problems rest solely at the SBA. Nevertheless, the SBA's Inspector General finds (on almost an annual basis) that a longstanding and unmet Agency management challenge continues to be cybersecurity.

The Committee continues to hear from the SBA that it lacks the financial resources needed to pay key procurement personnel at the Agency – procurement center representatives, commercial marketing representatives, and business opportunity specialists. If sufficient such individuals were hired and retained by the SBA, it would dramatically increase the ability of small businesses to compete in the federal marketplace, which would redound to the federal government and ultimately the taxpayer in lower costs for higher quality goods and services. Complaints of resource shortages are belied by the SBA’s requests for millions of dollars to implement its own entrepreneurial outreach initiatives that duplicate services provided by SBA resource partners (such as grantees operating small business development centers) and other agencies.<sup>8</sup> To exacerbate this problem, there is little evidence that the SBA performs proper evaluation of these training initiatives.<sup>9</sup> Simply put, this must end; in the past, these Views and Estimates have recommended the elimination of SBA-generated initiatives for entrepreneurial outreach and training. The Committee will continue to work with the Committee on the Budget and the Committee on Appropriations to ensure that funds are provided for proven resources – personnel who help small businesses compete in the federal procurement marketplace – rather than for the unproven and duplicative entrepreneurial outreach efforts of the SBA.

A basic premise of the SBA small business procurement programs is that they only are available to concerns that qualify as small businesses or some subset of small businesses. This requires that the Agency have robust information technology that can identify those eligible businesses and reject those that do not. However, the GAO found that the SBA did not perform adequate assessments of its investments in computer systems.<sup>10</sup> Without adequate information technology at the Agency, there is little in the way for the SBA to ensure that the benefits of the Small Business Act redound to true small business concerns. The Committee will continue its oversight of the SBA’s information technology investments to ensure that the data in such computer systems reflect accurately eligible small business concerns. The Committee also recommends that funds be diverted from duplicative or peripheral SBA programs and personnel and reallocated to the Agency’s computer systems.

Adequacy of the information in SBA databases is an important first step. Given the significant proprietary information provided to the Agency by small businesses involved in federal procurement, it is not surprising that there would be some chariness on the part of these enterprises to participate if their information is not secure from cyberattacks. The Agency must allocate sufficient resources to resolve the longstanding cybersecurity

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<sup>8</sup> For example, the SBA, for FY 2016, requested \$6 million for regional innovation clusters. Yet, the Department of Commerce operates a regional innovation cluster program that was funded at \$10 million for FY 2016. That raises a question about whether the SBA is in violation of § 18 of the Small Business Act which prohibits the Agency from duplicating the activities of another federal agency unless specifically authorized by the Small Business Act. There is no specific authority in that Act for the SBA to seed regional innovation clusters.

<sup>9</sup> UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE (GAO), SMALL BUSINESS ADMINISTRATION: LEADERSHIP ATTENTION NEEDED TO OVERCOME MANAGEMENT CHALLENGES 39 (GAO-15-347) (2015), available at <http://www.gao.gov/products/GAO-15-347> (hereinafter “GAO SBA Management Report”).

<sup>10</sup> *Id.* at 81-82.

concerns noted by the Inspector General and that remain unresolved.<sup>11</sup> Given the SBA's penchant for claiming lack of resources, budgetary allocations should be made explicit on the need for funds that should be allocated to cybersecurity.<sup>12</sup>

### III. Capital Access

Although the SBA has claimed that it lacks sufficient resources to provide robust assistance to those involved in federal procurement, no such claim has ever been made with respect to its efforts to provide capital to entrepreneurs. The issue is not one of resources but rather whether those resources are being managed properly in order to protect the taxpayer.

The SBA's capital access programs were not created to *supplant* existing commercial sources of capital. Rather they were created to *supplement* conventional capital markets. In particular, the programs were established to fill gaps in the market for promising small businesses that, for whatever reason, could not obtain capital through conventional markets. Thus, the provision of capital is aimed at meeting policy goals established by Congress, such as: offering small amounts of capital through the Microloan Program; promoting economic development through certified development companies; approving loans under § 7(a) of the Small Business Act only to those who cannot obtain credit elsewhere; or licensing small business investment companies that demonstrate their ability to fund promising enterprises.

The Administrator, in testimony before the Committee, appears to believe that simple growth in the program without more defaults demonstrates proper management of the taxpayer dollar. The Committee begs to differ because simple growth in the programs does not connote compliance with the underlying policy goals. This will require a significant overhaul in the SBA's oversight of its capital access programs.

Foremost, the SBA must undertake proper oversight of its capital access programs to ensure that the underlying policy goals are met. This would mean that the SBA must develop appropriate regulatory standards by which it can measure compliance with the policy goals. Once the standards are established, the SBA then must allocate sufficient resources to ensure that its capital access partners are in compliance with these standards. And if this means the termination of some them, so be it. The Committee expects to continue oversight efforts in this area and, if the SBA fails to correct problems in these programs, legislative action will be necessary to change the culture at the Agency and among those private enterprises that offer guaranteed financing through programs overseen by the SBA.

After the Agency has modified its oversight to ensure that its lending partners comply with statutory goals, the SBA must modify how it conducts businesses to provide greater

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<sup>11</sup> *Id.* at 13.

<sup>12</sup> Provision of sufficient resources to address cybersecurity issues are made more problematic by the longstanding absence of a Chief Information Officer (CIO) and whether the Agency's organizational structure ensures that the CIO has the managerial power needed to make proper technology investments.

certainty and transparency in its decisionmaking process. This will require the SBA to rely less on ad hoc, often unwritten, decisions and more on a transparent process in which all parties understand their rights and responsibilities. Such procedures also must include an ability to obtain waivers from the Agency should there be a demonstration that the waiver is in the public interest. Should the Agency fail to move towards this objective on its own, the Committee will have no compunction in finding an appropriate solution through legislation.

Appropriate decisionmaking also requires a robust information technology system. As already noted, the SBA information technology is anything but robust. The SBA will need to develop a plan for computer systems that can provide the data needed to measure the efficacy of its programs while maintaining their security from cyberattacks. In addition, the systems must ensure (as with those for its procurement assistance initiatives) that financial assistance only is being provided to small business concerns. With full information, the Agency and Congress can make appropriate modifications to ensure that the SBA is not lending solely for the sake of lending but rather to meet the underlying goals limned in the Small Business Act and Small Business Investment Act of 1958.

The combination of coherent, transparent decisionmaking processes, an adequate modernized information infrastructure and personnel to perform robust oversight will incentivize participation in the program by lenders and borrowers. At the same time, the federal taxpayers will have greater assurance that their funds are being used wisely to help small businesses that otherwise would have been overlooked in the conventional capital access markets.

#### **IV. Programmatic Duplication**

Federal taxpayer dollars are not used wisely when the SBA creates, on its own initiative programs that duplicate those already in operation at the Agency. Similarly, if the SBA duplicates efforts provided by other agencies, federal resources are not being spent wisely. Given the breadth of assistance that the Agency provides, it would be impossible to establish programs with clean lines of demarcation that prohibit any overlap. Nevertheless, SBA programmatic duplication is rampant and is exacerbated by the Agency's failure to measure the effectiveness of such assistance programs. This is particularly true in the area of entrepreneurial development in which the Agency offers technical assistance to small business owners.

Congress recognized that the SBA well could duplicate the efforts of other federal agencies and, in § 18 of the Small Business Act, prohibits any duplication of effort by the SBA if a program already is offered by another federal agency unless the Small Business Act expressly authorizes the duplication. Despite this statutory prohibition, the SBA created a regional cluster innovation program that duplicates, as far as the Committee can ascertain, the one operated by the Department of Commerce. The SBA program was not authorized in the Small Business Act. As a result, the SBA should cease operation of the

program.<sup>13</sup> To ensure that the Agency does not run further afoul of this statutory prohibition, the Committee will make every effort to catalog the programs<sup>14</sup> and determine which may violate the prohibition in § 18 thereby resulting in their termination.

Once duplicative efforts are eliminated under § 18, the Committee will be able to turn its attention toward SBA-created entrepreneurial development initiatives. These SBA initiatives often duplicate other efforts within the SBA and this Committee, on a bipartisan basis, has called for the rationalization of the entrepreneurial development programs. Before any such rationalization takes place, the SBA must create appropriate metrics to measure their efficacy that go beyond a simple head count of entrepreneurs served.<sup>15</sup> The Committee then can use these assessments to determine which programs within the SBA are duplicative and what prohibitions should be placed on the Agency's discretion to create its own entrepreneurial outreach efforts.

## V. SBA Mission and Organizational Structure

Since its inception, the SBA has, as far as the Committee can ascertain, revoked the status of only two of its lenders in its two major lending programs.<sup>16</sup> Although the SBA has significantly broader authority to suspend and debar federal government contractors than most other federal agencies (which only are permitted to suspend and debar contractors doing business with a particular agency), the SBA undertakes far fewer suspension and debarments than does the Department of the Air Force even though the Agency has jurisdiction over double the number of contractors than the Air Force.<sup>17</sup> Nor is the Committee aware of any action taken against any of its entrepreneurial development partners for failing to meet their agreements to provide services to small businesses.<sup>18</sup> Even if one assumes that the SBA private-sector partners and small business contractors are far more compliant than entities regulated by other federal agencies, the absence of enforcement activity by the SBA means that it quite possible that many enterprises are obtaining benefits under the Small Business Act and Small Business Investment Act of 1958 for which they are not eligible. That reduces the resources that are available to

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<sup>13</sup> It is important to note that the statute providing for appropriations of the SBA's entrepreneurial development programs does not specify that funds be used for regional innovation clusters. Yet, the SBA continues to spend in violation of § 18 of the Small Business Act.

<sup>14</sup> Such efforts are likely to require the assistance of the SBA and GAO.

<sup>15</sup> GAO noted that the SBA lacked effective metrics to assess the quality of its programs. GAO SBA Management Report, *supra* note 9, at 39. It is important to note that the metrics are a necessary component of the strategic planning requirements set out in the Government Performance and Results Act. Pub. L. No. 103-62, 107 Stat. 285 (1993) (codified, as amended, at 3 U.S.C. § 305, 31 U.S.C. §§ 1105(a), 1115-19, 9703-04, and 39 U.S.C. §§ 2801-05).

<sup>16</sup> Many lenders have voluntarily dropped out of the programs by not meeting certain goals relative to the number of loans that must be made to maintain their status.

<sup>17</sup> In FY 2014, the SBA took action against 8 small businesses while the Air Force took action against 16 small businesses – even though the SBA has jurisdiction over twice as many small businesses as the Air Force.

<sup>18</sup> The SBA's response that it does not have adequate data to measure compliance of its entrepreneurial development partners due to privacy concerns is unavailing since the SBA has had more than 11 years since Congress mandated the Agency to promulgate privacy regulations and none have been finalized.

small businesses that are deserving of assistance. Ultimately, that fails to protect federal tax dollars by diverting them to purposes for which they were unintended.

This inability to shepherd scarce taxpayer resources is exacerbated by a confusing and overlapping agency structure with unclear lines of authority. For example, the SBA has ten regional offices but the Administrator, in testimony before the Committee, was unable to articulate the actual responsibilities of these offices especially since the district offices (where most small businesses receive services) are overseen by an Office of Field Operations located at the Agency's headquarters in Washington, DC. The Administrator recently created an Office of Intergovernmental Affairs (OIA) which responsibilities overlap those of the Office of Disaster Assistance.<sup>19</sup> It is unclear whether the Chief Information Officer (CIO) has the appropriate authority and sufficient personnel to oversee the Agency's information technology investments.<sup>20</sup> Personnel, whose primary responsibility should be to assist small businesses obtain federal government contracts, have numerous other responsibilities and do not report to officials at SBA headquarters with expertise in government contracting. The SBA eliminated the Office of the Chief Operating Officer and then reestablished nearly a year later (a decision for which the Committee and GAO could find no written documentation). Given the fact that Congress created a Deputy Administrator to serve as the Agency's Chief Operating Officer it is unclear what functions the Office of the Chief Operating Officer serves. These structural problems are exacerbated by the lack of clear direction on the decisionmaking powers of various subsidiary officials and offices within the SBA.<sup>21</sup> It is difficult to rationalize an agency's management structure if the agency's delegations of authority to its personnel are unclear, outdated, and essentially irrelevant.

The problems of the SBA outlined, and in particular its lack of enforcement activity, reveals an agency that has not, despite more than 60 years of existence, rationalized its dual mission – to promote small businesses and enforce laws so that only eligible enterprises are able to access the resources provided by the federal taxpayer. Given the current federal deficit, the taxpayer no longer can wait for the SBA to resolve these problems; it will require intervention by Congress. This Committee will take all actions within its jurisdiction to rectify these problems and ensure that the SBA not only is an effective promoter of small business but also a reliable enforcer of the laws to ensure that scarce resources reach only eligible small businesses. The end result will be a more effective and efficient SBA.

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<sup>19</sup> Despite claims that OIA would have no involvement in disaster response, the Administrator's letter of May 29, 2015 to the Hon. Anders Crenshaw, Chairman of the Subcommittee on Financial Services and General Government of the Committee on Appropriations, stated that OIA will allow the SBA to "[s]erve as a troubleshooter in dealing with government officials SBA initiatives and disaster responses...." The letter never specifies why the Office of Disaster Assistance and other officials at the SBA are incapable of performing that function.

<sup>20</sup> The powers of the CIO were dramatically enhanced in the Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act, FY 2015, Pub. L. No. 113-291, §§ 831-37, 128 Stat. 3292, 3438-50 (2013).

<sup>21</sup> The SBA admitted that its standard operating procedure detailing delegations of authority within the Agency is outdated and requires revision. See GAO SBA Management Report, *supra* note 9, at 122 (noting that the delegations of authority last updated in February 2002 needs revision).