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Building an Opportunity Economy: The State of Small Business and Entrepreneurship

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My name is David R. Burton. I am Senior Fellow in Economic Policy at The Heritage Foundation. I would like to express my thanks to Chairman Chabot, Ranking Member Velázquez, and members of the committee for the opportunity to be here this morning. The views I express in this testimony are my own, and should not be construed as representing any official position of The Heritage Foundation.

After complying with the multitude of state and federal legal requirements, business owners should still have time left over to actually run their businesses. Entrepreneurs shouldn't have to be lawyers to run businesses in the United States. Unfortunately, that is just about where we find ourselves today. It is not where we want to be if we desire a return to sustained prosperity.

Entrepreneurship matters. It fosters discovery, innovation and job creation. It leads to more productive production processes that improve productivity and real wages. Entrepreneurs develop new and less expensive products that improve consumer well-being. They make markets more efficient. New firms account for most of the net job creation in the United States. Moreover, the vast majority of economic gains from innovation and entrepreneurship accrue to the public at large, rather than entrepreneurs.

Entrepreneurship is in decline. Business exits now exceed new business formations. Many other indicia of entrepreneurial health also indicate that we have placed an unprecedented burden on small and start-up businesses. Accordingly, job creation, productivity improvements and welfare-enhancing innovation have slowed.

The reasons for this are manifold. One policy change – or even a few – will not solve the problem because the problem is caused by the combined weight of hundreds of regulatory or statutory burdens imposed on small and start-up enterprises.

The problems fall into eight basic categories.

1. **Poor Tax Policy.** Poor tax policies raise the cost of capital, impose high taxes on risk taking and impede economic growth. Moreover, the tax system is monstrously complex, imposing inordinately high compliance costs on small and start-up firms.
2. **Inadequate Access to Capital.** Securities laws and, to a lesser extent, banking laws and practices, restrict entrepreneurs' access to the capital needed to launch or grow their businesses. After all, without capital to launch a business, other impediments to entrepreneurial success are moot.
3. **Expensive Health Care.** The U.S. health care system is the most costly in the world and the Patient Protection and Affordable Care Act (Obamacare) imposes high costs on firms with 50 or more employees.
4. **Burdensome Energy and Environment Laws.** Environmental and energy regulations raise the cost of energy and limit development of energy resources.
5. **High and Growing Regulatory Costs.** The cost of complying with increasingly burdensome and complex regulations continues to grow rapidly. These rules have a disproportionate adverse impact on small and start-up companies that can ill afford to use scarce resources on regulatory compliance rather than growing their business.
6. **Onerous Labor and Employment Laws.** Increasingly complex and opaque labor and employment laws raise the cost and risk of employing people. They reduce wages and cost jobs.
7. **Bad Immigration Rules.** The U.S. immigration system makes it difficult for firms to gain access to talented foreign workers and for immigrant-entrepreneurs to enter the United States to start a business.
8. **Costly Legal System.** The U.S. legal system is the most costly in the world, imposing high and potentially ruinous costs on small firms.

If we want a return to a prosperous America with opportunity for all and rising real wages, then Congress needs to systematically address these issues with alacrity.

The remainder of this testimony examines in greater detail why entrepreneurship matters, the evidence that entrepreneurship is in decline and the reasons for the decline. It makes 97 specific recommendations to remove barriers to entrepreneurship and economic growth.

Entrepreneurship Matters

Entrepreneurship matters.[1] It fosters discovery and innovation.[2] Entrepreneurs also engage in the creative destruction of existing technologies, economic institutions and business production or management techniques by replacing them with new and better ones.[3] Entrepreneurs bear a high degree of uncertainty and are the source of much of the dynamism in our economy.[4] New, start-up businesses account for most of the net job creation in the economy.[5] Entrepreneurs innovate, providing consumers with new or better products. They provide other businesses with innovative, lower cost production methods and are, therefore, one of the key factors in productivity improvement and real income growth.[6] In terms of the neo-classical growth model, entrepreneurship is an important factor affecting the rate of technological change and the marginal productivity of capital.[7] The vast majority of economic gains from innovation and entrepreneurship accrue to the public at large, rather than entrepreneurs.[8] Entrepreneurs are central to the dynamism, creativity and flexibility that enables market economies to consistently grow, adapt successfully to changing circumstances and create sustained prosperity.[9]

Entrepreneurship is in Decline

Entrepreneurship is in decline. Business exits now exceed new business formations.[10] The share of firms aged 16 years or more has increase by 50 percent over the last two decades.[11] High-Tech companies are shedding more jobs than they are creating.[12] Although recovering with the substantial recovery in equity market values over the past several years and the regulatory improvements in the 2012 JOBS Act "IPO On-Ramp" provisions,"[13] Initial Public Offerings (IPOS) remain substantially

below the previous two decades.[14] Although there is improvement since the depths of the recession, small and start-up businesses continue to struggle.[15] The decline in entrepreneurship is one of the key factors causing anemic U.S. economic performance.

Causes of the Decline in Entrepreneurial Activity

There are multiple reasons for the decline in entrepreneurial activity.[16] Reasons for the decline include poor tax policies that raise the cost of capital and impose high taxes on risk-taking,[17] a monstrously complex tax system that imposes inordinately high compliance costs on small and start-up firms,[18] inadequate access to capital,[19] a health care system that is the most complex and costly in the world,[20] a legal system that is the most costly in the world,[21] high and growing regulatory costs,[22] labor and employment laws that raise the cost and risk of employing people,[23] environmental and energy regulations that raise the cost of energy and limit development of energy resources,[24] and an immigration system that makes it difficult for firms to gain access to talented foreign workers and for immigrant-entrepreneurs to enter the United States to start a business.[25]

Helping to Restore Prosperity by Removing Impediments to Entrepreneurship

The key to reversing the decline in entrepreneurship is to systematically reduce the legal impediments to entrepreneurship. There is not any one policy change – or even a few – that will lead to a sudden renaissance in entrepreneurship. Since the decline is caused by the combined weight of many poor public policies, the solution requires systematically improving public policy in a wide variety of areas.

The remainder of this testimony sets forth 97 recommendations that would, if adopted, transform the American economy and lead to a resurgence in entrepreneurial activity, strong economic growth, higher real wages and renewed prosperity. The recommendations relate to tax policy, securities regulation and capital access, health care, energy and environmental regulation, administrative law and regulation, employment and labor law, immigration and the legal system.

POOR TAX POLICY

The tax system imposes very high compliance costs that disproportionately harm small firms. Moreover, the tax system dramatically impedes capital formation and economic growth.

Intermediate Term Objectives

1. Expensing of Investment in Machinery and Equipment. Amend Internal Revenue Code §179 to permanently allow annual capital expenses of up to $1 million to be deducted when incurred. Expensing would simplify small firms' tax returns, reduce compliance costs, reduce small firms' cost of capital and aid cash flow.[26]

2. Retirement Account Simplification. Very few small employers offer retirement accounts because of the complexity, high compliance costs and regulatory risk of doing so.[27] This makes it more difficult for them to attract employees and more difficult for both the small business owners and their employees to save for retirement. This is one of the most complex areas of the tax law and desperately in need of simplification.[28]

One possible solution would be to amend the Internal Revenue Code to create a Small Business Uniform Retirement Account as a voluntary alternative for employers with 500 or fewer employees to replace: (1) simplified employee pensions (SEPs), (2) salary reduction simplified employee pensions, (3) SIMPLE IRA plans, (4) SIMPLE 401(k) plans, (5) Keogh plans, (6) regular 401(k)s (with respect to employers with 500 or fewer employees), (7) profit-sharing plans (with respect to employers with 500 or fewer employees), (8) money purchase pension plan (with respect to employers with 500 or fewer employees), and (9) employee stock ownership plans (with respect to employers with 500 or fewer employees). The Small Business Uniform Retirement Account would (1) have check the box eligibility, (2) uniform employee eligibility, (3) automatic enrollment of employees with an option to opt-out, (4) no non-discrimination, coverage or key employee rules, (5) allow contribution levels to be chosen by the employee, (6) be maintained through a financial institution and (7) be available to employees and self-employed persons (including partners and LLC members).

3. Reduce the Top Long-term Capital Gains Tax Rate to 20 percent. Evidence shows that a capital gains rate much above 20 percent actually reduces federal revenues. In addition, a high capital gains tax rate reduces the willingness of investors to invest in relatively risky start-up and growth companies and impedes capital formation. The top long-term capital gains tax rate should not exceed 20 percent (including the Obamacare investment income tax).[29]

4. Permit Cash Method Accounting for Firms with up to $10 million in Gross Receipts. Cash method accounting is simpler and aids cash flow.[30]

5. S Corporation Liberalization. Permit S corporations to have more than one class of stock, non-resident alien shareholders (subject to 30 percent withholding on dividends) and more than 100 shareholders. The latter is particularly important if S corporations are going to have practical access to the crowdfunding or Regulation A+ provisions in the JOBS Act which will allow companies to raise small amounts from a large number of investors using the internet once the SEC promulgates rules implementing the JOBS Act. It is preferably for the S corporation rules to emulate the partnership rules so there would be no shareholder limit but S corporation status would not be available to publicly traded corporations. See Internal Revenue Code §7704.

6. Repeal the Obamacare Health Insurance Tax. Obamacare imposes an excise tax on health insurance premiums that effectively is aimed at small businesses because larger firms self-insure (with or without stop-loss insurance) and therefore do not pay health insurance premiums. It is roughly equivalent to a 2.5 percent tax. This tax should be repealed.[31]

7. Reduce Tax Rate of Pass-Through Entity income to the Corporate Tax Rate. Reduce the tax rate paid on income from S corporations and other pass-through entities (e.g. LLCs) to no more than the top corporate tax rate (currently 35 percent).

8. Increase the Incentive Stock Option (ISO) Cap Limitation from $100,000 to $250,000. Internal Revenue Code section 422(d) limits incentive stock options to $100,000 in aggregate stock value (not gain). This limits the utility of ISOs as a means to attract talent.

9. Full Deductibility for Health Insurance Purchased by the Self-Employed. Currently, health insurance costs incurred by the self-employed (which includes partners and LLC members) are deductible for income tax purposes but not for purposes of the 15.3 percent self-employment tax. This creates a special tax burden on the self-employed not borne by anyone else in the economy. There should be parity for the self-employed with those who are employed. Internal Revenue Code §162(l)(4) should be repealed.

10. Clarify Rules Governing to What Extent Distributions from Pass-Through Entities are Subject to Payroll Taxes. This issue has existed since at least the 1980s and it has never been adequately resolved. It causes a lot of audits and a lot of uncertainty. Reasonable, clear and uniform rules governing "reasonable compensation" and investment income should be adopted for partnerships, S corporations and C corporations.

11. Clarify Employee/Independent Contractor Rules. This issue has existed since at least the 1970s and it has never been adequately resolved. It causes a lot of audits and a lot of uncertainty. This is of even greater importance given the employer mandate in Obamacare. Provisions should be adopted allowing the employer to choose in ambiguous cases, subject to 1099 reporting and moderate backup withholding, whether a payee is an employee or a contractor.[32]

12. Estate and Gift Tax Reduction. The unified credit should be increased so that $10 million is effectively excluded from the estate and gift tax. For 2015, the amount that is effectively excluded is $5.4 million. Family farms and businesses should not either have to be sold to pay estate taxes when parents die or incur huge life insurance

premiums to provide the means of paying the tax.

Longer-Term Objectives

13. Fundamental Tax Reform. Fundamental tax reform would reduce compliance costs considerably and result in dramatically higher rates of capital formation, economic growth and job creation. The goal is a simple, flat rate, territorial consumption tax to replace the individual and corporate income tax and the estate and gift tax. Preferably, it would be border adjusted (i.e. destination principle) so it does not create an artificial tax incentive to produce goods and services outside of the United States. This can take one of four forms. (1) A Hall-Rabushka-Armey-Forbes flat tax, (2) A consumed income tax (also known as an expenditure tax, cash-flow tax, inflow-outflow tax or the new flat tax), (3) a national sales tax or (4) a Business Transfer Tax or BTT or, potentially, some combination of these.[33]

14. Estate and Gift Tax Repeal. Family farms and businesses should not have to be sold to pay estate taxes when parents die or incur huge life insurance premiums to provide the means of paying the tax. Repealing the estate and gift tax should be a part of fundamental tax reform.[34]

INADEQUATE ACCESS TO CAPITAL

Extraordinarily complex securities regulation and banking regulation impede the ability of small firms to raise the capital needed to start-up or grow.[35]

Intermediate Term Objectives

Regulation A

15. Preempt State Registration and Qualification Laws governing Regulation A Company Securities. Either define NSMIA[36] covered securities to include securities sold in transactions exempt pursuant to Regulation A or define qualified purchasers to include all purchasers of securities in transactions exempt under Regulation A, or both. State blue sky laws have effectively destroyed the usefulness of Regulation A.[37]

16. Simplify the Statutory Small Issues Exemption. Specifically, amend Securities Act section 3(b)(1) so that "Tier I" Regulation A offerings have reasonable requirements for offering statements and periodic disclosure and provide that the provisions are self-effectuating without having to wait for the promulgation of SEC regulations.[38]

17. Eliminate the Section 12(g)(1) Holders of Record Threshold for Regulation A Securities. Currently the limit stands at 500 holders of record (for non-accredited investors). If this is not increased, even relatively small issuers will be unable to raise additional capital. The cap should not apply to small issuers using Regulation A who will raise small amounts from a large number of investors. Otherwise, many will bump up against the limit and be unable to raise any additional capital. Crowdfunding investors are currently exempt from section 12(g) for the same reasons.

18. Prohibit Investor Limitations (as a Percentage of Income or Net Worth) under Regulation A. This has been proposed by the SEC in its proposed rule implementing the JOBS Act. It has no statutory basis.

Regulation D

19. Establish a Statutory Definition of Accredited Investor for Purposes of Regulation D Offerings. It should (a) set the income and net worth requirements for natural persons at current levels and (b) establish specific bright line tests for sophistication.[39]

20. Preempt State Registration and Qualification Laws Governing Rule 505 Securities. Either define NSMIA covered securities to include securities sold in transactions exempt under Rule 505 (in addition to Rule 506) or define qualified purchasers to include all purchasers of securities in transactions exempt under Rule 505 (in addition to Rule 506), or both.[40]

21. Define Reasonable Steps to Verify for Purposes of Rule 506(c) Offerings as including Self-Certification under Penalty of Perjury. The SEC rule promulgated to implement Title II of the JOBS Act went too far, requiring companies to obtain sensitive private tax return and financial information from investors.[41]

22. Prevent the Promulgation of the Regulation D Amendments Proposed in July 2013. These proposed rules would require issuers to file three Form Ds instead of one and meet many additional requirements. The proposed rule undermines the laudable aims of the JOBS Act.[42]

Crowdfunding.[43]

23. Eliminate the Audit Requirements for Crowdfunding Offerings over $500,000 required by Securities Act Section 4A(b)(1)(D)(iii). Such requirements are not imposed on much larger Regulation D or Regulation A offerings.

24. Permit Funding Portals to be Compensated Based on the Amount Raised by the Issuer.

25. Make it Clear that Funding Portals are not Issuers and not Subject to the Issuer Liability Provisions. The SEC has adopted an interpretation of the JOBS Act in its proposed rule that would make funding portals, in effect, insure investors against issuer fraud.

26. Repeal the Restriction on Providing Investment Advice Entirely or, Alternatively, Explicitly Permit "Impersonal Investment Advice." Make it clear that a portal may bar an issuer from its platform if the portal deems an offering to be of inadequate quality without fear of liability to issuers or investors and that this would not constitute providing prohibited investment advice.

27. Reduce the Administrative and Compliance Burden on Funding Portals.

28. Allow Intermediaries to Rely on Good Faith Efforts by Third Party Certifiers. Allow intermediaries to rely on good faith efforts by third party certifiers for purposes of complying with the investment limitation in Securities Act section (4)(a)(6)(B).

29. Reduce the Mandatory Disclosure Requirements on Crowdfunding Issuers. There are 21 specific disclosure requirements ((a) through (v)) most of which have multipart requirements. Issuers using the crowdfunding exemption will be among the smallest companies, unable to cost effectively comply with these requirements, many of which have no statutory basis.

30. Amend the Bank Secrecy Act to Make it Clear that Federal "Know Your Customer" do not Apply to Finders, Business Brokers or Crowdfunding Web Portals that do not Hold Customer Funds. This provision, including the proposed rule, would impose huge costs on funding portals that are likely to make them uneconomic.

31. As an alternative to items 23 through 29, Congress May do Better by Simply Starting Over and Replacing the Existing Title III with a More Reasonable Statute.

Creating Strong Secondary Markets

32. Create the Regulatory Framework for Venture Exchanges. Amend section 18(b) of the Securities Act to treat all securities as covered securities that (1) are traded on established securities markets, (2) are not penny stocks and (3) have continuing reporting obligations as (a) a registered company, (b) pursuant to Regulation A or (c) pursuant to Regulation Crowdfunding. An established securities market should be defined to include those on electronic markets such as OTC Markets, FINRA's OTCBB or a SEC designated alternative trading system (ATS).

33. Allow Companies to Transparently Pay Market Makers to Initiate and Maintain Quotations in Securities.

Reducing Regulatory Burdens on Small Public Companies

34. Increase the Smaller Reporting Company Threshold to $300 Million and Conform the Accelerated Filer Definition.

35. Make all Emerging Growth Company Advantages Permanent for Smaller Reporting Companies.

36. Improve the Disclosure Requirements under Regulation S-K for Smaller Reporting Companies.[44]

37. Repeal the Restrictions on Credit Union Lending to Small Businesses. Section 107A of the Federal Credit Union Act[45] imposes a limit on credit union business lending (which is almost exclusively small business lending). The limit is equal to 1.75 times the section 216 net worth requirement of 7 percent. Thus, no more than 12 ¼ percent of loans can be to small businesses. This arbitrary limit should be repealed.

38. Permit Peer-to-Peer Lending Portals to Provide Loans to Small Businesses without Filing a Registration Statement.

39. Amend Securities Act Section 4A(b) (JOBS Act Title III) to Provide that Companies Issuing Crowdfunding Debt Securities are not Subject to Reporting Obligations that are Inappropriate for Debt Securities.

40. Require a GAO Study of Bank Regulations and Bank Regulator Practices that may have a Disproportionate Adverse Impact on Small Business Lending.

Improving the Administration of the Securities Laws

41. Improve SEC Collection and Publication of Data on the Regulation of and Regulatory Costs Incurred by Small Public Companies. Improve SEC collection and publication of data on private placements and Regulation A offerings, including the regulation of, and regulatory costs incurred by, issuers, the amount of capital raised and the nature of the investors.

42. Improve SEC Collection and Publication of Data Regarding Enforcement Actions. Improve SEC collection and publication of data regarding enforcement actions taken with respect to private, Regulation A and small public company offerings, disclosure obligations and secondary market activity.

Other Improvements

43. Amend the Securities Act to Create a Statutory "Micro Offering" Safe Harbor. This safe harbor would provide that any offering is deemed not to involve a public offering for purposes of Securities Act section 4(a)(2) if the offering (1) is made only to people with whom an issuer's officers, directors or 10 percent or more shareholders have a substantial pre-existing relationship; (2) involves 35 or fewer purchasers; or (3) has an aggregate offering price of less than $500,000 (within a 12 month period).

44. Create a Statutory Exemption to the Broker-Dealer Registration Requirements for Finders. The exemption would provide that those who are not "engaged in the business of effecting transactions in securities for the account of others" or of "buying and selling securities" are exempt and, as an integral component of that exemption, provide a bright-line safe harbor such that small finders are not deemed to be engaged in the business of being a securities broker or a dealer.

45. Create a Statutory Exemption for Business Brokers to the Broker-Dealer Registration Requirements. The House has passed legislation accomplishing this result, although an exemption approach would be preferable to the registration approach adopted in this legislation.[46]

46. Amend the Investment Advisers Act of 1940 to include Advisers of Small Business Investment Companies (SBICs) in the Class of Venture Capital Funds and Private Funds that are Exempt from SEC Registration.

47. Increase the SEC Rule 701 Threshold to $20 Million.

Longer-Term Objectives

48. Rationalize and Integrate the Various Private Market Exemptions. Return to the basic principles of securities regulation, namely preventing fraud and misrepresentation and requiring the disclosure of material facts relevant to investment decisions. Oppose merit review where federal or state regulators substitute their investment judgment for that of the investing public. Eliminate extraneous reporting and regulation that is not directed at preventing fraud or the disclosure of material facts relevant to investment decisions. Provide for scaled disclosure so that disclosure requirements for smaller firms are less burdensome. Replace the patchwork quilt of exemptions, with various and sometimes conflicting requirements. Replace it with a coherent, rational system of exemptions and reasonable scaled disclosure that considers the cost of compliance, the investor protection benefits of the added disclosure, the cost to investors of being denied investment opportunities by investment restrictions and the cost to the public of lost economic growth, capital formation, innovation and job creation caused by over-regulation.[47]

EXPENSIVE HEALTH CARE

Health care costs are much too high and represent a substantial drag on economic growth and the ability of employers to provide improved cash compensation to their employees. Policies should be adopted to promote health care cost containment by creating a consumer driven system that preserves choice and provides incentives to economize.

Intermediate Term Objectives

49. Amend the Definition of "Excepted Benefits" In HIPPA, ERISA and the Tax Code to Unambiguously Exempt from Federal Regulation All Indemnity Health Insurance Policies and All Stop Loss and Reinsurance Policies for Health Care Risks. An indemnity insurance policy pays the policyholder for a claim and then it is up to the policyholder to decide how the money is spent. Most health care indemnity insurance policies are considered "excepted benefits" under HIPAA. There has recently been renewed interest in such policies both as an alternative to Obamacare and as a way to make consumers more cost and value conscious when purchasing medical care. Last year, HHS issued regulations adding the stipulation that indemnity policies sold in the individual market only qualify as excepted benefits if the applicant attests in his coverage application that he has other, Obamacare compliant coverage.[48] However, Congress did not grant HHS the authority to impose restrictions beyond those specified in the statute. Congress should amend the law to unambiguously exempt all indemnity health policies from federal regulation.

Employers that self-insure their health plans typically purchase "stop-loss" and "reinsurance" policies to limit their potential losses. Nowhere in federal law is there explicit authorization for the federal government to regulate such policies as "health risks." However, there are indications that the Obama Administration is looking for ways to do just that. Thus, the definition of excepted benefits should also be amended to clearly prevent such an expansion of federal regulatory authority. Doing so is particularly important to small businesses, as self-insurance will become an increasingly attractive option for small employers seeking to escape Obamacare's costly

requirements, but the feasibility of small employers self-insuring is dependent on their ability to purchase appropriate stop-loss and reinsurance coverage.

50. Exempt Health Insurers from the Requirement to Include Obamacare's Package of Mandated "Essential Benefits" in Policies Sold in the Small-Group Market and in the Non-Group Market Outside of the Exchanges. Obamacare's costly "essential benefits" package of mandated minimum benefits is imposed on all individual and small-group policies, but not on large-group policies, nor on self-insured plans (regardless of employer size). If large and self-insured employers are exempt from this costly burden, then small employers who buy group plans from commercial insurers should also be exempt. Furthermore, a business owner cannot participate in an employer-group health plan unless he is an employee of the business. Thus, many owners of small businesses must buy their own coverage on the individual market, even if they offer an employer-sponsored group plan to their workers. Given that coverage sold on the exchanges comes with government subsidies, for the government to impose benefit requirements on such coverage may be fiscally unwise, but is at least logically justified. However, there is no justification for imposing such discriminatory and costly requirements on *unsubsidized* coverage sold in the individual market *outside* the exchanges, particularly when those purchasing such coverage are principally small business owners and other self-employed individuals.

51. Exempt Employers with 100 or Fewer Full-Time Workers from the Employer Mandate. Raising the firm size threshold for Obamacare's employer mandate from 50 to 100 full-time workers would greatly reduce the prospect of employers trying to manipulate employee head-count and hours worked so as to avoid triggering the employer mandate. Furthermore, by the time that a small business has grown to employ 100 workers it is better able to feasibly adopt other strategies — most notably self-insurance — for managing its employee health benefits costs. Such a change would also reduce the issues surrounding the definition of "full-time" (e.g., 30 versus 40 hours per week) and the counting of part-time hours in calculating firm size on a FTE basis. Finally, such a change would remove one of Obamacare's largest impediments to job creation.

52. Liberalize Health Savings Accounts (HSAs) and Flexible Spending Arrangements (FSAs). Allow individuals and their employers to contribute greater amounts to HSAs and FSAs.[49]

Longer-Term Objectives

53. Repeal Obamacare.[50]

54. Adopt Patient-Centered Health Care Tax Reforms. Replace the tax exclusion for employer-sponsored coverage, the deduction for self-employed coverage and other current health care tax provisions with a new individual tax benefit for health care coverage available to individuals regardless of their employment situations.[51]

BURDENSOME ENERGY AND ENVIRONMENT LAWS

Energy and environmental regulations exceed reasonable levels and do more to impede job creation and economic growth than to protect public health.[52]

Intermediate Term Objectives

55. Require Timely Environmental Review. The environmental review requirements for projects on federal lands under National Environmental Policy Act (NEPA) take entirely too long. Congress should place a 270-day time limit on NEPA reviews, ensuring a quick, efficient review process for energy projects on federal lands.[53]

56. Prohibit Implementation of the "WOTUS" Rule and Clearly Define Federal Jurisdiction under the Clean Water Act. Congress should immediately prohibit the implementation of the proposed EPA and Army Corps of Engineers "waters of the U.S." rule. Congress should also define what waters are covered under the CWA to provide clarity and to prevent EPA and Corps overreach. The definition should generally limit federal authority to regulating traditional "navigable waters."[54]

57. Prohibit the EPA from Revoking a Validly Issued CWA permit. Under Section 404 of the Clean Water Act (CWA), a permit is required before dredged or fill material is discharged into covered waters. The EPA claims it can revoke one of these permits at any time, even after it has been lawfully issued by the Army Corps of Engineers, meaning there is no such thing as a final permit.

58. Change the Process for Developing the National Ambient Air Quality Standards (NAAQS). The EPA sets NAAQS for six principal pollutants that must be reviewed every five years, and must disregard costs in setting the standards. Even when existing standards are not close to being fully implemented, more stringent standards are proposed. Congress should repeal the current five-year review process and make any decisions to change standards itself. The EPA should not be making unilateral decisions that can have such a devastating impact on the economy, employment and the well-being of Americans. In making decisions regarding the standards, Congress should consider the impact of stricter standards and the incredible success that has already been achieved in air quality.

59. Stop Agency Accounting of Social Cost of Carbon (SCC). The SCC inflates the alleged benefits of proposed energy-efficiency regulations by adding the supposed monetary benefits of the regulations' reduced CO2 emissions. This prevents the economic development of energy and infrastructure projects.[55]

60. Repeal or Revise MACT Regulations. In February 2012, the EPA finalized new mercury and air toxics standards that would force utilities to use maximum achievable control technology (MACT) standards to reduce mercury emissions and other hazardous air pollutants (HAPs). More commonly known as the Utility MACT regulation, the EPA began the process to regulate mercury emissions in 1998, but during its evaluation, it did not find demonstrable direct health benefits from regulating other HAPs. The EPA estimates this rule could cost more than $10 billion per year by 2015, but the Electric Reliability Coordinating Council estimates it could cost as much as $100 billion per year. The EPA claims this rule would produce $53 billion to $140 billion in annual benefits, but the mercury reductions would produce at most $6 million in benefits. Utility MACT will raise electricity costs substantially and directly result in the shutdown of many smaller coal-fired electric utilities and the compliance deadline is April 2015.[56]

61. Prohibit EPA Greenhouse Gas Regulations (GHG). Along with a host of other regulations, the EPA now regulates GHG emissions (most notably carbon dioxide) for newly constructed power plants and is expected to do so for existing power plants. This rule would effectively eliminate the construction of new coal-fired power plants and raise the cost of electricity. Congress should permanently prohibit any federal regulators from using GHG emissions as a reason to regulate economic activity.

Longer-Term Objectives

62. Devolve Federal Land Management to States. Care and protection of public lands, with a few exceptions, should be devolved to states and private groups. Doing so would give responsibility to those closest to the land and with the most to lose from mismanagement or gain from wise use.[57]

63. Repeal New Source Review (NSR). Repealing NSR would create incentives for both small and large utilities to install technology upgrades to improve plants environmentally and to increase electricity supply with new coal, natural gas, or nuclear power plants.

64. Narrow NEPA Review. Reviews should be limited to major environmental issues that are not dealt with by any other regulatory or permitting process.

65. Reform the Endangered Species Act. Shift reliance to the states and focus federal efforts by requiring a Commerce Clause basis for an "endangered species" listing and prioritizing species. The ESA has been very disruptive to small business activity, especially in the West.

HIGH AND GROWING REGULATORY COSTS

Regulations impose costs estimated to be as much as $2 trillion or more than 10 percent of the Gross Domestic Product. Agencies are evading the current requirements to

conduct cost benefit analysis and to seek public comment on proposed rules.[58] Regulatory costs have a disproportionate adverse impact on small firms.

Intermediate Term Objectives

66. Apply Small Business Regulatory Enforcement Fairness Act (SBREFA) to All Agencies, including Independent Agencies.

67. Shut Down Agency Evasion of the Administrative Procedure Act through the Use of "Guidance." All regulations, even if they are called "guidance," should be subject to APA notice and comment provisions.

68. Require Apply Cost-Benefit Analysis for Rules Promulgated by Independent Agencies and Make All Agency Rules Subject to OMB OIRA Clearance. Independent agencies should be subject to CBA just like regular executive branch agencies. Some of the most important and expensive rules are being promulgated by independent agencies. These rules should also be subject to review by the Office of Management and Budget (OMB) Office of Information and Regulatory Affairs (OIRA).

69. Require Regulatory Assessment of Legislation before Congress. Just as Congressional Budget Office review is required for any on-budget spending measures, a regulatory assessment should be required for any legislation imposing regulatory burdens.

Longer-Term Objectives

70. Enact the REINS Act. All major rules (i.e. those with an economic impact of $100 million or more) should have to be approved by Congress before they are implemented.

71. Sunset Existing Regulations. Require all existing regulations to expire automatically if not specifically re-adopted through a notice and comment rulemaking.

ONEROUS LABOR AND EMPLOYMENT COSTS

The morass of laws governing the employer-employee relationship has become extremely complex. These costs and the risk and cost of lawsuits raise the cost of employing people, retards job creation and reduce wages. The NLRB has adopted a series of rules designed to promote unionization that are unwarranted by the National Labor Relations Act.

Intermediate Term Objectives

72. Reverse EEOC Guidance on Criminal Background Screening. The EEOC has issued "guidance" requiring employers to do an "individualized assessment" each time they conduct a criminal background screen for employment to determine whether to do the screen and whether to rely on it. Its 55 page, 100 plus footnote "guidance" requires a business to balance a multitude of factors and provides no meaningful guidance. The EEOC has launched hundreds of enforcement actions in this area. Businesses should be able to protect themselves, their customers and their employees by preventing, for example, rapists or thieves from entering their customers' homes.[59]

73. Reverse EEOC Guidance on Credit Report Screening. People in financial difficulty should not be handling, for example, large amounts of cash. In many contexts, credit screening is relevant and employers should be able to take reasonable steps to protect themselves.

74. Reverse the NLRB Joint Employer Doctrine Treating Franchisee Employees as Employees of the Franchisor. Many small businesses own franchises. And the franchise model is often the quickest way for start-up enterprises to grow. The NLRB joint employer doctrine would treat many employees of small business franchisees as employees of the franchisor - even though they are not – so that unions may more easily unionize small employers.[60]

75. Allow Reasonable Educational Attainment Requirements for EEO Purposes. Most people would be surprised that the EEOC regards, for example, having a high school diploma requirement as unlawful discrimination unless the business can prove that the high school diploma is a "business necessity."

76. Oppose OSHA Efforts to Regulate Family Farms. Children should be able to work on their parents' family farm without having to comply with complex OSHA regulations.

77. Reverse NLRB "Protected Concerted Activity" Interpretations (§7 of NLRA). The NLRB has, for example, held that a business requiring its employees to be courteous to customers and one another is an unlawful infringement on the free speech rights implicit in the protected concerted activity protections in the NLRA.[61] This is part of their protected concerted activity initiative and their social media initiative and applies to virtually all employers.

78. Reverse NLRB "Ambush Elections" Rule. This rule would allow unions to force an election in as few as 10 days.[62] The House passed legislation to accomplish this result.

79. Prohibit DOL Advice (or Persuader) Rule.63 The House passed legislation to accomplish this result.

80. Amend FLSA as per the Working Families Flexibility Act. The House passed legislation to accomplish this result.

81. Oppose Permitting Union Officials to Accompany OSHA Inspectors at Non-union Workplaces.

82. Allow Employers to Keep Investigations Confidential While Ongoing. NLRB "Guidance" puts employers in a difficult, untenable position.

83. Address Micro-Unions. Unions should not be permitted to manipulate voting units, organizing only particular, very small departments because they could not win a broader vote. Such an approach could result in even smaller employers having to deal with many different unions.[64]

84. Increase NLRB Jurisdictional Threshold Amounts. The NLRA allows the National Labor Relations Board to decline jurisdiction over small companies Those thresholds are generally $50,000 in annual revenue or a retail store with $500,000 in annual revenue. At a minimum, those thresholds should be adjusted for inflation to $400,000 or $4 million for enterprises and retail stores, respectively. Alternatively Congress can pass legislation exempting small businesses. This would reduce compliance costs and regulatory risk due to the NLRB.

85. The Rewarding Achievement and Incentivizing Successful Employees Act (RAISE) Act. Permit unionized employers to give performance-based raises without union consent. This would reduce the burden of collective bargaining on workplace productivity.[65]

86. Reduce Certain OSHA Fines. For small businesses, provide that a first-time OSHA violation that does not endanger the health/safety of employees result only in a warning rather than a fine.

Longer-Term Objectives

87. Repeal Davis-Bacon.

BAD IMMIGRATION RULES

U.S. businesses should be able to obtain skilled employees from abroad. Changes to the legal immigration system, however, should only follow after steps to improve border security and enforce U.S. immigration laws have been taken and shown tangible success.[66]

Intermediate Term Objectives

88. Create STEM Visas. Increase the number of available visas for foreign-born students graduating from a U.S. university with an advanced degree in a STEM field (science, technology, engineering and mathematics).[67]

89. Increase the cap for H-1B visas (for skilled workers).[68]

90. Support the immigration of highly-skilled entrepreneurs.

91. Ensure that the administrative burden for obtaining employment-related visas is reasonable.

Longer-Term Objectives

92. Create a simplified, rational, integrated skills-based visa program.

COSTLY LEGAL SYSTEM

Our legal system is the most costly in the world. This places American businesses generally at a competitive disadvantage. Lawsuits are potentially ruinous for small firms. Agencies use the threat of grossly disproportionate penalties to force compliance even with unlawful or otherwise questionable enforcement actions.

Intermediate Term Objectives

93. Update Equal Access to Justice Act. EAJA allows small entities to recover costs when the federal government's position was not substantially justified. In its current form, it rarely results in attorneys fee recovery. EAJA needs to be reformed so it does what was intended. The standard needs to be broadened by enacting a provision analogous to Civil Rights Attorney's Fees Awards Act (42 U.S.C 1988(b)).

94. Create a Small Business Patent Court. Create a specialized court able to resolve patent disputes quickly and inexpensively on an accelerated basis. This would let small firms defend against patent trolls and defend their intellectual property. Aspects of practice in European courts, small claims courts and the U.S. District Court for the Eastern District of Virginia should be incorporated into this plan. This could be a pilot for a more efficient court system.

Longer-Term Objectives

95. Tort Reform.

96. Over-criminalization Reform. Reduce the criminal penalties imposed for regulatory violations.[69]

97. Civil Money Penalty Reform. The EPA, for example, will threaten fines of $75,000 per day unless a small firm complies with their dictates.[70] With that much downside, a small firm really has no choice but to comply. This is unjust.

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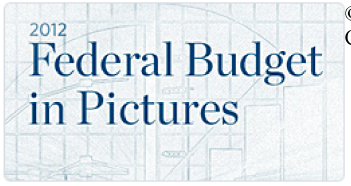

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