BACKGROUNDER – ERA Policy Group
March 4, 2021

1. **Welcome / Introduction of Members & Online Portal** ***(5 minutes: 11:00 a.m. – 11:05 a.m.)***

You have been selected by Board Chair ML Mackey and President Todd McCracken to serve on the ERA Policy Group this year based on your knowledge, expertise and your ability to take appropriate policy positions regarding the issues in this jurisdiction on behalf of NSBA.

For 2021, your policy group is chaired by Bill Belknap (bill.belknap@aeonrg.com), and Jody Milanese (jmilanese@nsba.biz) will be the primary NSBA staff contact.

NSBA staff has developed a one-stop-shop Webpage for the ERA Policy Group. Here, you will find the agendas and background documents for each meeting as well as: supplemental documents, ERA issue briefs, meeting document archives, all ERA Policy Group members, the meeting schedule and video conferencing information, and a variety of important links to the NSBA website. This website is ONLY for this committee and is password protected.

2. **Policy Group Overview and Expectations (Role, Guidelines, Process, and Requirements) from Vice Chair for Advocacy Bob Treiber** ***(5 minutes: 11:05 a.m. – 11:10 a.m.)***

In addition to specific roles required by membership on the Board of Trustees, members of NSBA Policy Groups are expected to actively participate in the work of the committee, to provide thoughtful input to committee deliberations, and to focus on the best interests of small businesses, the association and committee goals rather than on personal interests.

Please click here to find Member Expectations during your tenure on the ERA Policy Group.

3. **NSBA's Top Priorities for the 117th Congress – ERA Purview** ***(20 minutes: 11:10 a.m. – 11:30 a.m.)***
   No. 6 – Close the Partisan Divide and Reform Politics
   No. 8 – Regulatory Reform and Paperwork Reduction

4. **Discussion / Feedback** ***(10 minutes: 11:30 a.m. – 11:40 a.m.)***
   a. **Regulatory Issues to Watch—FY 2021 Spending and COVID-19 Stimulus Legislation**

Below are some potential regulatory issues that may impact small businesses as federal agencies continue to implement the provisions of the various COVID relief legislative package.

The stimulus and omnibus spending for FY 2021, known as the Consolidated Appropriations Act, 2021, had many provisions for small business relief during the COVID-19 pandemic,

including a second round of funding through the SBA's Paycheck Protection Program (PPP), updates to the Economic Injury Disaster Loan (EIDL) program, and the Shuttered Venue Operators Grant program. But bills of this size contain other, lesser known issues that may not directly mention small businesses, but can still impact them.

Many times, these large spending bills are packed with changes to regulatory issues that may not always make the front page of the paper or jump to the top of social media news feeds. Additionally, this particular bill contains both COVID-19 relief and other, broader regulatory changes.

Below are some potential regulatory issues that may impact small businesses as federal agencies continue to implement the provisions of the legislative package. Please note that this is not meant to be an exhaustive list of all regulatory issues related to small businesses:

The Families First Coronavirus Response Act (FFCRA), which became effective on April 1, 2020, required certain employers (including small businesses) to provide employees with paid sick leave or expanded family and medical leave for specified reasons related to COVID-19 through December 31, 2020. The legislative package did not extend this requirement beyond December 31, 2020, so employers are no longer required to provide FFCRA leave to employees. However, the legislative package extended employer tax credits for paid sick leave and expanded family and medical leave voluntarily provided to employees until March 31, 2021. This means that an employer may voluntarily decide to provide paid sick leave or family and medical leave to its employees for specified reasons related to COVID-19 and can receive tax credits for doing so. For more information, visit the Department of Labor's and the Internal Revenue Service's websites.

The American Innovation and Manufacturing Act of 2020 was included in the legislative package. This Act phases down the production and consumption of hydrofluorocarbons (HFCs) over 15 years, limiting the production and consumption of regulated HFCs to 15 percent of baseline levels beginning in 2036. This Act will be implemented by the Environmental Protection Agency (EPA). There is a concern that this Act could put small businesses at a disadvantage if future production and consumption of HFCs are not allocated fairly. The SBA Office of Advocacy has committed to working with the EPA to ensure that any implementing regulations comply with the Regulatory Flexibility Act, and that small business impacts will be appropriately considered.

When Congress passed the CARES Act in March 2020, the legislation did not address the deductibility of expenses paid with forgiven PPP loans. The COVID-related Tax Relief Act of 2020, included in the Spending Bill, clarified that business expenses paid with forgiven PPP loans are deductible.

First introduced in 2016, the Copyright Alternative in Small-Claims Enforcement (CASE) Act was included in the legislative package. The CASE Act would establish a small claims court for copyright disputes. It would also make illegal streaming a felony. The CASE Act establishes a

copyright tribunal within the Copyright Office that would hear infringement claims with awards for claims less than $30,000. This would provide an avenue for independent creators to enforce their copyright rights without having to go through the more expensive federal court system.

5. **Outstanding Issue / Ongoing Discussion** ***(10 minutes: 11:40 a.m. –11:50 a.m.)***
    a. **COVID-19 Reopening Liability Issues for Small Businesses**

This is an ongoing discussion from the 2020 Policy Group, working to identify some of the key liability and regulatory concerns for small businesses as they begin to reemerge from the pandemic. Below, you'll find some liability concerns that I have put together to consider for the discussion. This group may want to identify priority ones to focus your attention.

As states reopen businesses and ease stay at home orders, a new question of liability arises for companies that are open and risking exposure of the coronavirus to customers and employees. Additionally, issues are arising from companies retooling their core business model to respond to needs in the time of a pandemic, including PPEs, sanitizer, food and other sundries.

Employers are eager to protect their workforces and customers, but they need to be protected from damaging litigation if they have taken actions to prevent the spread of COVID-19 outlined in state and federal guidance. Small businesses are particularly fragile, with many already at jeopardy of permanent closure, and one frivolous lawsuit could be an existential risk.

As Congress closes in on the next COVID legislative relief package, one of the most important remaining debates is over lawsuit protections. NSBA and other organizations have united to call for timely, temporary, and targeted liability protections for those that work to follow public health guidelines. They need assurances that if they do the right thing, they won't face more financial hardships from unwarranted lawsuits. The business community is asking for temporary 'safe harbor' protections to give employers some degree of assurance that if they follow public health guidelines, they won't face further financial hardships through unwarranted lawsuits. Bad actors and companies that engage in gross negligence or willful misconduct should be held accountable.

We must be focused on a bipartisan strategy to get the American economy back on track safely and sustainably, and unwarranted lawsuits against businesses will hinder economic recovery.

Some liability issues to consider for the Policy Group's discussion, include:

Health Privacy

Federal and some state laws are designed to maximize the health privacy of individuals. However, this objective could conflict with potential reopening requirements for employers to verify an employee's COVID-19 status and/or their vulnerability due to underlying health conditions. Employer efforts to protect other employees and conduct contact tracing in the workplace after an individual has tested positive could be slowed by obligations to protect the

infected individual's health privacy. In addition, confidentiality requirements could prevent businesses from narrowly focusing their contact tracing so as to balance workforce safety while minimizing business interruption. During the COVID-19 national emergency and recovery period, employers will need a broad safe-harbor to make necessary inquiries regarding health status and to make certain limited disclosures to prevent the spread of the disease.

Discrimination Claims

Employers who conduct a medically-based or risk-based reopening (using factors such as age or underlying health conditions) may face liability under existing anti-discrimination rules, including the Age Discrimination in Employment Act and the anti-discrimination provisions of the Americans with Disabilities Act. In addition, employers could face claims for adverse employment actions by employees who are delayed in returning to work or who feel they are not provided other reasonable employment accommodations. At the same time, employers can likewise face liability if they return at-risk employees to work too soon. There is a need for clear guidance about what practices are acceptable in conducting a medically-based or risk-based reopening and provide a safe harbor for actions taken by employers consistent with those guidelines.

Safe Workplace Requirements

Generally, when maintaining a safe workplace requires the use of personal protective equipment (PPE) such as masks, respirators, and physical barriers, OSHA requires employers to be responsible for ensuring the availability of such equipment and training employees on the use of the equipment. This is simply not possible as PPE becomes recommended in all workplaces. The federal government should make clear that PPE recommended specifically to combat the spread of COVID-19 is not subject to the normal OSHA requirements around workplace PPE. Employers also may face lawsuits around the limited supply of or training for PPE. Worker's compensation issues dealing with shortages of PPE or its incorrect use are also likely to emerge. The federal government should clarify the scope of liability for the provision (or inability to provide due to scarcity) of PPE.

Support for Independent Contractors

More than 23 million Americans receive income as independent contractors in fields as varied as construction, news reporting, professional services, and online-platform-enabled work. Businesses want to be able to provide the same type of workplace protections to independent contractors as they do for employees. However, doing so could be used to argue that the individual has ceased to be an independent contractor and is instead an "employee." Some argue that Congress should settle this tension by creating a safe harbor that would allow businesses to implement health practices and provide benefits, including PPE, without establishing a formal employment relationship for the duration of the COVID-19 return to work transition.

Employment Practices

Employers already are facing litigation regarding employment practices related to the pandemic. This includes class actions in the transportation industry regarding employees' scope of work and travel destinations. Employers also could face liability around wage-and-hour issues (for example: Are employees compensated while getting tested or passing through screening?), leave policy, travel restrictions, telework protocols, and worker's compensation. In addition, employers could risk legal actions if they do not accommodate employees who either insist on returning to work even though they have not completed health screenings or are high risk, or who refuse to return to work and provide adequate support for such refusal. There should be a safe harbor for temporary employer-implemented workplace policy changes designed to combat the spread of the coronavirus.

Another source of liability are charges against employers forced to lay off workers in response to social distancing policies and government-mandated closures. The federal WARN Act and many similar state laws require employers comply with procedural requirements, including notice to employees in the event of layoffs. California Governor Gavin Newsom issued an executive order on March 17, 2020 that suspended some requirements under California's WARN Act and ordered the state's labor agency to issue guidance on the suspension. Some of our coalition partners believe policymakers should implement similar statutory and/or regulatory changes designed to limit the application of the WARN Act for COVID-19 related layoffs.

Exposure Liability

This is perhaps the largest area of concern for the overall business community. It encompasses multiple types of claims that could be brought against business that have been designated as "essential" as well as large swaths of the remaining business community once the economy is reopened. The core component of claims in this category is that a customer/employee/patient/member of the public/etc. was exposed to COVID-19 in a business facility or as the result of a business' particular action, or failure to act, and then that claimant became sick. The legal theories underlying these claims may range from simple negligence to strict liability to public nuisance, which the plaintiffs' bar could try to pursue through contingency fee arrangements with cash-strapped states and municipalities.

Depending on the legal theory underlying the claim, proving causation may be a challenge for plaintiffs. If enough claims are brought, the scope and magnitude of the litigation still may exert enough pressure to threaten businesses or industries with bankruptcy. The threat of exposure-related lawsuits also will deter some businesses from reopening even after it is determined that they could safely operate by following the guidance of appropriate health authorities.

Reforms to address these types of claims are largely dependent on which legal theory underlies a particular claim. For example, in the negligence space, providing a safe harbor for companies following CDC or state/local health department guidance could be helpful so long as the

companies' actions do not amount to gross negligence, recklessness, or willful misconduct. Procedural reforms such as channeling certain claims into federal court rather than allowing them to remain in various state courts could be helpful. Prohibiting or tightly circumscribing public nuisance claims also could be useful. Finally, policymakers should look to the reforms contained in prior economy-wide federal legal reform laws, such as the Y2K Act for guidance.

Product Liability

Makers of certain products/devices/equipment to either protect against, treat, or test for COVID-19 may not have sufficient protection against speculative litigation. While the PREP Act currently provides protection against some types of liability for some categories of key "countermeasures," it does not cover others. For example, while respirators are now covered by the Act, hand sanitizers, soaps and other key cleaning supplies are not. Furthermore, the Act does not provide protection outside key healthcare-related spaces. For example, a non-healthcare provider business that provides PPE to its employees or uses recommended cleaning products does not receive any protections under the PREP Act. The list of product types covered by the PREP Act should be expanded to include widely recommended protective products such as hand sanitizers and cleaning supplies. In addition, the Act could be expanded to cover additional categories of users and providers of essential countermeasures.

Medical Liability

There is increasing concern about medical liability claims being brought against healthcare providers and facilities caring for COVID-19 patients. For example, the plaintiffs' bar could try to bring medical liability/malpractice claims arising from care decisions, lack of care due to equipment shortages, as well as mistakes due to long hours or staff shortages. Also of concern are lawsuits brought against nursing homes and assisted living facilities for allegedly failing to protect residents/patients from contracting COVID-19. Healthcare facilities could be forced to ration care and make difficult decisions about who does and does not receive specific types of treatments, and each of those decisions has the potential of becoming a lawsuit. In addition, there are liability concerns about claims brought by non-COVID-19 patients who allege that they did not receive the appropriate standard of care due to the influx of COVID-19 patients that a healthcare facility or provider was required to treat. At the federal level, the CARES Act provides some liability protections for volunteer healthcare providers caring for COVID-19 patients.

Securities Litigation

Securities class actions already have been filed against businesses impacted by the coronavirus—such as those in the cruise line and pharmaceutical sectors—based on stock-price drops resulting from the impact of the virus and claims that companies should have been warning investors about the potential consequences if the world was faced with an unprecedented pandemic. In addition, securities litigation also has been filed related to data privacy concerns for certain video conferencing platforms that have increased in popularity due

to the increased use of teleworking because of COVID-19 stay-at-home orders. An automatic stay should be placed on securities litigation cases arising out of or related to the COVID-19 emergency until after the President's declaration of a public emergency has been rescinded. In addition, some make the case that these types of securities cases could be consolidated into one or a few federal district courts for efficiency purposes. Also, defendants in these cases should be allowed to have interlocutory appeal rights for the denial of a motion to dismiss and plaintiffs should have to plead with particularity all the elements of their claim in these cases; and all discovery should be stayed until after the motion to dismiss stage of the litigation. Finally, it is worth considering a cap on damages in COVID-19 related securities lawsuits.

Customer Communications

Businesses have an enhanced need during the COVID-19 emergency to communicate to customers via telephone and text messages regarding operating status, restricted access, and other issues. However, the threat of litigation under the Telephone Consumer Protection Act (TCPA) can cause a business to limit the use of the important informational phone calls and texts. Approval of a pending petition at the FCC to expand the type of communications subject to an emergency exemption due to the COVID-19 situation would be helpful.

False Claims Act

Cases brought under the federal False Claims Act (FCA) can impose significant liability on entities receiving federal funding or contracts and these types of liability concerns have the potential of slowing down relief under the CARES Act and any future relief measures. In the FCA space, the Small Business Administration's Interim Final Rule implementing the paycheck protection loan program under the CARES Act does contain very helpful hold harmless language for financial services providers; to more fully effectuate that language a memorandum of understanding between the SBA and the Department of Justice (DOJ) regarding how DOJ will approach FCA litigation under the CARES Act loan program would be extremely valuable and similar reforms also should be implemented for any future relief measures.

In September 2020, NSBA sent a letter to House and Senate leadership on the Delivering Immediate Relief to America's Families, Schools and Small Businesses Act, where we commend them for the inclusion of protections for employers against liability in any coronavirus-related lawsuits brought by workers.

On July 20, 2020, NSBA sent a letter to all Members of Congress outlining the priorities for small business when it comes to the Phase Four stimulus package which includes targeted liability relief.

NSBA, along with over 480 associations sent a letter on July 30, 2020 urging Congress to support the timely, targeted, and temporary liability relief provisions contained in S. 4317, the SAFE TO WORK Act and include the provisions in a Phase IV COVID-19 relief package.

Further, NSBA joined a diverse coalition of over 200 trade associations and business groups sent a letter on May 27, 2020 to Congress urging them to quickly enact temporary and targeted liability relief legislation related to the COVID-19 pandemic. The groups stated, in part "These crucial protections should safeguard businesses, non-profit organizations, and educational institutions, as well as healthcare providers and facilities, from unfair lawsuits so that they can continue to contribute to a safe and effective recovery from this pandemic."

6. **Ongoing Issue: Beneficial Ownership Reporting Requirements** ***(5 minutes: 11:50 a.m. – 11:55 a.m.)***

The 2021 National Defense Authorization Act (NDAA) was enacted into law over a presidential veto on January 1, 2021. A portion of the NDAA, the Corporate Transparency Act, imposes new beneficial ownership reporting requirements on certain businesses formed or registered to do business in the United States. While many of the details concerning the implementation of the Act are not yet known, the law requires certain reporting companies—those with fewer than 20 employees—to submit to the Financial Crimes Enforcement Network (FinCEN) a report identifying each beneficial owner and applicant, and providing certain identifying information. Accordingly, significant practical questions remain and the full impact of the Act's requirements will be heavily shaped by such future Regulations.

It is important to note that large companies are mostly exempted from the Corporate Transparency Act, thus, only those with 20 or fewer employees and $5 million or less in annual sales would need to report ownership information to the Treasury Department's financial crimes unit. Other corporate entities—such as registered public accounting firms, certain investment companies, bank holding companies, and public utilities—also are exempt from the disclosure requirements.

This is an extremely important issue for NSBA – our long term argument has been this new requirements unfairly targets small businesses and creates extra costs and legal risks for companies that don't typically pose a money laundering threats. The law allows the government to greenlight exemptions for other types of companies that it sees as low risk.

The Department of Treasury has a one-year window to craft corresponding rules, and as a result we are hoping for the opportunity to tweak it. Our goal now is working to ensure that Treasury will do more to address our concerns, and ideally we are trying to get a broad exemption for small businesses that already disclose this type of information.

Further, we are also very concerned that Sec. Yellen recently told the Senate Finance Committee that anonymous shell companies present an "important problem," and that creating a beneficial ownership database at FinCEN is a "very high priority." Since she wants to move quickly on this—I expect rules aren't too far off. Once the rules come out—NSBA will be submitting comments—as there is definitely a potential for Treasury to address some of our questions with this new reporting requirement.

7. **Other Issues** *(2 minutes: 11:55 a.m. – 11:57 a.m.)*

8. **Adjourn** *(12:00 p.m.)*