STATEMENT OF

THE NATIONAL ASSOCIATION OF CONVENIENCE STORES

FOR THE

HEARING OF THE SENATE COMMITTEE ON SMALL

BUSINESS & ENTREPRENEURSHIP

MARCH 29, 2017

"EXAMINING HOW SMALL BUSINESSES

CONFRONT AND SHAPE REGULATIONS"

The National Association of Convenience Stores ("NACS") appreciates the opportunity to submit this statement regarding the importance of the Regulatory Flexibility Act ("RFA") and the Small Business Regulatory Enforcement Act of 1996 ("SBREFA") and why legislation to improve RFA and SBREFA is needed.[1]

In enacting both RFA and SBREFA, Congress recognized that although businesses of all sizes face increasingly onerous regulatory burdens, small businesses are often disproportionately burdened by these regulations. Many times, small businesses do not have in-house counsel or regulatory compliance personnel. Thus, the regulatory burdens that may impose a cost – albeit a "manageable" one – on larger businesses, are magnified for smaller entities. This is particularly true in the convenience store industry where single-store operators often double as cashiers at their stores and work behind the counter many hours per week.[2]

By requiring agencies to (1) consider the impact of their regulatory proposals on small entities, (2) examine effective alternatives that would minimize the impact of a rule on small businesses, and (3) provide their analyses to the public for comment, RFA and SBREFA provide important protections for small businesses.[3] Unfortunately, however, agencies routinely fail to comply with their regulatory obligations imposed by these laws. Instead, they treat these requirements as mere procedural requirements without any policy or substantive content to them. To prevent agencies from merely "checking the box" for RFA and SBREFA requirements, legislation, such as the Prove It Act[4] and the Small Business Regulatory Flexibility Improvement Act,[5] should be enacted.

In the statement below, NACS provides an overview of the convenience stores industry, describes the benefits of passing legislation to restore RFA and SBREFA, and describes a case-study where RFA and SBREFA failed.

I. THE CONVENIENCE STORE INDUSTRY IS A SMALL BUSINESS INDUSTRY.

NACS is an international trade association representing the convenience store and fuel retailing industry with more than 2,200 retail and 1,800 supplier company members, the majority of whom are based in the United States. In 2015, the industry employed more than two and a half

[1] The Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121 (1996), amended the Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq.*, in a number of important ways.

[2] In addition to the general difficulties tied to small business ownership, many convenience store owners and operators are first generation immigrants, who do not speak English as a first language. Thus, even language can present an obstacle to compliance.

[3] Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (codified at 5 U.S.C. § 601). 5 U.S.C. §§ 603(c) (Initial Regulatory Flexibility Analysis), 604(a)(6) (Final Regulatory Flexibility Analysis), 610(b) (Periodic Review of Rules).

[4] Prove It Act of 2016, S. 2847, 114th Cong. (2016).

[5] Small Business Regulatory Flexibility Improvement Act, S. 584, 115th Cong. (2017).

million workers and generated $574.8 billion in total sales, representing approximately 3.2 percent of the United States' GDP. Our members serve approximately 160 million people per day – around half of the U.S. population –and our industry processes over 81 billion payment transactions per year.

Despite the fact that one in every 30 dollars spent in the American economy is spent in our members' channel of trade, the convenience and fuel retailing industry is an industry of small businesses. 63 percent of the 154,195 convenience stores in the U.S. are owned and operated by an individual with only one store. Moreover, under five percent of the retail motor fuel outlets in the United States are owned and operated by the integrated oil companies—the vast majority of branded outlets are locally owned. This small business nature of the industry is reflected in the association's membership where approximately 75 percent of NACS' total membership is composed of companies that operate ten stores or fewer.

The convenience store and retail fuel market is one of the most competitive in the United States. NACS' members operate on tiny margins (around 2 percent or less) and the average annual pretax profit per store is approximately $68,744. NACS' members are unable to absorb incremental cost increases without passing them on to consumers. Thus, every regulatory compliance cost (no matter how small) that a store owner accrues is a cost that must be passed along to consumers.

II. OVER TIME, RFA AND SBREFA REQUIREMENTS HAVE BECOME MERE "CHECK THE BOX" EXERCISES FOR MANY FEDERAL AGENCIES.

Despite the initial momentum behind RFA and SBREFA, and the hope that these statutes would lead to positive changes for small businesses in the regulatory space, RFA and SBREFA have become mere procedural requirements without any substantive meaning.[6] As Thomas Sullivan, Chief Counsel for Advocacy at the Small Business Administration under President George W. Bush, explained at a 2002 congressional hearing, "One of the largest hurdles to be overcome remains resistance in some agencies to the concept that less burdensome regulatory alternatives may be equally effective in achieving their public policy objectives."[7] Agencies, he explained, routinely find loopholes for not complying with RFA and SBREFA.

Legislation, such as the Prove It Act of 2016 and S. 584: the Small Business Regulatory Flexibility Improvement Act, is critical to ensuring that RFA and SBREFA serve as proper checks on agency actions and effectively work to protect small businesses from regulatory

[6] William J. Clinton, "Message to the Congress Reporting on the State of Small Business," May 6, 1999 (stating that "The new process is working. Agencies and businesses are working in partnership to ensure that small business input is a part of the rule-making process.") . Online by Gerhard Peters and John T. Woolley, THE AMERICAN PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws/?pid=57528.

[7] *Agency Compliance with the Small Business Regulatory Enforcement Fairness Act (SBREFA): Hearing Before the H. Committee on Small Business*, 107th Cong. (2002) (statement of Thomas M. Sullivan, Chief Counsel for Advocacy, office of Advocacy, U.S. Small Business Administration), *available at* https://www.sba.gov/sites/default/files/files/test02_0306.txt.

burdens as Congress intended. For example, S. 584 would close the loopholes agencies have been using to skirt economic analyses of their rules and ensure that agencies conduct proper analyses on how their regulations impact small businesses. Similarly, the Prove It Act would empower the Small Business Administration ("SBA") to request that the Office of Information and Regulatory Affairs ("OIRA") review any federal agency certification that a proposed rule, if promulgated, would *not* have a significant economic impact on a substantial number of small entities (in which case the agency does not need to submit a regulatory flexibility analysis of the rule). Such provisions are significant. It is far too common for agencies to formally perform an economic impact analysis (without analyzing the data in a meaningful way or by analyzing incomplete data) and find that a regulation would not have significant impact.[8]

NACS supports the principles behind the Prove It Act and the Small Business Regulatory Flexibility Improvement Act, and encourages the Committee to move them through the legislative process. If RFA and SBREFA are to be truly effective, agencies must be required to conduct meaningful analyses based upon legitimate and complete data sets and to consider and implement where possible less burdensome requirements.

III. CASE STUDY: RFA AND SBREFA FAILED TO PROTECT SMALL BUSINESS CONVENIENCE STORES DURING THE MENU LABELING RULEMAKING PROCESS.

An example of how RFA and SBREFA failed to protect small businesses is found below. In particular, it highlights how an inaccurate regulatory impact analysis and failure to find meaningful small business regulatory alternatives results in costly burdensome requirements for small businesses. The below example is a case in point for why Congress should be pushing to give RFA and SBREFA more teeth.

In December 2015, the Food and Drug Administration ("FDA") issued its long-awaited final rule on nutrition labeling of standard menu items in restaurants and similar retail food establishments.[9] Businesses must begin complying with the rule, which arose out of the menu labeling provisions of the Patient Protection and Affordable Care Act ("ACA"), by May 5, 2017.

Between enactment of the ACA and FDA's issuance of its final rule, NACS and many similarly situated parties actively engaged with the agency to achieve common sense

[8] NACS saw this first-hand during the recent rulemaking process to enhance retailer standards in the Supplemental Nutrition Assistance Program. *See e.g.*, Office of Advocacy, U.S. Small Business Administration, Letter to Undersecretary Kevin Concannon re: Enhancing Retailer Standards in the Supplemental Nutrition Assistance Program, (May 17, 2016)(stating that the Food and Nutrition Service should "improve its regulatory flexibility impact analysis and consider reasonable regulatory alternatives that will minimize the impact of the rule on affected small businesses" and that FNS' conclusions regarding the rule's impact on small retailers is underestimated), ID: FNS-2016-0018-1169, *available at* https://www.regulations.gov/document?D=FNS-2016-0018-1169.

[9] Food Labeling, 21 C.F.R. Part 101 (2014); Final Rule, Dept. of Health and Human Services, *Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments; Calorie Labeling of Articles of Food in Vending Machines*, 79 Fed. Reg. 71156 (Dec. 1, 2014).

implementation of the rule.[10] FDA, however, largely ignored the myriad real-world complications of implementing the underlying statute and the problems it created with its proposal. In the final rule, despite the agency's admission that the final rule will "have a significant economic impact on a number of small entities,"[11] the agency stated that in complying with RFA, "we have accordingly analyzed regulatory options that would minimize the economic impact of the rule on small entities consistent with statutory objectives. We have crafted the final rule to provide flexibility for compliance."[12] Yet, a close examination of the various iterations of this rule and the accompanying guidance documents shows that FDA did not truly analyze or provide for any meaningful alternatives that would have lessened the regulatory burdens for small businesses. FDA merely "checked the box" on its RFA and SBREFA requirements by stating empty words in its regulations. It did not accurately gauge the cost burdens the rule placed on small businesses, the unique problems the rule presented for small businesses, or any meaningful alternatives to reduce burdens on small businesses.

Section 4205 of the ACA required FDA to mandate disclosure of certain calorie information by any "restaurant *or similar retail food establishment* that is part of a chain with 20 or more locations doing business under the same name."[13] In its final rule, FDA failed to properly consider the differences between restaurants and other retail businesses, and whether non-restaurant businesses should be covered by the rule at all and if so, how.[14] This failure resulted in a regulation that is utterly devoid of flexibility for different business models (e.g., chain restaurant, grocery store, or convenience store) with respect to how and where calorie counts are displayed. In addition, it has led to substantial uncertainty related to core definitions and components of the rule, such as what constitutes a "menu" and natural calorie variations between fresh food products.

For instance, if a convenience store posts an advertisement for a sandwich + drink special inside the store, FDA has indicated it might be considered a menu and need to display calorie

[10] *See* Letter from Carin Nersesian, Director, Government Relations, National Association of Convenience Stores to Dr. Margaret Hamburg, Commissioner of Food and Drugs, Food and Drug Administration, Docket ID FDA-2011-F-0172-0191 (May 4, 2011) (commenting on FDA's Proposed Rule on Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments, 76 Fed. Reg. 19192 (Apr. 6, 2011) (hereinafter "Proposed Rule")); *see also* Letter from Erik Lieberman, Regulatory Counsel, Food Marketing Institute to Dr. Margaret Hamburg, Commissioner of Food and Drugs, Food and Drug Administration, Docket ID FDA-2011-F-0172-0455 (July 8, 2011) (commenting on FDA's Proposed Rule); Letter from Lisa Mullings, President and CEO, NATSO to Dr. Margaret Hamburg, Commissioner of Food and Drugs, Food and Drug Administration, Docket ID FDA-2011-F-0172-0467 (July 8, 2011) (commenting on FDA's Proposed Rule).

[11] Notwithstanding the agency's estimate that the rule would have a "significant economic impact," estimates by third parties found the cost would be even higher than the agency estimated.

[12] 79 Fed. Reg. at 71244.

[13] 21 U.S.C. § 343(q)(5)(H)(i).

[14] FDA dramatically expanded the scope of "similar retail food establishment" to effectively include any business that sells even a small amount of prepared food. The final rule now reaches "bakeries, cafeterias, coffee shops, convenience stores, delicatessens, food service facilities located in entertainment venues (such as amusement parks, bowling alleys, and movie theaters), food service vendors (e.g., ice cream shops and mall cookie counters), food take-out and delivery establishments (such as pizza take-out and delivery establishments), grocery stores, superstores, quick service restaurants, and table service restaurants." 79 Fed. Reg. at 71157.

information. If the advertisement were posted on a gas pump or on the street corner, however, it is even less clear. In fact, FDA staff has been unable to confirm whether any of these advertisements would be considered a menu under the regulations—despite having years to develop this regulation. As such, convenience store owners must expend vast amounts of money to rework advertisements that may or may not be considered menus.

If FDA actually adhered to the requirements of RFA and SBREFA, these points of confusion would likely have been cleared up between the proposed and final rule and the various guidance documents. FDA would have considered how small business owners – particularly small business owners across different business models – would be impacted by the rule and would have come up with viable alternatives for those companies. Instead, FDA did not consider (in any meaningful way) the difficulties and expense that small businesses will incur to comply with the requirements in the final rule.

IV. CONCLUSION

NACS believes that RFA and SBREFA are beneficial tools to protect small businesses against burdensome and expensive regulations. Over time, though, agencies have performed regulatory impact analyses as mere formalities, instead of revising and adjusting proposed rules to ensure small businesses are not adversely impacted. That is why – as evidenced by FDA's absurd implementation of its menu labeling rule – legislation addressing loopholes in the RFA and SBREFA is needed now more than ever.

NACS stands ready to assist the Committee as it examines RFA and SBREFA and considers future policy changes.