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3rd July 2013

Communities, Equality and Local Government Committee
National Assembly for Wales
Cardiff Bay
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To whom it may concern

RE: Barriers to Home Building in Wales

FSB Wales welcomes the opportunity to comment on the barriers to home building in Wales for the benefit of the Community, Equality and Local Government Committee.

There has been extensive debate around the impact and costs resulting from increasing regulatory burdens in Wales as a result of Welsh Government legislation. While FSB Wales does not wish to comment on the specific details of this debate; key lessons should be taken for future legislation around how we measure the costs of legislative proposals to businesses. This is particularly pertinent as there are nearly 12,000 construction SMEs in Wales, making up the vast majority of the construction sector[1]. As a matter of principle, Welsh Government should *think small first* in considering regulation.

Regulatory impact assessments

Following the referendum on further law-making powers in March 2011, the Welsh Government now has significant legislative powers at its disposal via the National Assembly for Wales. FSB Wales is concerned that insufficient focus has been paid to Regulatory Impact Assessments of legislation created under these new powers.

[1] Welsh Government. 2012. *Priority Sector Statistics 2012* [Online]. Available at: http://wales.gov.uk/docs/statistics/2012/121121sb1092012en.pdf (accessed 3rd July 2013).

For instance, in a recent paper entitled '*Regulatory Reform: Where Next?*' the FSB set out numerous actions that could be taken in Westminster to strengthen the Regulatory Impact Assessment (RIA) process via the Regulatory Policy Committee (a copy of the FSB policy document is attached)[2].

Similar work is yet to be carried out in Wales in relation to the National Assembly, Welsh Government and its ministers; however it is clear that there is no independent and transparent process for scrutiny of RIAs relating to Welsh legislation. Furthermore, the Welsh Government's Regulatory Impact Assessment Code, a statutory obligation under the Government of Wales Act 2006, has not been updated since 2009. This is despite an obligation under the act that states:

> *"The Welsh Ministers—*
>
> *(a)must keep the regulatory impact assessment code under review, and*
>
> *(b)may from time to time remake or revise it."*[3]

Given the dramatic change in competencies away from the Measure making system towards primary legislative powers, one would have expected a review of the RIA code to have taken place. Indeed, the code discusses the Assembly Measure as a novel form of legislation with advice in the annex that states:

> *"A new category of Welsh legislation, which may be used, for example, to repeal or amend existing Acts and/or make entirely new provision. Measures can only be enacted where the Assembly has legislative competence and therefore must relate to one or more of the Matters listed in the Fields set out in Part 1 of Schedule 5 to the Government of Wales Act 2006."*[4]

Clearly, the code is in need of updating. However, simply updating an already weak system of Regulatory Impact Assessments would be of little benefit to businesses in Wales. This is particularly true while other UK nations are pursuing policies aimed at enabling SMEs to better deal with regulatory policies.

By way of example, the Scottish Government has established an independent scrutiny process under the auspices of its better regulation programme with extensive Business and Regulatory Impact Assessments published on all Scottish legislation[5]. The Scottish Government is also forging ahead with a regulatory reform Bill to improve consistency in the application of regulation. This practice is common amongst OECD countries as the FSB report '*Regulatory Reform: Where Next?*' documents.

The Regulatory Policy Committee provides a traffic lighting system in England to assess the quality of the evidence base used to assess the cost implication to business and wider society as well as whether there has been full exploration of alternatives to regulation and publishes details of its decisions for public

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[2] FSB. 2012. *Regulatory Reform: Where next?*[Online]. Available at: http://www.fsb.org.uk/frontpage/assets/fsb_regulatory_reform_web.pdf (accessed 20th June 2013).

[3] Government of Wales Act 2006. [Online]. Available at: http://www.legislation.gov.uk/ukpga/2006/32/section/76 (accessed 2nd July 2013)

[4] Welsh Government. 2009. *Regulatory Impact Assessment Code* [Online]. Available at: http://wales.gov.uk/legislation/guidance/riacode/?lang=en (accessed 2nd July 2013).

[5] Scottish Government. 2013. Business and Regulatory Impact Assessments [Online]. Available at: http://www.scotland.gov.uk/Topics/Business-Industry/support/better-regulation/partial-assessments (accessed 20th June 2013).

scrutiny. This means that legislation with a poor analysis of economic impact is 'named and shamed' and passed only in the knowledge that its impact is unmeasured.

Furthermore, from this summer all RIAs must include a Small and Micro Business Assessment that requires all departments to consider whether a proposal will disproportionally impact upon small businesses. If this is the case, they will have to demonstrate that they have mitigated this impact through measures such as delayed implementation, fewer reporting requirements, exemptions and a lighter inspection regime. The FSB lobbied for such a measure at Westminster as a tool to ensure that when regulations are developed, the impact upon small and micro businesses are central to the design.

In this context, FSB Wales is concerned that any future legislation would not have a reasonable and independently assessed measure of costs for businesses in Wales. FSB Wales believes this is an area the Community, Equality and Local Government Committee should examine in its deliberations over the barriers to home building in Wales.

Conclusion

Construction firms, as well as SMEs across the Welsh economy, are more likely than ever before to have to deal with Wales-only regulatory burdens emanating from the Welsh Government and National Assembly. This is a natural part of the political process. However, political decisions must be made on the best possible evidence base so that the true costs of any proposal are properly discussed. Regulatory Impact Assessments should be transparent and independently assessed to ensure they provide a sound assessment of the costs of any future regulation.

I hope you find the comments of FSB Wales of interest.

Yours sincerely

Janet Jones
Wales Policy Chair
Federation of Small Businesses Wales

Annex

- *Regulatory Reform: Where Next*

Federation of Small Businesses

The UK's Leading Business Organisation

Regulatory Reform

Where next?

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Foreword

As we approach the first anniversary of the moratorium from new regulation for micro businesses, the Federation of Small Businesses (FSB) has written this paper to look at further ways to improve the regulatory environment for small businesses. Our aim is to contribute to the debate about how best to develop the regulatory reform agenda from here, and to embed once and for all a regulatory culture that really puts the interests of small businesses at its heart.

The regulatory reform agenda has received growing political attention since the 1980s. As is universally accepted, the costs of regulation – opportunity, policy and administrative costs – are very real and damaging to business and to the spirit of enterprise. If regulation is done well it creates a safe and productive environment for businesses, their workers and their consumers alike. When done poorly, it slowly drains away the spirit of enterprise on which the long-term prosperity of this country depends.

The FSB warmly appreciates the approach the current Government has adopted on the regulatory reform agenda. The micro moratorium is welcome, as are many of the new processes put in place. However, the reality on the ground is that businesses are still waiting for the everyday regulatory burdens to decrease. Our members have consistently told us that, despite the best efforts of previous administrations, the burden of regulation has only increased. The UK still ranks 83rd out of 142 countries for the compliance burden it places on business.[1] Last year, the National Audit Office's own assessment of the UK system revealed the ongoing concerns with our regulatory framework, stating there is:

"…*the lack of a coherent framework to manage regulatory reform including clear accountabilities, effective incentives on departments and a detailed plan for delivery and for long-term management of the flow of regulation*".[2]

To assess what can be done to improve this situation, this paper considers the next steps in the regulatory reform agenda. While governments since the 1980s have tried a number of schemes, targets and processes to cut the burden of regulation on business, they have failed to introduce lasting initiatives that will finally deal with this barrier to growth.

In analysing the problems with the current system the FSB has looked at best practice around the world, including counterparts in Australia and the US. This paper recommends bold but eminently achievable changes to reform regulatory institutions to embed a culture change that is urgently needed.

We put forward suggestions for bolstering the Regulatory Policy Committee (RPC) to create RPC+, increasing its ability to influence the development of regulation from the outset and to investigate how existing regulation and enforcement work for small businesses. This recommendation should serve to better embed the regulatory reform agenda and also underline its importance across Government. Coupled with the FSB's proposals for the creation of a UK Small Business Administration (SBA), this 'dual-prong' approach should lead to the tangible improvements in the UK's regulatory culture that our members and other small businesses have been yearning for over many years.

Mike Cherry FRSA
National Policy Chair
Federation of Small Businesses

Executive Summary

Coinciding with the first anniversary of the moratorium from new regulations for micro businesses, this paper looks at the institutional structure governing regulation in the UK, from its inception through to its implementation, and puts forward a number of recommendations to improve the regulatory environment for small businesses. A further driver behind this paper is the National Audit Office's (NAO) own downbeat assessment of the UK regulatory framework in 2011, which was summarised in the Department for Business, Innovation and Skills' (BIS) annual report:

"*There is a lack of a coherent framework to manage regulatory reform including clear accountabilities, effective incentives on departments and a detailed plan for delivery and for long-term management of the flow of regulation.*"[3]

Chapter One provides an overview of the regulatory framework in the UK, highlighting the role of the Regulatory Policy Committee in overseeing impact assessments (IAs), the potential effects of a regulatory proposal, and the multiple agencies that operate in the field spread between the Cabinet Office, individual central government departments, and BIS.

To provide a comparison, Chapter Two reviews the regulatory framework in three other advanced industrialised nations: the US, Australia and the Netherlands. Insights obtained from these examples include:

- The benefits of transparency in the regulation process make it easier for regulatory proposals to be challenged and therefore improved.
- The desirability of a strong, independent body free from political interference and beyond electoral cycles that acts as the reference point to oversee the regulatory process and drive improvements.
- The benefit of a body advocating the needs of small businesses at the heart of Government, such as the SBA in the US.

Chapter Three then looks at the weaknesses of the UK regulatory framework when set against these alternative models. This chapter also looks at small businesses' views of the current regulatory environment. A number of issues come into focus:

- Despite the laudable commitment to the deregulation (sometimes called 'better regulation') agenda since the early 1980s, the FSB's 2011 member survey[4] shows that respondents remain concerned about the burdens placed on them by the stock and flow of regulation, and the apparent lack of progress achieved by previous initiatives. The results echo the NAO's assessment.
- Perhaps the most fundamental weakness is the confusion about who 'owns' the regulatory reform agenda, and who is responsible for driving it through Whitehall and for monitoring compliance and enforcement. The FSB argues that there is no one body that oversees or monitors the regulatory reform agenda in a transparent way.

- The lack of a single focus driving the regulatory agenda and responsibility for regulation spread over many different institutions. The ability to oversee the regulatory process is therefore diffuse and can lack authority.

- Alongside the dispersed nature of the UK system is the patchy implementation of regulatory reform. Some departments consistently fail to undertake good quality IAs.

In Chapter Four, the FSB argues that a key factor in this patchy performance is that the remit of the Regulatory Policy Committee (RPC) hampers its performance. While the RPC should in principle be an influential and successful scrutiniser of the regulatory reform agenda, its effectiveness is limited by two factors:

- It is not able to publish its opinions. Greater transparency in this area would improve business confidence; and

- The RPC's powers are limited to a narrow remit of private opinions and advice on IAs only: it has no teeth beyond that.

To resolve these weaknesses, and to strengthen the regulatory framework so that regulation is designed correctly from the outset, the FSB puts forward a number of recommendations for institutional reform based largely on strengthening the role of the RPC. The FSB has called this new body 'RPC+'.

To further lock small businesses' needs in to the design of regulation, RPC+ would work with the FSB's proposal for a SBA for the UK. This would play a key role in advocating the position of small business in the regulatory process at the centre of Government, and would ensure that the opinions and advice of the RPC are heard throughout Government departments and beyond.

To 'own' the regulatory reform agenda and to drive through cultural change across Government, RPC+ would be given greater powers of scrutiny, a strengthened advocacy role in Government for better regulation, and an ombudsman role where issues to do with regulation arise for businesses.

To advocate

- Getting regulation right from the beginning of its design is the only way to ensure that the burden of regulation doesn't increase unnecessarily for businesses. RPC+ would suggest, explore and advise on alternatives to regulation, micro exemptions or other special measures for micro businesses to ease the specific burden that they face. This advocacy role would be carried out in conjunction with the SBA. There also needs to be consideration of systems that ensure that such recommendations are adhered to.

- RPC+ would have an explicit remit to advocate the views of small businesses on regulation under the principle of 'Think small first'. It would promote this agenda throughout Whitehall. As part of a concerted campaign, it would ensure that policymakers are well educated and trained on all aspects of regulatory reform and understand the position of small businesses in relation to it.

"Getting regulation right from the beginning of its design is the only way to ensure that the burden of regulation doesn't increase unnecessarily for businesses"

To scrutinise

- To aid RPC+, more transparency is vital to ensure that there is not only trust but also greater external scrutiny of the Government's actions in relation to regulation. All opinions for IAs would be published, and a system already in place in other countries replicated whereby departments that create regulations are monitored and potentially ranked by their performance across all areas of regulatory reform. They would also produce detailed annual reports setting out their performance.

- To achieve greater transparency, RPC+ would have a greater role in overseeing and monitoring departments and regulators, with the necessary powers to recommend or provide incentives and ensure accountability. This could range from incentivising bodies that perform well (making recommendations to the Cabinet Office) to providing intensive support for departments that are struggling.

- To further empower the role of the RPC+, the remit of One-in One-out (OIOO) the system whereby no new regulations can be bought in without a regulation of similar or greater impact being removed. What falls under the scrutiny of the RPC needs to be extended to include all regulations from regulators, and regulations that originate in the EU.

Act as an ombudsman

- By acting as an ombudsman, RPC+ would give small businesses a single point of contact should problems arise. A strengthened RPC would run challenge panels for all areas of regulation and regulatory enforcement and would investigate specific problems or trends when they are highlighted by trade associations and business groups. This would ensure a greater role for businesses in rectifying problems and a permanent solution once the Red Tape Challenge comes to an end.

1. An overview of the UK System

“The new Coalition Government said that it would be the first Government to leave office with fewer regulations in place than when it came in”

The regulatory reform agenda in the UK began in earnest in the 1980s, when there was recognition that unnecessary and complicated regulations failed to facilitate growth and productivity and in fact stifled entrepreneurship and employment. It was clear that while some regulation was needed to ensure that markets were competitive and safe, and consumers and workers were protected, over-regulation needed to be dealt with.

An overview of how the regulatory reform agenda (at times called the ‘better regulation’ or ‘deregulation’ agenda) has progressed is provided in Box 1. While history shows that this area has not been lacking in initiatives, a review of progress over the previous 30 years left many asking what tangible changes for small businesses had in fact been made. While a 25 per cent cut in administrative burdens was claimed to have been achieved,[5] the NAO found in 2009 that:

“*Very few businesses said that complying with regulation had become easier or less time-consuming*”.[6]

In attempting to tackle these seemingly intractable problems, the new Coalition Government said that it would be the first Government to leave office with fewer regulations in place than when it came in.[7] Many of the recent developments have recognised that policies need to be made that put in place permanent processes that deal with both the stock *and* the flow of regulation.

Box 1: Regulatory reform: a brief history

1985: Publication of the 'Burdens on Business' report which led to the introduction of compliance cost assessments using cost/benefit analysis and alternatives to regulation.

1986: Creation of the Enterprise and Deregulation Unit.

1993 onwards: Stock reviews undertaken by task forces. These looked at both the enforcement of regulation and the regulations themselves, and highlighted deregulatory priorities.

A Bill was introduced to cut regulation alongside a review of regulators to try to eliminate overlap. It was also suggested that a small-firms test be applied to all new regulations.

By 1996: Compliance cost assessments were in place and had increased oversight with a requirement for ministers to sign off on new IAs. The Cabinet Office, which then housed the deregulation unit, was monitoring the number of regulations being introduced and was meant to be monitoring them for business burdens.

1998: Publication of the Better Regulation Guide which introduced Regulatory Impact Assessments.

2001: The Regulatory Reform Act (RRA) replaced the 1993 Deregulation and Contracting Out Act. It was designed to allow for reforms to be made to statutory instruments that did not require a Bill, but resulted in only 27 regulatory reform orders.

2005: The Better Regulation Task Force claimed that the annual burden of regulation on UK business was £100bn. The Hampton Review reported that the inspection system was over-complicated and need greater levels of accountability.

2006: The Legislative and Regulatory Reform Act widened the areas that could be reformed and simplified the process, allowing some of the changes that the Hampton Review recommended.

2007: The newly named Department for Business, Enterprise and Regulatory Reform (BERR) published its simplification plan and the Better Regulation Executive was moved into this department. It was meant to be an integral part of the department and to be the driver of the better regulation agenda across government.

2008: The Better Regulation Commission, a watchdog of the regulatory reform agenda was abolished.

2009: BERR was renamed the Department for Business, Innovation and Skills (BIS) and lost the regulatory reform title. The independent Regulatory Policy Committee was created.

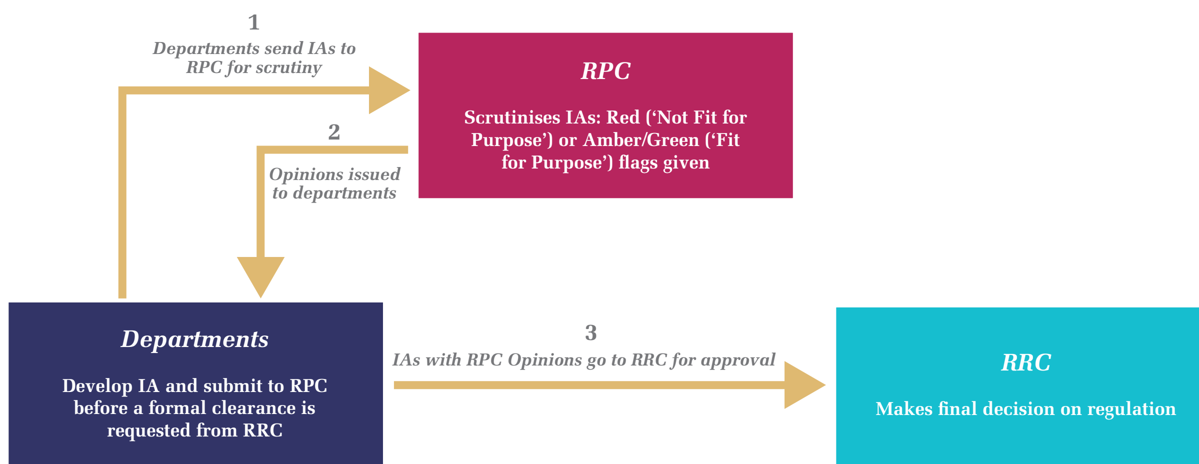
Sourced from the British Chambers of Commerce, 'Deregulation or déjà vu, 2007 paper, the NAO Delivering Regulatory Reform, 2011, the Hampton Review 2005, Regulation.org.uk, and the Department for Business, Innovation and Skills.

The current regulatory structure

There are seven main actors of varying size and weight operating in the current regulatory management framework, as summarised below. The majority of regulations themselves originate in departments, and are developed by officials with varying degrees of outside advice, depending on the complexity of the matter.

Once the options have been considered and a proposal for a regulation formed, an IA of its potential impact is submitted to the RPC. Most regulations of domestic origin need to be seen by the current RPC and the Cabinet sub-committee and the Reducing Regulation Committee (currently chaired by the Secretary of State for BIS) before they can be put onto the statute books. This process is summarised in Figure 1.

Figure 1: Summary of the RPC role in the clearance of regulatory proposals[8]



Source: RPC 2011

Regulatory Policy Committee

The Regulatory Policy Committee (RPC) plays a pivotal role in scrutinising the evidence base for proposed regulations. It is an independent advisory committee, sponsored by BIS, which from 1 April 2012 will be a public, formal, advisory non-departmental body. The chairman is independent too with extensive business experience.

The RPC scrutinises many IAs to challenge the evidence and analysis of IAs. Alongside this, the RPC helps to scrutinise the operation of the OIOO system by taking part in the production of the six-monthly Statement of New Regulation (SNR) by validating the figures used as the basis for OIOO.

If the RPC rates an IA as 'red' (not fit for purpose) then it should be sent back to the department or regulator for changes; however, this system can be overridden by Government. This has happened on five occasions since the system was set up, in which cases the RPC publishes its opinion on the proposed regulation. On any other occasion, the RPC is not able to publish its opinions. A weakness of this system is that where impact assessments are rated 'amber' (the largest proportion of IAs[9]), there is no transparent system to ensure that the concerns that remain have been addressed – a concern raised by both the RPC and the BCC in their recent reports.[10]

Reducing Regulation Committee

Once an IA has been passed by the RPC, the Reducing Regulation Committee (RRC, a Cabinet sub-committee) has the final say on whether a regulation progresses. The Committee deliberates in private as it is protected by the constitutional convention of Cabinet collective decision making. Its role is defined thus:

"*… to take strategic oversight of the delivery of the Government's regulatory framework. It has broad terms of reference to consider issues relating to regulation. These include scrutinising, challenging and approving all new regulatory proposals as well as proposals for transposing EU obligations*".[11]

There are in addition a number of other bodies located in central Government and involved in the regulatory arena.

Better Regulation Executive

Sitting separately from the RPC is the Better Regulation Executive (BRE), which "*lead(s) the regulatory reform agenda across government*".[12] This body resides in BIS, and has responsibility for helping to implement deregulatory policies and provide expert advice and support to departments and regulators on simplification and burden reduction and to improve the quality of new regulation.[13] In addition to these functions, it also produces the SNR and guidance on how to implement policies such

as Sunset Clauses and OIOO – the system whereby no new regulations can be brought in without a regulation of a similar or greater impact being removed.

Better Regulation Strategy Group

This group provides advice and direction to the BRE and informs its approach right across the regulation agenda. It is made up of independent advisors, some in business, some representing consumers. It is chaired by the non-executive chair of the BRE.

Local Better Regulation Office soon to be Better Regulation Delivery Office

The Local Better Regulation Office (LBRO) was a government independent non-departmental body, which from 1 April this year will become the Better Regulation Delivery Office (BRDO). It will sit alongside the BRE in BIS. It looks at how regulation is delivered on the ground as well as helping to administer the Primary Authority Scheme.

Better Regulation Units

Better Regulation Units (BRU) are units that sit within each government department to help implement regulatory reform policies such as OIOO. Questions have been raised about their effectiveness, when only one in three IAs meet the RPC-assessed standard of green. Units can comprise as few as two people. These small units are also tasked with an educational role within their department, and with promoting the agenda.[14]

Alternatives to regulation team

The final regulatory layer is the team of civil servants within the Cabinet Office and the BRE that provide departments with advice and ideas on what alternatives to regulation look like, for example economic instruments to control environmental emissions rather than the traditional regulatory approach.

"There is no transparent system to ensure that the concerns that remain have been addressed"

2. International experience

The FSB has examined the regulatory framework in the United States of America (US), Australia and the Netherlands to see what lessons can be learned and potentially implemented in the UK.

The US

A key feature of the US's regulatory environment is the institutional structure that allows for the interests of small businesses to be advocated at the centre of Government, reinforced by legislation through the Regulatory Flexibility Act (RFA).

The Office of Advocacy, created in 1976 sits within the SBA, which was established in 1953. Both play a vital role in looking after the interests of small businesses on Capitol Hill. The Office of Advocacy's overriding duty is to be:

"an independent voice for small business within the federal government and [is] the watchdog for the Regulatory Flexibility Act (RFA). The Office of Advocacy advances the views and concerns of small business before Congress, the White House, the federal agencies, the federal courts and state policy makers".[15]

The Small Business Administration and the Regulatory Flexibility Act

The RFA was first enacted in 1980, and was subsequently amended in 1996 by the Small Business Regulatory Enforcement Fairness Act (SBREFA) to provide additional tools to aid small businesses in the fight for regulatory fairness. The key goal was to change the culture in government agencies. It gave greater powers to the SBA and required federal government agencies to commit to the following:

- *"To consider the impact of their regulatory proposals on small entities, to analyse effective alternatives that minimise small entity impacts, and to make their analyses available for public comment".*[16]
- To review the regulations that they introduce periodically to ascertain if they impose a significant burden on small firms. If they do, they must consider amending the regulation or withdrawing it. All research and work done complying with this rule is made public.
- If a small business or representative body wishes to challenge a regulation on the basis that it imposes an undue burden on small firms, they are able to call for a judicial review of the regulation and the agency's possible failure to comply with the Act.
- Government agencies are required to ensure that they publish a year in advance all of the possible regulations that they are considering introducing.
- Government agencies are required to consult a board representing small businesses on possible future proposals to ensure that they do not disproportionally affect small businesses.

- They are also required to consider the views of the Office of Advocacy which sits within the SBA.
- The SBA's Chief Council for Advocacy has formal powers to monitor agencies' compliance with the law and to file Amicus briefs where regulations are being reviewed in Court.

It has been estimated that this Act has saved small entities more than $200 billion since 1998.[17]

The Office of Advocacy reports to Congress on the progress of agencies' compliance with the Act and, since 1996, small businesses are able to force change through the judicial review process. This office also provides training for agencies on deregulation and how to better serve the interests of small firms. They also run a service to publically flag up potential new regulations that may affect small firms.

While the US system is robust and generally supported, some consider that the Office of Advocacy needs still more authority. The National Federation of Independent Businesses[18] (NFIB) told the FSB that the key principles to make it work better are independence and the legal authority to hold regulatory agencies/departments to account. They commented that:

"*the Office of Advocacy could be more effective if it had more authority. Right now, executive agencies (like the Department of Labor and Environmental Protection Agency) are supposed to comply with standards that the Office of Advocacy sets in terms of small business impact analysis, etc.*

However, these agencies are not legally bound to do so. As a result, we find that many agencies simply make a cursory attempt to do a small business analysis just so they can say they have met the requirement. What NFIB would like to see is Congress give the Office of Advocacy the authority to write binding regulations that would allow for recourse if the Office of Advocacy is not satisfied with an agency's assessment".

The Office of Information and Regulatory Affairs

Separate from the Office of Advocacy is the Office of Information and Regulatory Affairs (OIRA), located in the White House – a further sign of how seriously the regulatory agenda is taken in the US. It provides advice to government agencies on the regulatory reform agenda and is responsible for managing the regulatory agenda, including reviewing draft regulations and returning them to agencies if they are not satisfactory. It also works with agencies to achieve the necessary improvements – a power the Office for Advocacy doesn't have. Essentially, OIRA acts as a clearing house and

"*develops and oversees the implementation of government-wide policies in several areas, including information quality and statistical standards*".[19]

It helps agencies comply with a variety of Executive Orders which request that regulation should not burden society, should include a cost-benefit analysis, and should ask for alternatives to regulation to be considered.

A memorandum of understanding operates between OIRA and the Office of Advocacy, outlining the way that these two bodies will work together to scrutinise draft regulations and to ensure that a small-business impact test is performed where necessary. They also share the goal of promoting better agency compliance with the RFA and other statutes and Executive Orders, and of helping to train agencies on these issues.

Because OIRA lacks independence and is perceived to be open to political influence, the NFIB[20] wants the Office of Advocacy to be able to:

"*issue binding regulations, that have the rule of law, on the procedures that agencies must undertake to analyse a rule's impact on small businesses. That way, if an agency develops a rule that has a sound analysis, it can proceed. Conversely, if the agency does not follow the procedure, a court can decide that the rule is 'null and void'*".

Australia

The Australian system benefits from a high level of transparency. In this model, there are three central actors. The deregulation group sits within the Department of Finance and Deregulation and comprises the Deregulation Policy Division and the Office of Best Practice Regulation (OBPR). The Small Business Advisory Committee assists departments or agencies to understand the impact that regulations in development may have on small businesses.

The deregulation group's role is to be:

"*responsible for advising on and implementing the Government's deregulation agenda. This involves providing advice on a wide range of policy proposals with regulatory implications and developing and implementing an enhanced regulatory management framework*".[21]

This body performs a number of functions, but most important are its duties to support departments in implementing deregulation policies as well as reporting publicly on their progress – a similar role to those of the BRE and current RPC combined.

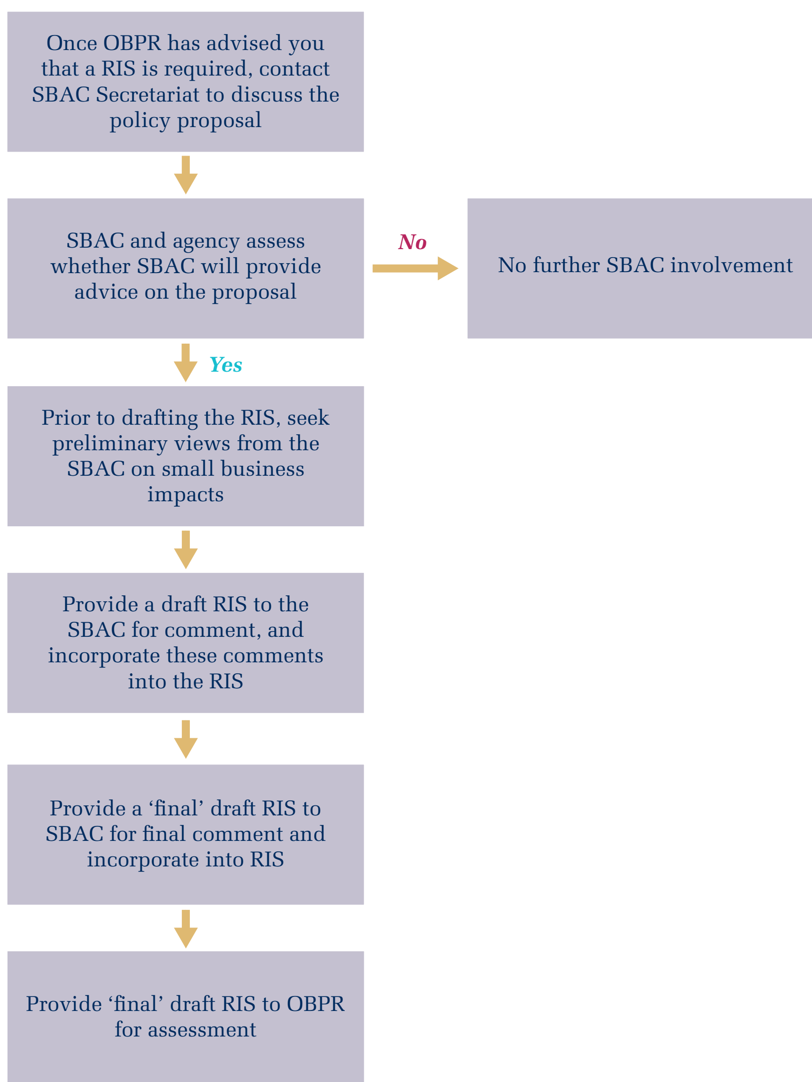
The OBPR plays:

"a central role in assisting Australian Government departments and agencies to meet the Australian Government's requirements for best practice regulatory impact analysis and in monitoring and reporting on their performance".[22]

It offers regular training for policymakers on IAs as well as on how to comply with deregulatory requirements. It publishes views on each individual impact assessment online soon after the proposal is made public, and produces an annual report on Government's overall compliance with deregulatory measures, including the performance of departments and government agencies across a range of deregulatory measures. This public assessment provides a powerful incentive for departments and agencies to prioritise this policy objective.

The Small Business Advisory Committee (SBAC) has a key role in the government's deregulatory agenda and sits within the Australian equivalent of BIS. It is composed of independent individuals who have extensive knowledge of business. However, its role is not formal, and it only provides advice to, "*improve the quality or regulation and minimise compliance costs for small business by being involved throughout the development of the Regulation Impact Statement process*".[23]

Figure 2: Role of the Small Business Advisory Committee in Australia[24]



(RIS refers to Regulatory Impact Assessment. SBAC refers to the Small Business Advisory Committee and PBPR refers to the Office of Best Practice Regulation.)

The SBAC produces a report on all IAs it sees, but these are not made public and are for the departments' use only. It may recommend that an IA needs to pay further attention to factors that have not been fully considered or on which more information is needed. This advocacy body has the potential to ensure that the interests of small businesses are constantly considered in the development of regulation (Figure 2).

> ***"SBAC has the potential to ensure that the interests of small businesses are constantly considered"***

Despite the investments in deregulation by the Australian Government, a recent survey by the Australian Industry Group found that:

"*despite all the efforts on regulatory reform by governments in recent years, the compliance burden associated with business regulation is rising, not falling*".[25]

To reduce the compliance burden, the Group argues for regular health checks of regulators, a better quality of IA, and better consistency across state borders – all themes that are familiar in the UK.

The Australian scrutiny process under development is, however, reasonably comprehensive. The centrality of the small business perspective is impressive and the UK could learn lessons from this. The transparency of the opinions made on individual IAs is another strong feature of the model, allowing for greater scrutiny of the impact of new regulations and their effect on small businesses.

The Netherlands

The Netherlands is often viewed as a leader on the better regulation agenda,[26] with strong procedures in place to ensure a consistent approach. The OECD comments that:

"*achievements so far have been significant in the programme to reduce burdens on the business community, and considerable by international standards*".[27]

The systems for dealing with regulatory burdens continue to develop, in particular regarding the stock of regulation. The Regulatory Reform Group (RRG) is a recent development which grew out of a merger of a number of other institutions. The RRG produces biannual reports for Parliament. It provides training and guidance on better regulation issues across Government. In addition, there is a Steering Group for Better Regulation for the four main government departments.

Alongside these internal groups is an independent watchdog, the Advisory Board on Administrative Burdens (ACTAL). This body has had a key scrutiny and advisory role as well as being a driving force for regulatory reform. It has now become a statutory body. This independent oversight of progress on this agenda is a crucial addition to the advice it provides to Cabinet.

The regulatory reform agenda appears to be becoming embedded in the thinking of the Dutch Government and is producing results.[28] However, concerns have been raised that the institutional framework remains fragmented and therefore weak.[29] This is an important lesson for the UK: too many institutions involved in the agenda may in fact weaken the structure. Focus on fewer institutions works better and allows for external stakeholders to engage more usefully.

"Concerns have been raised that the institutional framework in the Netherlands remains fragmented... This is an important lesson for the UK: too many institutions involved in the agenda may in fact weaken the structure"

3. An assessment of the UK Regulatory Model

There remain ongoing concerns about the culture across Whitehall as regards regulation. In the current UK model, the oversight of regulatory reform policies from inception to implementation can be diffuse, and lacks transparency. Moreover, regulation is at times regarded as the best solution to problems rather than possible alternatives, for example economic instruments in the field of environmental policy. These weaknesses were recognised by last year's NAO report:

"*The BRE and departments do not have adequate sight of the totality of regulation faced by businesses and there have been systematic weaknesses in estimating the costs and benefits of individual regulations with little review once regulations are implemented.*

There is also a lack of a coherent framework to manage regulatory reform including clear accountabilities, effective incentives on departments and a detailed plan for delivery and for long-term management of the flow of regulation."[30]

This is a view shared by the FSB's members when surveyed:

- Forty-one per cent of members said that the cost of complying with regulation had increased in the last 12 months. Only one per cent claimed it had decreased.
- Eighty-six per cent of businesses claimed that they had not experienced any positive improvements such as greater clarity of regulatory requirements. Very few members (5%) felt that there were fewer inspections.
- Twenty-seven per cent said that the time taken to comply with regulations had also increased, with 57 per cent claiming that it had remained the same.
- Sixty-one per cent of members claiming a cost said that the cost of complying with regulation is more than £1,000 per year, and 10 per cent said that it cost them more than £10,000 a year.
- The FSB Survey Panel results indicate that constant changes to regulation, both existing and new, is the most difficult aspect of regulation. Sixty-four per cent of members claim that this was the most challenging issue, with a further 55 per cent saying that it was the sheer time involved.

Against these structural weaknesses, the FSB believes that further institutional reforms are needed to tackle the root problems surrounding the development and implementation of regulation, and the monitoring of its implementation. Unless that final step is taken, and a long-term structure is put in place, the regulatory reform agenda in the UK will lack a clear driving force to ensure that all departments and regulators are committed to this policy priority and perform consistently well across decades, not years.

Perhaps the most fundamental weakness in the UK is the confusion about who 'owns' the regulatory reform agenda and who is responsible for driving it through Whitehall and for monitoring compliance. Unlike in the US, there

is no single body that oversees or monitors the regulatory reform agenda in a transparent way. The result is a structure that remains relatively internal and fails to engage actively with small businesses in a consistent and formal way – businesses are unsure of whom they should turn to within Government to have their views heard.

For example, the Red Tape Challenge team – which aims to cut the stock of regulation on a thematic basis – sits half in the Cabinet Office and half in the BIS. The Cabinet Office hosts some of the work on regulatory alternatives too.

Added to the dispersed nature of the UK system is the patchy implementation of regulatory reform. The RPC's own evidence shows that some departments consistently fail to undertake good-quality IAs.[31] Linked to this is the fact that other departments are failing to make enough progress in the OIOO system.[32]

When looking at international evidence one factor behind the patchy performance becomes clear, which is the remit of the RPC. While the RPC should in principle be an influential and successful scrutiniser of some aspects of the regulatory reform agenda, its work is hampered by two factors:

- It is not able to publish its opinions. Greater transparency in this area would improve business confidence; and
- The RPC's powers are limited to a narrow remit of opinions and advice on the quality of IAs only: it has no teeth beyond that.

The result of these constraints is ongoing underperformance by some government departments. While the RPC has instilled a better level of discipline, demonstrated by the fall in the number of impact assessments that have been viewed as 'not fit for purpose',[33] only a third of impact assessments are found to be 'green rated'.[34] And while the largest proportion of IAs are found to be sufficient, they still require changes to be made to make them fully fit for purpose.

A further obstacle arises in that there is no mechanism to ensure that departments actually make these changes. Policies are progressing despite continuing problems within their IAs. Neither the BRE nor the RPC has a role in this 'aftercare'. The RPC sees this as a significant concern.[35]

The FSB's view is that enforcement and the development of regulation should not be considered to be separate issues. Yet inconsistent enforcement of regulation remains problematic. Small businesses often do not know how to make a complaint when they are not happy with a regulatory inspection if the issue is not serious enough to escalate to an appeal or official complaint. Some businesses may also be wary of raising any concerns they have with the inspecting body out of fear of retribution.

What underpins the success or otherwise of how they work is the culture within which they operate. Dealing with this aspect should help improve the business experience. All regulators need to view themselves as supporters of better business and not simply as enforcers who want to 'catch businesses out'.

"All regulators need to view themselves as supporters of better business and not simply as enforcers who want to 'catch businesses out'"

4. Changing the UK culture

The following analysis sets out potential changes to the institutional framework that would better embed the regulatory reform agenda within all relevant organisations and improve the experiences of SMEs in the regulatory environment. These proposals go hand in hand with the FSB's call for a UK SBA to put small business concerns at the heart of Government.

As this paper has highlighted, the current Government has put in place a number of ambitious targets to improve the regulatory environment for small firms, and the FSB has welcomed these. However, when set against international best practice, the current system is unable to provide the transparent scrutiny needed to ensure that regulatory reforms are implemented fully or provide a formal process for SMEs' concerns to be investigated. There is therefore a need to consider further changes to the regulatory management framework, which are permanent and intended for the long-term.

The FSB believes a key reform would be to move some of the roles and resources currently within the BRE and build the RPC into a stronger, independent body that is the focus for the regulatory agenda: RPC+. Combining them into one transparent body would create a stronger driving force behind the reform agenda and would also serve to underline the importance of deregulation and to make the RPC a central force across the whole of Whitehall.

RPC+

A strengthened RPC (or RPC+) needs to have powers that previous bodies have not had to ensure that it establishes itself and is able to be a powerful watchdog for the regulatory reform agenda. To enable the new body to carry out this wider remit, the FSB puts forward a number of recommendations, based on the following three themes:

- A strengthened advocacy role for improving regulation;
- Greater powers of scrutiny of the regulatory process; and
- An ombudsman function for when problems arise.

The US introduced legislation (the RFA) to provide a legal underpinning for its regulatory reform policies and processes. A similar option should be used in the UK, to ensure that commitment to policies such as OIOO does not decrease with time or come under pressure to be watered down, and that safeguards are in place that protect the agenda from external pressures. This is something that the RPC has recognised, as shown by its reports on departments 'gaming' the system.[36]

A general but crucial role for RPC+ would be to provide support and training for regulators and departments throughout the process, and to disseminate and advocate best practice. This would pull into one place an efficient body that could provide expert advice and support for all departments and regulators on all regulatory reform issues, scrutinise regulatory proposals, investigate concerns raised by small businesses, and monitor progress.

Advocacy

The key to getting regulation right is to ensure that new regulations are on the right path from the outset. RPC+ therefore needs to have much greater influence upstream, with a greater training and advice function to support departments from the very start of regulatory design. While they would not be able to direct policy, there are circumstances in which they should be able to comment on aspects of it – and in public, to increase transparency. This is about improving the system at the challenge and support stages of policy development.

An important additional power for RPC+ would be the ability to comment publicly on a proposal/mechanism and to research and work with the department to propose alternatives to the regulation if the department had failed to make appropriate suggestions.[37]

To increase transparency, it should have the power to comment publicly on the timing of the proposal and the effects that it might have on the existing regulatory environment. For example, if a regulation is proposed soon after a similar change, as has happened recently with regulations concerning paternity leave, the RPC+ should be able to comment on the timing and recommend a delay or time for the existing regulations to embed before further changes are made.[38]

With an explicit and more substantial remit to consider the impact of regulations on small firms, the opinion would include the likely impact of the regulation on small businesses and whether the proposal fails to 'think small first' and comes as a last resort. The RPC+ would also comment on whether policymakers had adequately considered exemptions of varying sorts, or special measures for micro firms, and would use their expertise to recommend options if they felt that more could be done to reduce the burden of the regulation on small businesses. There is also a role for an SBA at this point to provide added expert advice on the position of small businesses and to bring in stakeholders where necessary.

At a UK level, IAs ask the policymaker to consider whether there is a compelling case for including SMEs in the regulation. Owing to the current three-year moratorium policy, they are also currently required to consider a micro moratorium. This process should be strengthened by forming a more important and specific part of the impact assessment.

As a key part of their assessment, RPC+ would then consider whether the department has provided a robust justification for applying the same regulation rules to businesses of different sizes. The FSB fully accepts that in many cases there is no argument for a micro exemption; in other cases it would be detrimental to micro firms to have an exemption. A mechanism such as this would allow for each regulation to be considered on a case-by-case basis. In the EU we have recommended a system that would reverse the burden of proof.

To obtain full oversight of the formation of regulations, RPC+ should have greater powers to ensure that their recommendations are followed through. Amber ratings should not occur at the final stages, and the RPC needs to have the resources to follow up on all recommendations to improve regulatory design.[39]

"The current Government has put in place a number of ambitious targets to improve the regulatory environment for small firms and the FSB has welcomed these"

Particular consideration needs to be given to the status of RPC+ recommendations on small-business issues: departments and regulators should take full account of them.

This advocacy role will be made stronger by requiring departments and regulators to publish a full list of all the regulatory changes they intend to make at least a year ahead – as happens under the US model. This will allow RPC+, and others, to provide a challenge at a very early stage. Putting in place a process whereby small businesses are consulted at the outset on possible future proposals will further ensure that their input is taken into account.

Under the FSB's system, the RPC+ would work closely with the proposed SBA to advocate the position of small businesses across Government. A model similar to that found in the US – the Office of Advocacy in the SBA – should be considered here. Where issues need to be taken beyond RPC+, the SBA will work with them to do that.

Scrutiny

This new body will have a strengthened oversight role, continuing the current work of the RPC to scrutinise IAs as well as to validate the figures used in the OIOO system. Critically, RPC+ would publish all its opinions. This would not only help with scrutiny and transparency but also increase business confidence.

As with its advocacy role, greater transparency will be a powerful tool to raise performance, along with greater powers to monitor and oversee the way that all new regulatory reform processes are being implemented. Publishing the results and possibly ranking departments/regulators would be a means of assessing performance against criteria such as OIOO, Red Tape Challenge, sunset clauses, the micro moratorium, regulation as a last resort, better enforcement and the quality of impact assessments. Where departments and regulators are lagging behind, the new body would recommend measures to drive improvement. This might mean a team of specialists being placed within the department or regulator for a few months to train the team and disseminate best practice. Regulators and departments would also report annually on their progress.

As well as a 'stick' approach, greater incentives might be useful to ensure that departments and regulators are fully committed to regulatory reform. RPC+ should make recommendations to the Cabinet Office on the back of their annual reports. There are models of regulatory oversight bodies with powers to reward regulators financially for good work in this area.[40] There needs to be greater consideration of what soft and hard tools could be used here. The OECD supported this position:

> "*There remains a culture/capacity gap, and the carrots and sticks for better performance may not be strong enough. The BRE does not dispose of any formal powers to call departments to account, and the real effectiveness of its role with departments during the policy development process is hard to judge from the outside, absent any clear sticks (such as budget cuts) if performance is inadequate. It is also not clear how good work by officials on Better Regulation is rewarded in the current performance appraisal system and career postings.*"[41]

Often the main impact of regulation is felt through the accompanying guidance, the quality of which has been highlighted as a concern by business. This guidance is often as much the source of 'gold plating' as the regulations themselves. Further additional power should therefore be given to scrutinise the guidance accompanying regulations. There would also be a greater role for RPC+ in the Red Tape Challenge process beyond scrutiny of IAs, such as the RPC+ sitting on the internal challenge panels.

The oversight role can be further extended by the inclusion of regulations from the EU and all regulators into the OIOO system. This will ensure that, as far as possible, all areas that affect the regulatory environment for small businesses come under its remit. While we understand that the UK Government is not able to control regulations from the EU, they do substantially increase the burden on business and this needs to be recognised.

Ombudsman

The final pillar of a strengthened body would be its role as ombudsman when problems arise to do with certain regulations and their implementation. Recently there have been moves by Government to consider ways in which businesses can be better empowered throughout the process of regulatory enforcement, and also to highlight particularly burdensome regulations.

One promising option is the example of the Health and Safety Executive (HSE), which is developing 'challenge panels' that allow businesses access to a free, independent review of national and

local inspections and/or areas of regulation where they feel there are problems. This idea should be developed, but given the powers to force change rather than simply to make recommendations – and for all areas of regulation, not just health and safety. This should be done by the RPC rather than in a piecemeal fashion by different departments or regulators. It would help create an environment in which businesses begin to see regulators as providing a service, so that they are viewed as supporters of better business rather than simply as enforcers. It would also help the post-implementation review process.

This process should also be used by trade associations and business representative groups who could bring forward issues, for example, if there were a number of reports of a regulator being particularly heavy-handed. The RPC should have the powers to launch full investigations into these concerns and to make recommendations accordingly. As with departments, if it were found that a regulator was not adhering to regulatory reform principles, the RPC should recommend that they work intensively with the regulator to improve their practices.

A further measure that should be adopted is to allow businesses the opportunity to rate regulators. In a document published in June 2010,[42] the FSB recommended that Government should consider developing a body to rate local authorities on their regulatory performance each year based on the views of the businesses in their area. This would encourage local authorities to provide a business-friendly regulatory service and would thereby improve standards across the country. This role could be extended to national as well as local regulators. This process and this new body could play a key role in the promised review of the regulators.

5. Conclusions

All Governments have attempted, to varying degrees, to reform the regulatory environment for small businesses – tackling the ingrained culture is the biggest challenge. Despite years of effort, FSB members continue to tell us about the increased burden of regulation. The FSB welcomes much of what this Government has done to try to deal with the flow and stock of regulation as well as in enforcement. Structural change is the next step in driving the culture change that would underpin a genuine deregulation agenda and ensure that it is sustainable across governments. Only when ministers and civil servants alike understand the crucial effect that this work has on business – especially in relation to the work that they do – will businesses become more confident about the regulatory environment.

There are lessons to be learned from other countries. As has been recommended by the NAO, a long-term, strategic and well-managed programme is needed to take this agenda in hand, along with effective incentives and accountabilities.[43] The changes suggested in this report, and in particular the creation and empowering of a central oversight body, RPC+, will be the keys to doing this.

This new body needs to be well resourced and well respected and to have the right balance between the power to improve the performance of regulators and departments that are struggling and advocating and incentivising a better approach to regulation. Ultimately, its key role is to provide focus and drive and, most importantly, to ensure that all policymakers and regulators across Whitehall and beyond are in no doubt about the importance of tackling the burden of regulation. The setting-up of a permanent body should also begin to ensure a consistency of approach across governments, thereby creating greater stability for small businesses.

This is the next stage in improving the regulatory environment for small businesses. The processes put in place are good, and in time they might begin to have a noticeable impact. However, if regulators and policymakers do not buy in to the project they will find a way round the 'regulations for regulation' and may well fail, as many have in the past.

Developing the right framework of oversight within which regulatory reform objectives are pursued is the only way to make it work, and this is what has been lacking in all previous efforts to tackle this burden.

Annex

FSB survey results

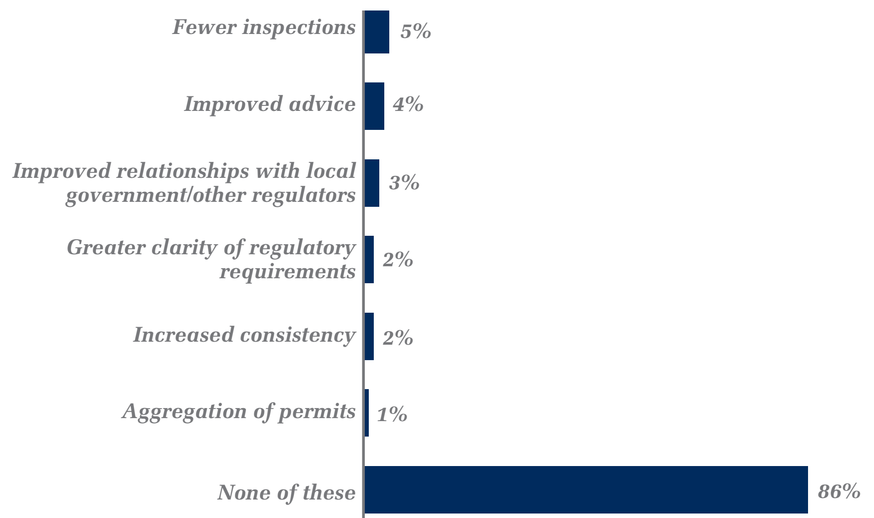
FSB members were surveyed in 2011 on the regulatory burden they experience in their businesses. An online survey was carried out in December 2011 and elicited responses from 1,674 members of the FSB's 'Voice of Small Business' Survey Panel. The members of this panel are broadly representative of the wider FSB membership. The study was undertaken by Research by Design Ltd on behalf of the Federation of Small Businesses.

The survey results indicate that many small businesses feel that the burden of regulation has changed only a small amount over the last 12 months:

- Forty-one per cent of members said that the cost of complying with regulation had increased, with only one per cent claiming that it had decreased.
- Eighty-six per cent of businesses claimed that they had not experienced any positive improvements such as greater clarity of regulatory requirements, and very few members (5%) felt that there were fewer inspections.
- Twenty-seven per cent said that the time taken to comply with regulations had also increased, with 57 per cent claiming that it had remained the same.

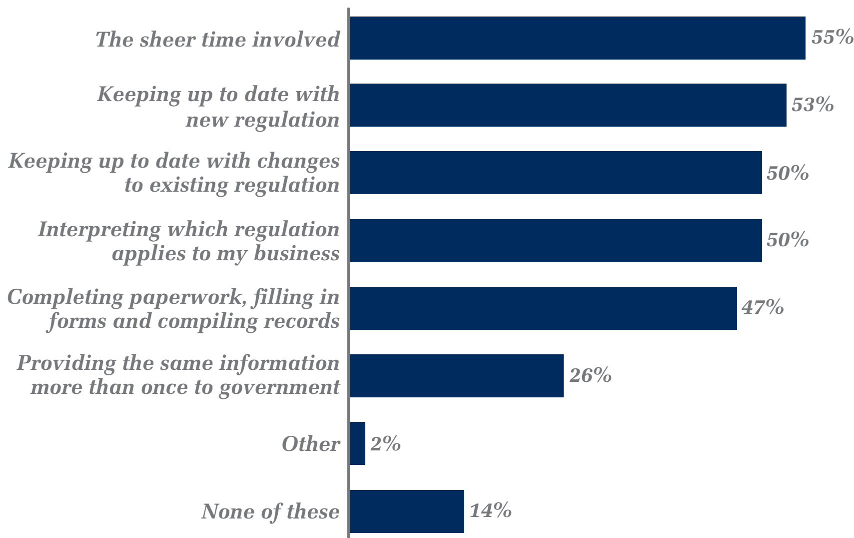
"41% of members said that the cost of complying with regulation had increased"

Figure 1: Experiences in the regulatory environment



Question: Which, if any, of the following have you experienced in the regulatory environment over the past year? (Base: 1,653.)

Figure 2: The most challenging aspects of regulatory compliance



Question: Which of the following aspects of regulatory compliance do you find most challenging to deal with, if any? (Base: 1,669.)

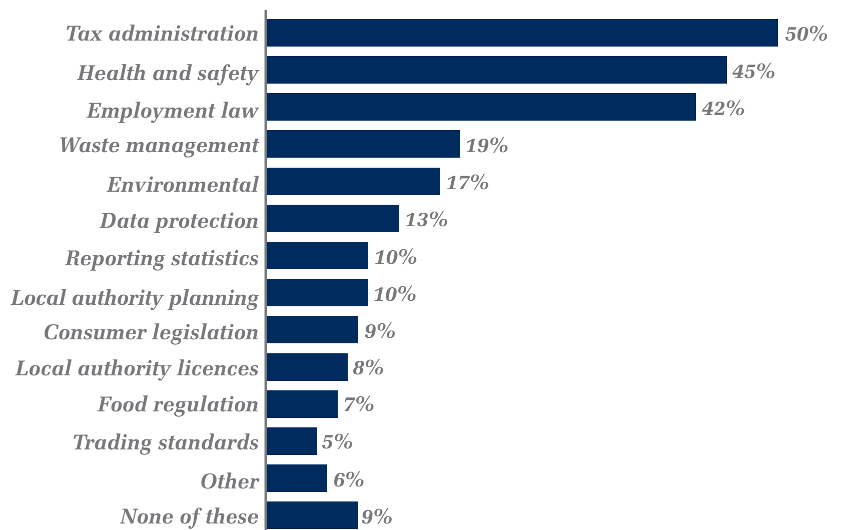
Our survey results reveal the cost of complying with regulations, and the challenges created by constant changes to the regulatory system (Figure 2):

- Sixty-one per cent of members claiming a cost said that the cost of complying with regulation is more than £1,000 per year and 10 per cent said that it cost them more than £10,000 a year.[44]
- The FSB Survey Panel results indicate that constant changes to regulation, both existing and new, is the most difficult aspect of regulation. Sixty-four per cent of members claim that this was the most challenging issue, with a further 55 per cent saying that it was the sheer time involved.

Figure 3 shows the compliance areas that FSB members find most challenging. By a clear margin the administration concerned with tax was highlighted as the most difficult area of compliance, followed by health and safety and employment regulations. Other insights provided by the survey include:

- Sole traders were more likely to find tax administration the most difficult area of compliance than larger firms. Fifty-four per cent of sole traders cite tax administration as the most difficult area of compliance, as opposed to 28 per cent of businesses with 21–50 members of staff.
- Larger businesses (21–50 staff) are more likely to cite employment law as the area of compliance that is most challenging (76 per cent), as opposed to those businesses with between one and 10 employees (39 per cent).
- Waste management is an area in which larger businesses find it more difficult to cope, with 42 per cent of businesses with 21–50 employees citing this as a major compliance challenge as against 18 per cent of businesses with between one and 10 employees.

Figure 3: The most challenging areas of compliance



Question: Which are the most time-consuming and difficult areas of compliance to deal with? (Base: 1,620.)

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