THE RFA AT 25: NEEDED IMPROVEMENTS FOR SMALL BUSINESS REGULATORY RELIEF

HEARING

BEFORE THE

COMMITTEE ON SMALL BUSINESS
HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

WASHINGTON, DC, MARCH 16, 2005

Serial No. 109–5

Printed for the use of the Committee on Small Business

Available via the World Wide Web: http://www.access.gpo.gov/congress/house

U.S. GOVERNMENT PRINTING OFFICE

21–282 PDF WASHINGTON : 2005

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2250 Mail: Stop SSOP, Washington, DC 20402–0001

COMMITTEE ON SMALL BUSINESS

DONALD A. MANZULLO, Illinois, *Chairman*

ROSCOE BARTLETT, Maryland, *Vice Chairman*
SUE KELLY, New York
STEVE CHABOT, Ohio
SAM GRAVES, Missouri
TODD AKIN, Missouri
BILL SHUSTER, Pennsylvania
MARILYN MUSGRAVE, Colorado
JEB BRADLEY, New Hampshire
STEVE KING, Iowa
THADDEUS McCOTTER, Michigan
RIC KELLER, Florida
TED POE, Texas
MICHAEL SODREL, Indiana
JEFF FORTENBERRY, Nebraska
MICHAEL FITZPATRICK, Pennsylvania
LYNN WESTMORELAND, Georgia
LOUIE GOHMERT, Texas

NYDIA VELÁZQUEZ, New York
JUANITA MILLENDER-McDONALD, California
TOM UDALL, New Mexico
DANIEL LIPINSKI, Illinois
ENI FALEOMAVAEGA, American Samoa
DONNA CHRISTENSEN, Virgin Islands
DANNY DAVIS, Illinois
ED CASE, Hawaii
MADELEINE BORDALLO, Guam
RAÚL GRIJALVA, Arizona
MICHAEL MICHAUD, Maine
LINDA SÁNCHEZ, California
JOHN BARROW, Georgia
MELISSA BEAN, Illinois
GWEN MOORE, Wisconsin

J. MATTHEW SZYMANSKI, *Chief of Staff*
PHIL ESKELAND, *Deputy Chief of Staff/Policy Director*
MICHAEL DAY, *Minority Staff Director*

CONTENTS

WITNESSES

	Page
Sullivan, Hon. Thomas, Chief Counsel for Advocacy, U.S. Small Business Administration	2
McCloy, Ms. Cecelia, President, Integrated Science Solutions, Inc.	4
Haas, Mr. Blair, President, Bud Industries	6
Lancaster, Mr. Jay, President, B.E.S.T. Inc.	8
Freedman, Mr. Mark, Esq., Director, Labor Law Policy, U.S. Chamber of Commerce	10
Glover, Mr. Jere, Esq., Of Counsel, Brand Law Group	13

APPENDIX

Opening statements:	
Manzullo, Hon. Donald A.	27
Kelly, Hon. Sue	31
Prepared statements:	
Sullivan, Hon. Thomas, Chief Counsel for Advocacy, U.S. Small Business Administration	32
McCloy, Ms. Cecelia, President, Integrated Science Solutions, Inc.	40
Haas, Mr. Blair, President, Bud Industries	48
Lancaster, Mr. Jay, President, B.E.S.T. Inc.	52
Freedman, Mr. Mark, Esq., Director, Labor Law Policy, U.S. Chamber of Commerce	58
Glover, Mr. Jere, Esq., Of Counsel, Brand Law Group	66

THE RFA AT 25: NEEDED IMPROVEMENTS FOR SMALL BUSINESS REGULATORY RELIEF

WEDNESDAY, MARCH 16, 2005

HOUSE OF REPRESENTATIVES
COMMITTEE ON SMALL BUSINESS
Washington, D.C.

The Committee met, pursuant to call, at 2:07 p.m. in Room 311, Cannon House Office Building, Hon. Donald A. Manzullo [Chairman of the Committee] presiding.

Present: Manzullo, Velazquez, Bartlett, Lipinski, Akin, and Moore.

Chairman MANZULLO. The Committee will come to order.

During the explosive growth of the 1970s, word grew among the business community that the rational decisions made by federal agencies under the Administrative Procedure Act were actually irrational because they could not afford to comply.

Congress reacted by enacting legislation designed to change the way federal agencies made decisions. Two laws were passed in 1980, The Paperwork Reduction Act, and the focus of this hearing, The Regulatory Flexibility Act, or the RFA.

The RFA was enacted to assist agencies in making rational decisions through the application of a standard set of analyses focused on small entities, particularly small businesses. The act requires federal agencies to examine the impact of their proposed and final rules on small entities, and if they are significant on a substantial number of such entities, examine less burdensome alternatives.

Federal agencies continued to ignore the law despite the best efforts of the President, Dr. John Graham of the Office of Information and Regulation Affairs at OMB, and Chief Counsel for Advocacy, Tom Sullivan.

In part, loopholes existed in the RFA that allow them to avoid compliance. In other circumstances, agencies simply cannot be bothered and need not worry because most small businesses do not have the resources to fight the federal government.

Noncompliance with a statute that has been in existence for a quarter of a century is not acceptable. Time has come to say enough is enough, and that is why we decided to introduce H.R. 682, along with co-sponsors Messrs. Chabot, King, Westmoreland, Pence, Akin and Keller.

Since then, we have acquired additional co-sponsors, including the Chairman of the Subcommittee on Judiciary that has jurisdiction over the bill, Chris Cannon from Utah.

I would also like to thank Mr. Case of Hawaii for recognizing the importance of the legislation and becoming a co-sponsor.

The bill significantly strengthens the RFA by making many technical improvements that close existing loopholes so that agencies, as President Bush stated, "will care that the law is on the book."

These changes include more detailed analyses, assessment of indirect effects, other regulations, and mandatory government-wide regulations drafted by the Office of Advocacy.

[Chairman Manzullo's statement may be found in the appendix.]

Ms. Velazquez is not here for her opening remarks. We are supposed to have a series of four votes, it always happens, starting at 2:15. Is that not fun? So we are going to start the testimony, see how far we get before we have to go and vote.

Our first witness is the Honorable Tom Sullivan, Chief Counsel for Advocacy of the U.S. Small Business Administration, and we have got the five-minute clock going. The written testimonies of all the witnesses will be made part of the record without objection, and we look forward to your testimony. Mr. Sullivan.

STATEMENT OF THOMAS SULLIVAN, OFFICE OF ADVOCACY, U.S. SMALL BUSINESS ADMINISTRATION

Mr. SULLIVAN. Thank you, Mr. Chairman, Mr. Lipinski. It is a pleasure to come before the Committee. I am going to not read my written statement, but rather summarize just from some notes that are before me.

The Regulatory Flexibility Act is actually working. It is working pretty well. In fact, in my written statement you will see that under President Bush's administration we estimate cost savings achieved through enforcement of the RegFlex Act totaling over $64 billion, and I will say that again. Savings for small business totaling over $64 billion.

So there is a question of why is it working. One of the reasons is because of the activism of small business, and actually that is why it is a pleasure for me to be on a panel with not only small business owners, but organizations who represent large amounts of small business owners. And those organizations and the small business owners themselves, in their vigilance over the Regulatory Flexibility Act and making sure that agencies consider their impact on small business, allows for the RegFlex Act to work.

Another reason why we have achieved such great cost savings over the past four and a half years is because of this Committee. Without the type of vigilant oversight that this Committee exercises, we would not have achieved the $64 billion cost savings for small business, and I think it bears notice that while so many Committees and members of Congress gauge their success over the amount of legislation that comes out of Committee and individuals, there is more to it than that, and the oversight part of it deserves recognition, and this Committee in particular, with regards to the RegFlex Act and its ability to save small business deserves compliments.

And last but certainly not least, one of the reasons the RegFlex Act is working is because of the courts. Last Friday the Court of

Appeals in the District of Columbia issued an incredible victory for small business, and in particular, the Regulatory Flexibility Act.

When the court struck down an FCC rule because they did not follow the RegFlex Act, it should serve as a wake-up call for all regulators that they cannot ignore the Regulatory Flexibility Act.

When a court makes a decision like this, the question is, is the law working perfectly, and the answer is no. Small businesses do not have a quarter to a half million dollars sitting around that will allow for them to pursue regulatory actions all the way through the courts, and ultimately to the Supreme Court, we are talking about millions of dollars.

So how can we improve the act? Obviously, H.R. 682 fills in every loophole of the act. But what is the intention of it? How do we get this victory, the cost savings for small business, before a court has to make a decision?

And the answer is early involvement by small business in agency decision making. My office has example after example after example where if an agency listens, which is very important, to small business, and acts on their advice before the ink is dry on draft regulations, then they can save small business money without compromising the underlying purpose of rules: protection of the environment, workplace safety and the safety of roads and airways, and the protection of our borders.

So the Office of Advocacy is supportive of the goals of H.R. 682. I believe there are suggestions in my written statement, and the questions that I will respond to on how a narrow approach, a targeted approach to improving the act can meet that goal, which is to involve small businesses as early on in the process, and to absolutely make sure that agencies act on that advice on small business, and reduce the regulatory burden on small business.

So with that I will close. I want to thank again the Chair, and now the Ranking Member, for having this hearing. We have achieved remarkable success, and we can achieve more by improving the RegFlex Act through legislation. Thanks.

[Mr. Sullivan's statement may be found in the appendix.]

Chairman MANZULLO. The Chair will recognize the Ranking Member.

Ms. VELAZQUEZ. Mr. Chairman, in light of time I will ask that my opening remarks, we will insert that into the record.

Chairman MANZULLO. Without objection.

Ms. VELAZQUEZ. Thank you.

Chairman MANZULLO. Thank you.

Chairman MANZULLO. Our next witness is Cecelia McCloy, President and CEO of Integrated Science Solutions. I look forward to your testimony. You may be the first geologist and zoologist who has ever appeared before our Committee. My wife is a biologist. I wish she were here, and we look forward to your testimony. Thank you.

Ms. MCCLOY. Hopefully, I will not be the last.

Chairman MANZULLO. That is correct. Thank you.

STATEMENT OF CECELIA MCCLOY, INTEGRATED SCIENCE SOLUTIONS, INC.

Ms. MCCLOY. Mr. Chairman and Ranking Member Velazquez, I am Cecelia McCloy, President of Integrated Science Solutions, a woman-owned science and engineering company. We specialize in engineering studies, geotechnical evaluations, health and safety services, environmental studies, and training, and provide solutions for our customers' complex problems. The ISSI has offices in California, Nevada, Colorado, Washington, D.C., and the State of Washington.

I am testifying today on behalf of Women Impacting Public Policy, WIPP, of which I am a national founding partner, And the Women's President Organization, WPO.

Women Impacting Public Policy is a bipartisan organization representing 505,000 women in business nationwide. Thank you for inviting me to testify, to share WIPP's and WPO's views on H.R. 682, improvements to the Regulatory Flexibility Act.

As a business owner, I see firsthand the effect regulations promulgated by federal agencies have on small business. We help our clients understand and comply with federal regulations, especially in the environmental area. While we support efforts to provide a safe and clean environment, the cost of compliance for small businesses often outweighs the benefit to the environment.

Just last week this Committee held a hearing on House Resolution 22, which identified reducing paperwork burdens on small business as a congressional priority for the 109th Congress. WIPP wholeheartedly agrees that reduction of paperwork is an important goal. A U.S. Chamber of Commerce paperwork survey estimated that small business owners spend 3.5 hours on non-IRS-related paperwork per week, which translates into 4.2 billion hours of time small business could be using to generate income.

Although the stated goal of H.R. 682 is not paperwork reduction, the practical implications of this legislation is a reduction in paperwork, which is good news for small businesses.

The WIPP believes requirements such as making sure compliance guides published by agencies are written in plain English are important to small businesses. After all, we are not trying to invent creative ways to skirt the law. We just need to know how to comply.

A key provision of H.R. 682 is the requirement that agencies complete a more detailed economic impact analysis of the impact on small business when formulating and finalizing their regulations. Indirect costs should be taken into account as well as direct costs.

A recent interim proposed rule by GSA on access to the Federal Procurement Data System, FPDS, is just one example of the requirements of H.R. 682 which would have been helpful. We have attached WIPP's comments to the GSA at the end of our testimony, but let me just summarize the issue.

The GSA has proposed a $2,500 charge for a direct hook-up for direct web service access to FPDS. The FPDS site has a non-fee-based data site which the GSA says is open to all businesses.

Companies participating in federal contracting use this data on a continual basis for market research. We asked our members to test the non-fee site. Not one of our member companies was successful in retrieving the data they needed. In fact, analysts in IT companies were unsuccessful in accessing the data requested.

Our conclusion is that the non-fee site does not work for small business. If our companies want to access the federal procurement data, they will have to pay the $2,500 fee. Yet the GSA, in its interim rule, stated that this interim rule has no effect on small business.

If the GSA was required to take into account the indirect cost to small businesses, the hours and manpower required to access the data on a non-fee-based site, they likely would have come to a different conclusion about the effect of this rule on small business.

Equally important, H.R. 682 requires the federal agencies to contain a detailed description of alternatives which would either minimize adverse impact, economic impact, or maximize economic benefits to small businesses.

The WIPP also supports the additional enforcement activity given to the Office of Advocacy at the U.S. Small Business Administration in this bill. Last year alone the efforts of the advocacy's chief counsel saved small businesses in America more than $17 billion in potential regulatory costs. One of the reasons for this success was the implementation of Executive Order 13272.

H.R. 682 would place into law some of the critical authority contained in the executive order. The requirement that agencies must respond to concerns raised by the Office of Advocacy is critical to small businesses. The Office of Advocacy speaks for all of small business , so we must make sure its views are taken into account.

Other powers, such as the advocacy's right to intervene in any adjudication before any federal agency if it believes small business concerns were not addressed, is a powerful tool. In addition, the provision that grants the chief counsel of advocacy the ability to issue rules for agency compliance with the Regulatory Flexibility Act means that small business concerns will be heard.

In conclusion, Mr. Chairman, we thank you for your leadership in making sure that small businesses do not get lost in the throes of government regulations. It is almost impossible for a small business owner to follow every proposed regulation which may have an impact on her business. By giving the agencies a mandate to consider the total cost of regulations on small business ultimately means small business owners will be able to spend less on compliance with government regulations, and more on business growth.

Thank you for giving me the opportunity to testify and I am happy to answer any questions.

[Ms. McCloy's statement may be found in the appendix.]

Chairman MANZULLO. We are going to be taking a break here to go vote. Is anybody here in the audience from GSA?

Okay, Ms. Velazquez and I are going to have the head of GSA come into our office, and explain why this $2,500 charge has been imposed. Thank you for bringing that to our attention.

We are going to recess for probably about a half an hour or so until we finish with these votes, and then we will come back. Thank you.

[Recess.]

Mr. AKIN. [Presiding] I believe we are picking the hearing up part of the way along, and our next witness I believe is Blair Haas, if I am not mistaken, and if you could try to keep thing within five minutes, we would appreciate it. Thank you very much. Proceed.

STATEMENT OF BLAIR HAAS, BUD INDUSTRIES

Mr. HAAS. Thank you. I would like to thank the Chairman and Ms. Velazquez and the members of the Committee for the opportunity to appear before you today in support of H.R. 682, the Regulatory Flexibility Improvements Act.

My name is Blair Haas, and I am the President of Bud Industries, the nation's best known provider of electronic enclosures for industry. I also serve on the board of governors of the Electronic Industries Alliance, a partnership of electronics and high-tech trade associations. In the interest of full disclosure, I would like to also let you know that my son is a member of the minority staff of this Committee. However, my invitation to testify today came through a completely unrelated channel, and does not represent a conflict of interest.

[Laughter.]

Mr. HAAS. Founded in 1928 by my grandfather, Bud Industries has evolved to meet the high-tech industry's requirements for electronic enclosures which are these outsides or skins of industrial electronic equipment. Today with sales of about $15 million, we have 165,000 square foot factory just outside Cleveland, and a sales office in Arizona. We employ about 100 people with an average tenure of almost 20 years, and we have resisted the competitive pressure to outsource our metal products offshore, producing them completely in our Ohio factory.

An internal survey by the Electronic Industries Alliance last year found that nearly 60 percent of executives describe the U.S. labor relations as costly, while only 20 percent consider them fair. Regulations such as those from OSHA, Sarbanes-Oxley Act and superfund clean-up spending all add to the cost of doing business in the U.S. and work to make our companies less competitive in their global markets.

There are strong arguments in favor of many of the U.S. regulations. However, the volume of these regulations, their layers, and the compliance costs also have created a landscape that is increasingly expensive and burdensome for business, particularly for small business.

The Regulatory Flexibility Act, which requires agencies to take the interests of small businesses into account before implementing new regulations, is an important safeguard. Therefore, I support

H.R. 682, believing even more can be done to close the loopholes in this act and compel agencies to comply with the spirit of RFA and ensure that small businesses remain competitive.

The RegFlex Improvement Act's requirements of more detailed economic impact analysis of proposed regulations on small business, including an examination of the indirect costs, with input from small business, is an important improvement. Hidden costs can prove even more burdensome in financial outlays and it is critical that the agencies complete a thorough assessment of their potential cost before imposing them on small business.

I would like to just cite a few examples of regulatory burdens that Bud Industries faces as a small Business.

The alternative minimum tax: As a small business, we find ourselves paying extra taxes under a program that was designed to prevent large businesses from avoiding tax payments. We, unfortunately, have significant net operating loss carry-forwards, but still have to pay taxes under the AMT system, which is a burden at a time when our company is working to rebuild our net worth.

Pension plans: Post-Enron we now have to create a company-sponsored IRA for each employee who does not cash out of our plan when they leave our company. We have to be responsible for any investment losses, track the employees' whereabouts long after they leave us. We also have to pay legal counsel to create these accounts and keep us up to date with constantly changing regulations.

O.S.H.A. determines a formula for inspection based on lost days as a percent of total employment. When you have a smaller workforce, such as that at Bud, the impact of one employee who develops a long-term injury can be significant. As our percentage is skewed, we have to go through the expense of preparing for, managing, and responding to OSHA inspections.

The Fair Labor Standards Act: We have an employee who is categorized as exempt but can no longer be because she now supervises only one person instead of the two mandated by the act. I recognize that there is a push for her to be able to receive overtime, but the flexibility of being exempt was extremely meaningful to this single mother.

Bud has been involved with two EPA superfund sites cased by our waste being disposed of improperly by the professional companies we hired. In both cases our waste was quite minimal. However, we had to pay for legal and other costs to set standards for de minimis standing, fighting against larger companies with significant internal legal counsel that sought to reduce their own liabilities.

While I recognize that there were good intentions and perceived improvements in the development of each of these regulations, they have the unintended consequences of costing us huge amounts of both money and time.

Further improvements to the process, such as those outlined in the RegFlex Improvement Act, would be helpful to companies like ours as we struggle to thrive in a global economy.

Once again I would like thank the Chairman and the Committee for the opportunity to comment on this legislation on behalf of Bud Industries and the Electronic Industries Alliance. I hope you will

move toward swift approval of the Regulatory Flexibility Improvement Act.

[Mr. Haas' statement may be found in the appendix.]

Chairman MANZULLO. [Presiding] When I saw Bud Industries, you think of something else liquid.

[Laughter.]

Mr. HAAS. I only wish.

Mr. AKIN. You only wish. That is great. Thank you very much for your testimony.

Chairman MANZULLO. Our next witness is Jay Lancaster, owner of B.E.S.T. Incorporated; a graduate of Washington State University, a degree in economics; a practical economist speaking on behalf of the NFIB.

Mr. Lancaster, we look forward to your testimony.

STATEMENT OF JAY LANCASTER, B.E.S.T. INC.

Mr. LANCASTER. Good afternoon, Chairman Manzullo, and members of the Committee.

Thank you for the invitation to be here today. I am here to talk about H.R. 682, the Regulatory Flexibility Improvement Act sponsored by Chairman Manzullo. Also, I am also pleased to be representing the 60,000 small business members of the NFIB in expressing our support for H.R. 682.

My name is Jay Lancaster, and I own and operate B.E.S.T., Incorporated, specializing in commercial roof installations and waterproofing. We are truly a family-run operation as all five full-time employees are related to the two founders.

Small businesses today are being barraged by government regulations. H.R. 682 will help relieve the regulatory burden on small businesses like mine by amending Regulatory Flexibility Act to hold federal agencies accountable for rules they create.

My goal today is to first discuss how regulation impacts a small business like mine; and second, how this bill will help reduce that burden.

I want to take a minute to discuss what I see as the most pressing issues for small businesses. I will note here that I am not an expert in regulation. I am an expert in running my business, but I want to share with you my perspective as a small business owner.

According to an NFIB poll, the greatest problem with regulation experienced by small businesses was the amount of paperwork required by regulation. The second was the complexity of compliance, and the third, but not far behind, was the cost.

My personal experience reflects the findings of the poll. It is almost impossible to keep track of how many regulations affect me. My small eight-person business is regulated by over eight agencies that is just at the federal level. Of course, those—

Chairman MANZULLO. Mr. Lancaster, can I interrupt you a second?

Mr. LANCASTER. Yes, sir.

Chairman MANZULLO. We have your written testimony and it is good. What I would like to hear is some anecdotal stories of how regulations have impacted you directly on some problems that you had and the relief that you need. Can you help us on that?

Mr. LANCASTER. Yes, sir.

Chairman MANZULLO. That is what this is about. It is how it impacts you, and if you could sort of steer your testimony towards that, that helps out members more than anything.

Mr. LANCASTER. I will—

Chairman MANZULLO. If that is okay with you.

Mr. LANCASTER. Yes, it is. I would note that—then I am just going to set this aside.

In the speech it talks about my wife who has been my partner for 40 years, and she and I went through a list of the things, the times that she spends. She spends at least eight hours a week trying to deal with the federal paperwork. My daughter, who is here with me today, is in charge of compliance with OSHA, and she spends at least an hour a day.

It is the fear as much as trying to deal with these regulations. At first we tried to deal with them, sir, and it became impossible because running a business like ours, which is a seven-day-a-week business, a construction business, it was necessary for us to be out in the field.

We found it necessary to hire an expert who is also an accountant to deal with the intricacies, and as the paperwork grew increasingly complicated, it was necessary for us to hire both him, and we have hired a private consultant that helps us with the OSHA, and sends us paperwork and helps us with understanding the compliance nature. It is the paperwork aspect that is oftentimes totally unrelated to with practical aspects of safety or efficiency in your business.

The latest example that has been a disaster, not only to my business but to the industry, is the Environmental Protection Agency and the other subsequent agencies, the Montreal Protocol has established and have completely changed the chemistry and the polyurethane industry, which is I am a member of the Society of Plastics in our work.

With the United States signing on to the Montreal Protocol in the manner in which they did, the chemicals that we now purchase in the last 11 months went from a price of $1.06 to $1.60, and those same old chemicals that were fine a year ago are being manufactured in the United States and sent all over the world, primarily to Mexico and Canada, but also to China, which is one of the major reasons why our prices have gone up.

They are able to use what the Montreal Protocol considered an inappropriate chemical. They are allowed to continue using that for the next 30 years when our businesses now have to comply with

this extremely sensitive and far more expensive chemical, we have had to change all of our equipment. Our office is now having to comply with some of the regulations that are connected with some of the new chemical laws, the placarding of our trucks, having all of the people having to now be—have to be HAZMATed where as before they did not, and all the drivers will have to have that. The paperwork that is subsequently necessary for all of that is a real burden.

Those are some anecdotal experience.

[Mr. Lancaster's statement may be found in the appendix.]

Chairman MANZULLO. I appreciate that. If you would give me a letter about how you are impacted by the Montreal Protocol, I am the Chairman of the American-Chinese and the American-Canadian Interparlimentary Exchanges, and meet with members of the respective bodies from time to time, and I will be with the Canadians in May, and I would like to bring that to their attention.

Mr. LANCASTER. I would be happy to. It will also probably be written by the vice president of the chemical company that is a friend. He will share this with me.

Chairman MANZULLO. But if you could get that to our Committee, I would appreciate that.

Mr. LANCASTER. I would also like to mention that my wife did say on a positive not that IFTA in the last couple of years has made her life much easier, and she is very grateful because they no longer require documents and paperwork from every state that our trucks pass into that are diesel-operated trucks.

Chairman MANZULLO. Okay.

Mr. LANCASTER. It is now a central and only one form allows you to go through all the states.

Chairman MANZULLO. Good. Then we did something right.

Mr. LANCASTER. Yes, sir.

Chairman MANZULLO. Thank you for your testimony.

The next witness is Marc Freedman, Director of Labor Policy for U.S. Chamber of Commerce, and Mr. Freedman, we look forward to your testimony.

STATEMENT OF MARC FREEDMAN, U.S. CHAMBER OF COMMERCE

Mr. FREEDMAN. Thank you, Mr. Chairman.

Good afternoon, Chairman Manzullo and Ranking Member Velazquez.

Before coming to the Chamber in October, I was the regulatory counsel for the Senate Small Business Committee, and among oth-

ers, use covered compliance with the Regulatory Flexibility Act, as amended by SBREFA.

I am here today to convey the Chamber's strong support for improving the Regulatory Flexibility Act; in particular, our support for H.R. 682, the Regulatory Flexibility Improvements Act.

During my more than five years as regulatory counsel for the Senate Small Business Committee, agency compliance with the various aspects of the RFA was a constant area of concern. I was involved with hearings to examine agency compliance, GAO reports examining agency compliance, letters to agencies commenting on their compliance, letters to improve agency compliance, and heard many accounts from small businesses about the lack of agency compliance.

It is clear to me that the agencies have taken advantage of every ounce of flexibility when it comes to complying with the Regulatory Flexibility Act. The Regulatory Flexibility Improvements Act would help resolve many of these issues.

The Bush Administration has taken compliance with the RFA more seriously than previous administrations. Unfortunately, this enhanced the attention to compliance with the RFA is only as strong as the administration in power wants it to be. This requires legislation, such as the Regulatory Flexibility Improvements Act.

The RFA has always enjoyed strong bipartisan support and we hope this pattern will continue as reforms and improvements to it are considered.

The provisions of the Regulatory Flexibility Improvements Act build on this momentum of concern for the impacts of regulations on small businesses. I would like to highlight just a few of the ones that we endorse.

Perhaps the most significant is requiring agencies to consider the indirect impact of regulations when calculating the impact of regulations on small businesses. This is particularly helpful with respect to EPA regulations where the agency has claimed that those regulations that are in force by the states only have an indirect impact and therefore do not trigger the range of requirements under the RFA and SBREFA.

Similarly, the requirement the agencies assess the cumulative impact of their regulations addresses another loophole used by agencies to diminish the real impact of their regulations. Just as any given straw might not break a camel's back, so any specific regulation considered in isolation might not impose a crushing burden.

However, and as we have just heard from some of the other witnesses, many such regulations added together impose on the small business where the same person is responsible for sales, bookkeeping, inventory, safety and environmental compliance, and probably getting the kids to soccer practice, can indeed become an overwhelming burden.

We are also pleased to see that the Regulatory Flexibility Improvements Act attempts to put more teeth into judicial review of agency compliance with the RFA. Notwithstanding the victory that we heard about last week, we believe it would be more helpful to allow such an action to be brought closer to the point at which an agency makes a determination about whether a proposed regula-

tion will have the significant economic impact on a substantial number of small entities.

That certification could be deemed a final action by the agency for the purposes of determining whether to proceed with the requirements of the RFA. Once an agency certifies a regulation, they are not going to revisit that question.

Closing loopholes used by the IRS to distinguish their rulemakings from all others is another long sought-after goal. IRS regulations affect every business, and the notion that they are not subject to the RFA means that small businesses are forced to absorb these regulations without the IRS having to take their impact on small businesses into account.

Finally, mandating the chief counsel for advocacy promulgate regulations that will determine how agencies must comply with the RFA is a step that is long overdue. Just as employers must rely on agencies to interpret laws and describe how they are to comply, so agencies should have one office in the government that directs their compliance with this law that covers them.

Agencies have consistently argued that the terms of the RFA are vague, and that the act gives them flexibility to define terms as they think suitable. Chief among the terms that need clarification are, of course, significant economic impact, and substantial number of small entities. Allowing agencies to define these terms differently for each and every rulemaking gives a wide array of definitions and results. We would hope that the chief counsel would use this authority to issue regulations defining these terms. Not only would agency compliance with the RFA improve, but everyone would finally have a standard against which to evaluate whether an agency has met its obligations.

The Regulatory Flexibility Improvements Act comes at a propitious time. Attention to the needs of small business has never been greater. With so many sectors such as manufacturing coming under increasing international pressure, it is incumbent on Congress to make sure that our laws and regulations are as narrowly tailored as possible to achieve their goals.

The improvements continue to go a long ways towards getting us to that promised land of small business regulatory relief envisioned by the original authors of the Regulatory Flexibility Act almost 25 years ago.

Thank you for your time and attention on this. I would be happy to answer any questions you might have.

[Mr. Freedman's statement may be found in the appendix.]

Chairman MANZULLO. Thank you very much. The promised land of small business regulatory relief. That is—

Mr. FREEDMAN. Well, we may see it but some of us may never actually get there.

Chairman MANZULLO. There you are. I do not want to go into that.

Mr. FREEDMAN. It is that time of year, right?

[Laughter.]

Chairman MANZULLO. That is what America is all about, is it not?

Our next witness is Jere Glover. I have known Jere for a long time. He held a position now that Tom Sullivan has from 1994 until 2001, and look forward to your testimony.

STATEMENT OF JERE GLOVER, BRAND LAW GROUP

Mr. GLOVER. Thank you, Mr. Chairman, Ranking Member Velazquez. It is delightful to be here, especially on the twenty-fifth anniversary of the Regulatory Flexibility Act.

I am Jere Glover, and I have some great memories during the last 25 years fighting to reduce the regulatory burdens on small business. We have won many battles, but we are losing the war.

In 25 years, many things have changed, but the regulatory burden on small business has not. It is like the energizer bunnies, the regulatory burdens on small business just keeps growing and growing. Literally hundreds and hundreds of new regulations are enacted each year. Now is the time to do something about the problem.

I remember when the Office of Advocacy was first started. The idea that small business needs an advocate within the government was a new concept. Workers at the Department of Labor, Environmental Protection Agency had—the environmentals at the EPA, but small business was without an effective voice inside the government.

How could anyone be against giving small business an advocate within the government? After all, it creates over half of the GDP, hires over half the employees, and produces over half the innovations.

I remember when I first heard about the concept of regulatory flexibility. What a wonderful concept, making regulations fit the problem. How could anyone be against the concept that regulations should be flexible and should treat small businesses different than big businesses?

And I remember when the Regulatory Flexibility Act was passed, and the excitement about the new law. I remember meeting with the agencies, explaining the new law to the agency employees, and getting President Carter to sign a memorandum directing the agencies to comply.

Then I remember the 10-year fight to get judicial review for the Regulatory Flexibility Act, and when SBREFA was passed. I remember reading decision after decision where courts found reasons not to enforce the Regulatory Flexibility Act and SBREFA and grant small business relief. We won a few cases, but we lost the vast majority.

I remember reading the very first Court of Appeals decision that found a violation of the Regulatory Flexibility Act and stayed enforcement of the regulation until the agency complied with the Regulatory Flexibility Act. Actually, it was just last week when the court issued that ruling, some eight years after judicial review was provided and some 60 cases not having come down with a clear decision.

I remember reading and writing annual reports on the Regulatory Flexibility Act about agencies such as the Federal Communications Commission, the IRS, and CMA, who were habitually—CMS—who were habitually violating the Regulatory Flexibility Act, and I remember the first time the Office of Advocacy compiled the regulatory savings for small business. Today those savings have grown to over $84 billion.

It is time for some new good memories. The RFA and the Office of Advocacy need to be strengthened. They go hand in hand. Laws are not self-enforcing. As Tom has pointed out in his testimony, the Office of Advocacy has done a lot of really great things. His work on implementation of the Regulatory Flexibility Act is superb. But can anyone say that we have solved the problem and won the war? I do not think so.

Eliminating the line item for advocacy research in the President's budget is a huge mistake. In the last decade we have seen the Office of Advocacy drop from 78 to 44 employees. If we allow this to stand, it sends the message that we do not care about small business advocacy.

The first line of defense in the regulatory fight is the Office of Advocacy. Its annual reports remind Congress and the agencies that the burden on small businesses keep growing. We need to request that the Appropriations Committee give the Office of Advocacy a line item in SBA's budget, and it be for both staff and for research functions.

Unfortunately, just preserving the Office of Advocacy alone is not enough. We also need to improve and strengthen the Regulatory Flexibility Act. Certainly the regulatory flexibility analysis and the agency determinations that small business is not impacted need to be far more detailed and substantive.

The panel process needs to be expanded to more agencies such as the FCC, CMA and the IRS. The Executive Order needs to be codified to make sure that it covers independent agencies and that it is there after the current president leaves.

Now is the time to create some more good memories. Small business deserves better. Thank you.

[Mr. Glover's statement may be found in the appendix.]

Chairman MANZULLO. Thank you very much. We appreciate the testimony of the witnesses.

Ms. Velazquez, did you want to go first in the questions?

Ms. VELAZQUEZ. Sure.

Chairman MANZULLO. Because I was a little bit late here and I want to organize my thoughts.

Ms. VELAZQUEZ. Sure. Thank you, Mr. Chairman. Thank you all for your presentation here today.

Mr. Glover, your testimony last year indicated that the panel process is quite expensive. In fact, you said that it will be around three to seven million dollars to do 10 to 20 panels for just the three agencies we had under consideration then.

H.R. 682 will require a panel for every rule that has a significant impact on a substantial number of small businesses, and that could well be over 100 panels per year. Is that achievable with advocacy current structure? Is it desirable?

Mr. GLOVER. It is not achievable. There is no way that the Office of Advocacy could do that with anywhere near the resources it currently has.

We spent between four and five hundred hours, staff hours per panel. Now perhaps if you are expanding it, there may be some efficiencies, but I cannot imagine how you could understand any regulation sufficiently to sit down with small business people and talk about it in less than 100 to 200 hours, and that is the minimum you are going to spend.

Ms. VELAZQUEZ. Can you give me a ballpark figure if we have—if advocacy has like 100 panels?

Mr. GLOVER. I have not done the math, but I will simply tell you you would probably more than double advocacy's current budget.

Ms. VELAZQUEZ. Thank you.

Mr. Freedman, you have studied the panel process when you were in the Senate. I now that the Chamber supports this expansion of the panel process. Do you believe that panels for every—for over 100 rules per year are necessary or achievable?

Mr. FREEDMAN. Ranking Member, I think achievable has probably been addressed better by Jere, and perhaps Tom would speak to that point since they are the ones who are actually running that process.

I think we have seen some very strong examples of where the panel process has opened up the process to small businesses and has had a significant impact on the outcome of the regulation. I probably would tell you that every rule does not need that, or every agency probably does not need that, but I think at this point the bill is a good starting point, and we would support the bill. And then if there is an opportunity to look at it more closely, then that may be something that can happen down the road.

Ms. VELAZQUEZ. Thank you, Mr. Freedman.

Well, here we are again, Mr. Sullivan. Welcome. I know that this year you raise some concerns in your testimony about the scope of the panels that will have to be held as well as your usual questions about changing advocacy's role in the panel process.

So I ask you again, do you have the resources to implement H.R. 682 as currently written? Also, do you even recommend as a matter of strategy and policy that advocacy do all those panels? And do you have a ballpark figure or estimate as to how much it will cost?

Mr. SULLIVAN. Congresswoman Velazquez, the answer is no, no, and yes.

The first one, can my office under current structure do all of the panels that are called for in 682, and the answer is no. Last year

when I testified on 2345 you were kind enough to allow for me to supplement my response with a detailed breakdown of number of hours per panel. With the Chair and the Ranking Member's permission, I would like to submit that letter of May 18th for the record.

Ms. VELAZQUEZ. Well, I was about—I am prepared to ask unanimous consent that that letter be made part of the record.

Chairman MANZULLO. Without objection.

Mr. SULLIVAN. Thank you, Congresswoman.

What we found was that each panel, and this is consistent with what Jere Glover said, equates to about 400 hours. We measured roughly 200 initial regulatory flexibility analysis last year, so that brings it to what would roughly be the need to add 40 additional staff on the legal team, so we could not handle that under the current structure.

So that gives you no we cannot do it under the current structure. Yes, with a detailed breakdown of roughly 400 hours.

And you asked about whether or not there are policy recommendations to achieve the same benefits of the panel without necessarily requiring separate panels for each rule, and the answer is yes. I would recommend that the codification of the executive order get very close to achieving the same type of policy goals that all the panels do.

Ms. VELAZQUEZ. Mr. Sullivan, after all the savings that your office has helped to produce, and I believe you talked about $64 billion—million dollars.

Mr. SULLIVAN. Yes, Congresswoman.

Ms. VELAZQUEZ. Billion dollars?

Mr. SULLIVAN. Billion.

Ms. VELAZQUEZ. The President's budget submission for your office, and Mr. Glover made reference to that, eliminated the line item for advocacy's research.

Do you think it is important for your independent research efforts and for the research efforts of future chief counsels under future administrations that advocacy retain complete control over its budget?

Mr. SULLIVAN. Let me answer the first part about the Fiscal Year 2006 budget. I believe that under Hector Barreto's stewardship of the agency, my office has been treated very well from a budget perspective.

In answer to your second question about future administrations, I believe that future administrations should have a separate line item budget for the entire Office of Advocacy budget, and I am most anxious that in the 110 Congress to have bipartisan support for this approach as well as support from the White House who

know the type of value that an independent office can bring to the process.

Ms. VELAZQUEZ. Mr. Glover, you made reference to the importance of a line item. Do you care to comment?

Mr. GLOVER. Yes, I would be happy to. The fact is the Office of Advocacy when it was first created had a not less than 70 employees in its authorization and appropriations. That maintained it for a long time. When that provision slipped out of the law, the Office of Advocacy gradually dropped from 70 just before I came on board, to 58 at the end of my tenure, to 44 now.

Without that line item you are going to continue to see administrators who have other priorities besides advocacy, and they are going to allow that to continue to slip. Our research budget was cut badly during that period of time as well. So I feel strongly that we need to have, to protect the Office of Advocacy's role and functions for future administration, a very clear statement that there needs to be a line item for the entire Office of Advocacy.

Ms. VELAZQUEZ. Thank you. Mr. Chairman, I have unanimous consent request that Mr. Sullivan submit for the record over his signature a detailed estimate of how many panels per year advocacy does now, what advocacy spends on those panels in terms of resources, how many panels they expect if H.R. 682 is adopted, and an analysis of the costs to advocacy in resources.

I would also like an analysis as to the other amendments short of a panel process that advocacy believes will help achieve full disclosure and compliance, and I will be sending this in writing to your office.

Mr. BARTLETT. [Presiding] Without objection to the extent that that information is available to you.

Mr. SULLIVAN. Mr. Chair, not only do you have my commitment to provide that, it is a welcome opportunity to flush out the detailed costs.

Ms. VELAZQUEZ. Thank you. Thank you, Mr. Chairman.

Mr. BARTLETT. I am sorry I could not have been here for the whole hearing. As most of you know in a former life I was a small business person. I was one of maybe 35 people in the Congress that was a member of NFIB when I came here.

I carry a copy of the constitution, and I would just like to get in the record how prophetic the founding fathers were when they wrote the Declaration of Independence. I cannot imagine how they would have known about our regulatory agencies, but this is what it says:

"He has erected a multitude of new offices and sent hithers forms of officers harass our people and eat out their substance."

[Laughter.]

Mr. BARTLETT. I wonder, is there any more succinct description of the effect of our regulatory agencies, particularly on small business?

And that is in the—that is really there. It is in the Declaration of Independence. I have no idea what the king did. I thought maybe they were just being prophetic because it certainly, I think, is a good description of our regulatory agencies.

You know, I often ask myself the question, how come we are so lucky. We are one person out of 22 in the world, and we have a fourth of all the good things in the world. How did we get here?

And if we figure out how we got here, maybe we can figure out what we need to do to stay here. And I think one of the reasons is the enormous respect for the rights of the individual. Those rights are implicit in the constitution itself and made very explicit in the first 10 amendments, and I think that establishing a milieu, an environment in which creativity and entrepreneurship could flourish is important. I think several things put that at risk, and one of those things are over zealously implemented regulations which just dampen the enthusiasm and hamper people in their quest to continue along this really marvelous march where this one little country, one person out of 22 in the world has a fourth of all the good things in the world.

This is a fragile commodity. We are no longer the hardest working people in the world. We are no longer the people that have the most respect for education in the world. We no longer have the most intense commitment to nuclear families in the world, and you need to ask yourself what do we need to do to stay in this very privileged position?

I think paying attention, we need some regulations, there is no question about that. But we do not need such over zealous implementation of these regulations that they are killing the goose that laid the golden egg, and that is very much where we are sometimes with these regulations.

Sorry I could not have been here for your testimony. You know where I am on these issues. When you need help, I am there.

Ms. Velazquez, you have additional questions?

Ms. VELAZQUEZ. She is next.

Mr. BARTLETT. Okay.

Ms. MOORE. Thank you, and thank you for all the time that you have spent. We had votes and we were not able to start the meeting on time, and I really appreciate your diligence.

If I am asking a question that you have already asked, please forgive me because I was not there, or here earlier.

I guess I am curious about the provisions in the Regulatory Flexibility Act that called for alternative regulations, because as the Chairman has indicated, we do realize that there has to be an appropriate balance between necessary regulations. This will make sure that there is basic safety features in the workplace and basic compliance with Internal Revenue Service, but we do not want to impose too many regulations on small business.

So what—can you give me just give me a few examples of the regulatory flexibility that you have accorded small businesses that you regard as innovative?

Mr. SULLIVAN. Ms. Moore, I would be happy to address that if you would like. I can give you two examples. The first is an OSHA example, and the idea of focusing on alternatives is definitely a good place to start because any time a regulatory agency looks to small business for alternatives they will come out ahead at the end of the day.

So from an OSHA perspective, I will use a rulemaking that is ongoing. There is a Hex-chrome regulation that is going on at OSHA, and very early on in the process under SBREFA they are required to convene panels of small business owners, and float ideas and regulatory proposals by small businesses so small businesses can advise them to better alternatives.

Well, in this progress, Congresswoman, it became clear that one of the proposals was to vent above a chrome-plating assembly line the fumes, so that the fumes would go across or underneath the workers to prevent them from inhaling chrome fumes, which are dangerous.

Well, thank goodness they checked with small business because a small chrome player in fact told OSHA if you require that, you will put us in violation of the EPA Clean Air Act. It is a very good example of alternatives that come to the table from small business.

Now, luckily under the process OSHA listened because they are required by law to listen, and they have been re-jiggering their proposal so whatever they do will ultimately be less harmful for small business.

Another example that is not part of the SBREFA process but a good one has to do with the regulatory approach to protecting our nation after the terrorist attacks of September 11th. Obviously, we are very concerned about protecting our borders, and also very concerned about protecting our ports.

So the Department of Homeland Security, when wrestling with those very important issues, under the Regulatory Flexibility Act consulted with my office, the Office of Advocacy, to say, all right, when we are issuing regulations for port security, are we getting it right, and we connected them with small businesses who run small shops in ports. It turns out that their initial thoughts of regulating would have affected all these mom and pop businesses who thrive in the port areas, whether it is Mailboxes, Etc., franchises or small delis, and other business that really thrive on the port business. They were all going to be covered by rules that really should be narrowly tailored to the entry and exit of foreign and other vessels.

So by focusing Department of Homeland Security about not overreaching they actually exempted out many businesses that really are not a threat, but then focused primarily on things that were a security risk, and therefore had rules that were finalized that were protecting our borders, but at the same time doing it in a way that did not devastate a community in which small businesses thrived.

Mr. FREEDMAN. Congresswoman.

Ms. MOORE. Thank you. I also just wanted you all to comment on the regulatory impact study done in 2000 where the cost on a small business was estimated to be almost $7,000 per employee for the regulatory burden.

Share with us, because those are—you know, you could interpret that in two different ways. You could interpret that as being certainly an awesome burden on a small business, but you could also say that perhaps they are not ready for prime time if they are not ready to make sure that basic workplace protections are in place.

Could you please just weigh in on those data?

Mr. FREEDMAN. Congresswoman, I would like to start, and I am sure other people will have other thoughts on that. Let me sort of try and tie both of your questions together because I think there is some links there.

First of all, the study talking about the increased cost for small business compliance, it is not that small businesses as you would say are not ready for prime time, it is that in order for them to get to that threshold, it is more expensive for them to do that, and this is not—I think we should all understand this has nothing to do with small businesses' desire to comply.

The problem that these regulations are—the reason these problems—forgive me. The reason these regulations are such a problem is that they do want to comply, and they understand the obligation to their employees, to the environment, to the public around them, to everyone that they come in contact with to be in compliance with these regulations. But they have so few resources. They do not have the personnel. They do not have the revenue. In some places, their whole income structure is different than a larger business that would be able to do these things more efficiently.

So that is where you get that $7,000 number, and I think that number is important because it really goes to the heart of the matter, and why we are here, and why there is a Regulatory Flexibility Act in the first place.

Let me just comment briefly on your discussion about regulatory alternatives. The problem is in the Regulatory Flexibility Act, there is a requirement that an agency must examine regulatory alternatives in their analysis that they are expected to do under the RFA.

However, if they find that the regulation does not meet this threshold of the significant economic impact on a substantial number of small entities, they do not have to do that analysis. So it is the question of how they get to that threshold that drives everything else, and that is where I think our concern is in terms of how the RFA is operating right now, and some of the changes that we think should be made to it.

Let me yield to the other people here who I am sure have other things to day.

Ms. MCCLOY. If I may—

Mr. BARTLETT. You may.

Ms. MCCLOY. — Cecelia McCloy, with Integrated Science Solution.

As a small business owner, one of the things that we do every year is to look at the regulatory requirements that we must comply with that year, including new regulations that sort of pop up both on the state and the federal level. Then we have to make some choices. I mean, maybe we have to reduce our tuition reimbursement program in order to pay for that, or maybe we can only offer a different kind of health care policy for our workers because we only have X amount of dollars. And really, if we have to pay more for regulatory burden, that means we have to play—there is less dollars available for investment in our employees and their education and their families.

Mr. SULLIVAN. Congresswoman, the Crane-Hopkins study that you referenced I think is also intended to be placed in a broader context, and that broader context is the United States' competitive position in the world. Because if you look at three-quarters of the net new jobs coming from small business, you see small business innovating, and the Chairman knows something about innovations, holding so many patents himself. But when you look at innovations, you are looking at small business innovating at a rate of 13 or 14 times their larger business counterparts.

So if you realize that small business is in fact the economic engine that is driving this country, then you have got to then look at this study to say, well, this is the engine. How are regulations impacting that engine? And that study shows that there is a disproportionate impact, a 60 percent greater impact on small business than their larger counterparts.

When it comes to tax compliance, it is twice as burdensome for small business than it is for larger business to comply with the tax code.

So there is considerable effort to try to remove those barriers that stifle the economic power of small business, and that, if unchecked, can damage the competitive position of the United States.

Mr. GLOVER. Let me just add to this one additional way to look at this. When you assume certain reporting responsibilities, such as filing a tax return for your business, there is a set cost to do that. If you have one employee or 500, it does not go up proportionally. So a lot of these costs are much heavier when you have very few employees, so the average cost per employee is much higher than it would be otherwise.

Each agency has a little different thing that they want you to report. If you have one employee, that employees carries the whole 100 percent of that cost. If you have 100 employees, then it is one percent of that cost. So as a general rule you will also see that the numbers in that Hopkins study talk about per employee, and as a result of that you are going to see much higher numbers for very small businesses than you do for others.

Ms. MOORE. Thank you.

Mr. BARTLETT. Thank you. Do you have additional question or comments?

Ms. VELAZQUEZ. Yes, please, Mr. Chairman.

Mr. Sullivan, you know that the General Accounting Office recently—we made reference to that—they recently reviewed the OMB data on regulatory burden and reported that it has increased by 700 million hours in the last three years. They concluded that the number would have been higher still had the OMB not changed the 2003 data to reflect adjustments that lowered the total, but have nothing to do with actually reducing the burden.

Then here you testified that you have achieved regulatory cost saving of $64 billion over the past four years. Those savings do not even include items where savings are impossible to estimate.

I know that you are proud of this record, but does not this level of proposed burden indicate that the agencies still have not gotten the message?

Mr. SULLIVAN. Congresswoman, I think Dr. John Graham has been pretty good in looking at some of the numbers, and he recently estimated that the number of new rules from this administration is 75 percent less than in the last one. And I think your comment is accurate in that that is just not enough.

I mean, slowing the stem—excuse me. Slowing the growth of overburdensome or unnecessary regulations is a good start, but when you look at the 843 plus billion dollars of cumulative impact that small businesses still face, there is a heck of a lot more to do.

So I agree with your comment, and actually know that regardless of how proud of our record we are, we have more work to do, and some of the improvements to the Regulatory Flexibility Act that are contained in H.R. 682 should help us do that.

Ms. VELAZQUEZ. Which of the tools in H.R. 682, or if not in the bill, what tool can you recommend to persuade agencies to follow the law?

Mr. SULLIVAN. I believe, actually, that there are more narrowly tailored approaches also contained within 682 that could do a great deal in helping small business. I think the first, and this was mentioned by the Chamber of Commerce's testimony, is fix indirect impact, and this actually has to do with Congresswoman Moore from Wisconsin.

Wisconsin is one of the states that has passed a state Regulatory Flexibility Act, but their hands are tied if the federal government is simply passing on the responsibility to the states to do impact analysis or to consider less burdensome alternatives.

I think there is a fairness issue here or a unfunded mandate issue here where the federal regulators have a responsibility to do that type of analysis to help the states do a better job in how they impact small business.

So indirect impact, I think, is a priority. Bolstering the regulatory look-back provision, which is Section 610, also is something that is important. Something that is not in the legislation but deserves to be looked at is once a regulation is final, that agencies

actually do what they are supposed to do under SBREFA and that is product compliance guides and regularly report to Congress on those compliance guides. And I think the most valuable thing that could be done is to codify the executive order that President Bush signed three years ago, because that does two things:

First of all, it brings in independent agencies, which is very important. The second is that it requires agencies to share drafts with the Office of Advocacy pre-proposal, so it gets at that early process. It also requires agencies to respond to advocacy's comments in conjunction with the final rule.

Ms. VELAZQUEZ. Mr. Sullivan, three years later after the executive order we have this data, and so something is not working.

Mr. Freedman, you and the Chamber have some good ideas about requiring regulatory analysis and compliance guides to be performed by the agency, to be posted on the internet so that it is more easily located.

Will you and the Chamber flesh out some of these ideas and submit suggested legislation language that could be included into the bill?

Mr. FREEDMAN. Yes, Ranking Member. We would be happy to do that, and I can mention from my previous experience that Senator Snowe introduced a bill on that subject in the last Congress, so there is legislative language available that talks about that problem.

Let me just address one other point that you asked Mr. Sullivan about, in terms of what I think would make the most difference. I have thought for a long time that the whole question of the significant economic impact and substantial number of small entities terms are really the heart and sole of the Regulatory Flexibility Act. I mean, that is the threshold go-no go question.

The more stability and certainty we can bring to those terms the more likely it is we will be able to hold an agency to a standard that says you did not do it, or this is what we expect of you.

To that end, I believe that the provision in the bill that directs the chief counsel to issue regulations describing how agencies are to comply would probably have the greatest overall impact on agency compliance, because absent of them getting past that threshold, or let me put it this way, forcing them to get to that threshold easier will then trigger all the other compliance, all the other requirements like the compliance guides, like the Section 610 review, and the IRFAs and FRFAs. So it is a critical matter in terms of how the Regulatory Flexibility Act is actually implemented.

Ms. VELAZQUEZ. Thank you. Thank you, Mr. Chairman.

Mr. BARTLETT. Thank you very much.

One of you mentioned the cost of these regulations and then the unfunded mandates were mentioned. Two or three years ago I remember that Tax Freedom Day was May 10. Now, we cut taxes and we have done pretty well. We have moved that back to late April now. But Government Freedom Day has moved the wrong direction. When we have Tax Freedom Day, that is the day you pay

all your federal, state and local tax. It was May 10, now near the end of April.

But Government Freedom Day, the day you finish paying for government, was July 4. That has a very special double significance, did it not? That is now moved to about July 8. You know, this is the cruelest tax of all. It is the tax that the poorest of the poor have to pay because it increases the cost of everything they touch, and the mandates, a lot of them federal, and a lot of these regulations that you are talking about, the average working American now spends 52 percent of their time working to support government. I think that is too much.

When you are talking about taxes and maximum revenues, and we need more revenues, we are spending a whole bunch of money, but you know, if you have a zero tax rate, obviously you will collect no taxes. If you have 100 percent tax rate, you are not going to collect any taxes, are you, because nobody will work?

So somewhere between the zero percent tax rate and the 100 percent tax rate is that magic number where you have not meaningfully suppressed, stifled the economy, and you are going to get the maximum revenues. I think 52 percent of your time working for government is too much. And we have reduced taxes. We have gone backwards in regulations. You know, we really need to change that.

If you think about these regulations, and I just sat back and I thought why do we have them, and there are two fundamental premises for why we have regulations.

The first one is that every manufacturer, every provider, every employer is greedy and evil, and they are going to take advantage of their customers and their employees, so we have to make sure they do not do that.

The other premise for regulations is that every consumer is incredibly stupid. Unless we protect them, they are going to hurt themselves.

Now, I think that if you think about regulations, most of them are here because of an application of one or the other or both of those premises. I reject both of those premises. I was a small business owner. There was nobody more concerned about my employees than me. If I lost one of my people, you know, the team was not going to work well. You know, they were, in effect, family members to me.

I think the American people are very bright. I have no problem with government educating. You know, I really just take a double take when I read that they have gone and the government people have put a red sticker on your house and told you it is dangerous, and you cannot go in it. What business is that of theirs to tell you that you cannot go in your house?

I do not mind them telling you that they think your house is dangerous, and that you are probably better off if you did not go in your house. But you know, what business have they—you know, the reason is that they concluded that you are just so dumb you would not know whether your house was dangerous or not, and so they have got to protect you.

I really believe that if we give it a chance, self-regulation will work. The hard liquor industry does not advertise on television. Nobody told them not to advertise on television. They just decided

that was not in their best interest to advertise on television, and it would not have been.

When high school kids are given the responsibility of disciplining their peers, they are a lot tougher than the school administration would be. You have seen those little experiments.

But there is little incentive for self-regulation because you have to push back so hard in order to limit the damaging effects of regulation on your business. And I know we do not have time here but I would really like to ask each of you if you would please for the record tell us how we can get from here, where we are with ever-increasing regulations and these mandates that run cost up, because there is no business that is not concerned about happy customers and happy employees and so forth. Our people are not incredibly stupid, and we do not need all these regulations.

How can we get from here, and I really believe in self-regulation. You know, I think in industry, the industry most hurt when they get—when a drug comes out on the market that hurts people. What industry is most hurt by that? It is the drug industry, is it not? It is not Food and Drug. It is the drug industry that is hurt like that. I really believe in self-regulation.

How can we get from where we are, where we are moving from more and more egregious regulation to where we can encourage people to self-regulation? And then stand back and watch, and if they are not doing right, then maybe we can move in. I do not think we would have to move in very often. But now we have created a culture where we are moving in this direction. How can we move back?

If each of you would prepare a little statement for the record, I would be very appreciative of that.

This has been a long hearing. Is it okay if we submit other questions for the record? I am sure Ms. Velazquez has additional questions she would like to ask. And you are tired, and we may get a more deliberate answer if you prepare it for the record rather than holding you here for all these hours.

I want to thank you very much. I am sorry I could not have been here for the whole hearing. Small business, as you mention, is the engine which drives our economy.

Just one little word. Out of the 1992 recession, I was stunned by these statistics. If you group businesses by size from the biggest, 5,000 or more, to the smallest, zero to four employees, a few new jobs came from the 5,000 plus, 90 odd percent of all the other new jobs came from zero to four employees. That is small business. And it is not just the engine that drives our economy, it is the engine that brings us out of a recession.

You mentioned the enormous productivity in terms of discoveries and entrepreneurship and innovations that come from small business. You know, I have worked for big business. I have worked for IBM. I have worked for big government. I worked for Johns Hopkins University. I worked for myself in a little company. And I will tell you the smaller it is the more freedom you have. I was lucky, the employers I worked for who were big kind of pretended they were little, and I had a very good experience with them.

Well, thank you so much for your testimony, and please prepare for the record your little suggestion of how do we get to there from

here, where we have more self-regulation. What the government does is stand back and step in when industry is not doing it right. Thank you very much, and we are adjourned.

[Whereupon, at 4:10 p.m., the Committee was adjourned.]

DONALD A. MANZULLO, ILLINOIS
CHAIRMAN

NYDIA M. VELÁZQUEZ, NEW YORK

Congress of the United States
House of Representatives
109th Congress
Committee on Small Business
2361 Rayburn House Office Building
Washington, DC 20515-6315

Statement of Donald A. Manzullo
Chairman
Committee on Small Business
United States House of Representatives
Washington, DC
March 16, 2005

During the Great Depression and World War II, Congress created new agencies and programs. These agencies each had their own method for making decisions and the lack of standardized procedures led to different treatment of similarly situated persons. Shortly after the end of World War II, Congress reacted by passing the Administrative Procedure Act (APA). That Act forced agencies to adopt a coherent set of procedures for making decisions. More importantly, the APA mandated that the government make *rational* decisions.

The APA governed agency procedures for nearly 35 years without amendment. However, the 1970's saw an explosion of the federal regulatory process that might have exceeded that which occurred during the Great Depression. Frustration grew, particularly among small businesses that were being inundated by paperwork and burdened by regulations that really were designed for large businesses. Even though agency decisions might have been rational under the APA, the small business community did not consider them rational because of the expense of complying would drive them out of business.

Congress reacted, as it did 35 years earlier, by enacting legislation designed to change the way federal agencies made decisions. Two laws were passed in 1980 – the Paperwork Reduction Act and the focus of this hearing – the Regulatory Flexibility Act or RFA.

The RFA did not modify the two fundamental principles of the APA; agencies had to follow standard procedures in making decisions, and the procedures had to result in rational decisions. Rather, the RFA was enacted to assist agencies in making rational decisions through the application of a standard set of analyses focused on small entities, particularly small businesses. The Act requires federal agencies to examine the impact of their proposed and final rules on small entities and, if they are significant on a substantial number of such entities, examine less burdensome alternatives.

Analysis of the impact on small entities makes sense because the vast majority of entities affected by regulation are small. If an agency wants to obtain maximum compliance and benefit from its rules, rational decisionmaking dictates that the agency examine the application of the rules to small entities.

Let me provide an example. The Department of Justice is currently considering changes to the rules that govern the implementation of the Americans with Disabilities Act. According to statistics from the Office of Advocacy of the Small Business Administration, there are 23.7 million establishments in the United States and 99.7 percent of them are small. If the Department of Justice adopts costly regulations that small businesses cannot afford, two things will result. First, small businesses will close. In turn, this will reduce opportunities for the disabled. The end result of failing to comply with the RFA is that opportunities for the disabled will decrease thwarting

congressional efforts to increase participation of the disabled in daily American life. In short, for the Department of Justice to make a *rational* decision as required by the APA, it must consider the impact on small businesses. The RFA does provides the tool by which an agency can ensure that its decisions are rational.

Twenty-five years after enactment, federal agencies continue to ignore the RFA. That was highlighted on Friday, when the United States Court of Appeals for the D.C. Circuit enjoined the Federal Communications Commission from enforcing number-portability rules against small telephone companies because the Commission did not comply with the RFA.

As President Bush noted on March 19, 2002, the RFA is an important law and federal agencies continue to ignore the law. This is so despite the best efforts of the President, Dr. John Graham of the Office of Information and Regulatory Affairs at OMB, and Chief Counsel for Advocacy, Tom Sullivan. In part, loopholes exist in the RFA that allow them to avoid compliance. In other circumstances, agencies simply cannot be bothered and need not worry because most small businesses do not have the resources to fight the federal government.

Noncompliance with a statute that has been in existence for a quarter of a century is unacceptable. Time has come to say enough is enough. I, along with Mr. Chabot, Mr. King, Mr. Westmoreland, Mr. Pence, Mr. Akin, and Mr. Keller, introduced H.R. 682, the Regulatory Flexibility Improvements Act. Since introduction, we have added a number of significant cosponsors, including Mr. Cannon, the Chairman of the Judiciary subcommittee that has jurisdiction over the bill. I also would like to thank Mr. Case for becoming the first Democrat to cosponsor the legislation.

The bill significantly strengthens the RFA by making many technical improvements that close existing loopholes so that agencies, as President Bush stated, "will care that the law is on the books." In addition, the bill makes three major changes to the RFA. First, it forces agencies to perform detailed analyses of their proposed and final rules. No longer will perfunctory analyses be acceptable. Second, the bill requires that agencies consider the indirect effects of their regulations on small businesses. So if an agency imposes an overall national standard but leaves it to the states or local governments to implement, the agency is required to examine the impact on the small businesses that are likely to be regulated by state or local governments. Finally, to ensure that all agencies follow consistent procedures and enhance the influence of the Office of Advocacy, the bill requires the Chief Counsel to promulgate regulations for complying with the RFA that will apply to all federal agencies. H.R. 682 represents a comprehensive fix to the current weaknesses in the RFA.

No good reason exists to oppose H.R. 682 other than the fear of the unknown. But as President Roosevelt stated "the only thing we have to fear is fear itself." I for one shall be intrepid in seeking the passage of this legislation and work with Chairman Sensenbrenner, Subcommittee Chairman Cannon, House leadership, the Senate, and the White House to see that H.R. 682 becomes law.

I now recognize the ranking member, the gentlelady from New York, for her opening remarks.

Statement of the Honorable Sue Kelly
Small Business Committee hearing – RFA
March 16, 2005

Over the last 20 years, the costs and impacts of regulations have increased dramatically

Since the 104th Congress, I have been fighting for a Congressional Office of Regulatory Analysis (CORA) resulting in the passage of the Truth in Regulating Act of 2000 (TIRA)

Statute authorized a 3-year pilot project adding a function at GAO to respond to Congress' requests for an independent evaluation of selective economically significant proposed rules, including an evaluation if the proposals are consistent with Congressional intent

While small business is the greatest source of job growth in our economy (7 out of 10 new jobs); they unfortunately bear a disproportionate share of the regulatory burden

Paperwork and regulatory requirements is a drain on their job growth, competitiveness and productivity

Burden of regulatory compliance is as much as 50 percent more for small businesses than their larger counterparts

It is tragic that despite passage of TIRA, we still do not have an independent analysis of the various agency regulatory analyses required by law or executive order

Legislation I recently introduced (H.R. 1167) would permanently authorize this function within GAO, ensuring full-time agency expertise within GAO

It's time to increase the transparency of important regulatory decisions, promote effective Congressional oversight and increase the accountability of Agencies, and I encourage the members of this Committee to join me in supporting this legislation

Testimony of

Thomas M. Sullivan
Chief Counsel for Advocacy
U.S. Small Business Administration

U.S. House of Representatives
Committee on Small Business

March 16, 2005, 2:00 P.M.
Cannon House Office Building, Room 311
Washington, D.C.

on

Improving the Regulatory Flexibility Act-H.R. 682

Chairman Manzullo, Ranking Member Velazquez, Members of the Committee, good afternoon and thank you for the opportunity to appear before you today to address H.R.682, the Regulatory Flexibility Improvements Act. My name is Thomas M. Sullivan and I am Chief Counsel for the Office of Advocacy at the U.S. Small Business Administration (SBA). As Chief Counsel for Advocacy, I am charged with monitoring federal agencies' compliance with the Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). Because the Office of Advocacy is an independent office within SBA, the views that I express do not necessarily reflect the views of the Administration or the U.S. Small Business Administration.

Success of the Small Business Regulatory Enforcement Fairness Act

In 1980, Congress enacted the RFA after determining that uniform federal regulations produced a disproportionate adverse economic hardship on small entities. In order to minimize the burden of regulations on small entities, the RFA mandates that federal agencies consider the potential economic impact of federal regulations on small entities. The RFA also requires agencies to examine regulatory alternatives that achieve the agencies' public policy goals while minimizing small entity impacts.

Agency compliance with the RFA, however, was not judicially reviewable. Since agencies could not be held legally accountable for their noncompliance with the statute, many agencies ignored the RFA and did not conduct full regulatory flexibility analyses in conjunction with their rulemakings. In response to the widespread agency indifference, Congress amended the RFA in 1996 by enacting SBREFA, which reshaped the requirements of the RFA and provided for judicial review of agencies' final decisions under the RFA.

The RFA requires agencies to prepare and publish an initial regulatory flexibility analysis (IRFA), when proposing a regulation, and a final regulatory flexibility analysis (FRFA) when

issuing a final rule for each rule that may have a significant economic impact on a substantial number of small entities. The purpose of the analysis is to ensure that the agency has considered the economic impact of the regulation on small entities and that the agency has considered all significant regulatory alternatives that would minimize the rule's economic impact on affected small entities. The RFA allows the head of an agency to certify a rule in lieu of preparing a regulatory flexibility analysis if the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. Pursuant to SBREFA, the agency must provide a factual basis for the certification.

SBREFA has been successful. In general, agencies are paying closer attention to their RFA obligations. As a result, they are implementing less costly regulations. Some agencies submit their draft regulations to Advocacy early in the process to obtain feedback on their RFA compliance and small business impact. Early intervention and improved agency compliance with the RFA have led to less burdensome regulations. For example, in FY 2001, involvement by the Office of Advocacy in agency rulemakings helped save small businesses an estimated $4.4 billion in new regulatory compliance costs. [1] Similarly, in FY 2002, the Office of Advocacy's efforts to improve agency compliance with the RFA on behalf of small entities secured more than $21 billion in first-year cost savings, with an additional $10 billion in annually recurring cost savings. [2] In FY 2003, Advocacy achieved more than $6.3 billion in regulatory cost savings and more than $5.7 billion in recurring annual savings on behalf of small entities. Most recently, in 2004, Advocacy helped save small entities more than $17 billion[3] for a total of $64.4 billion in cost savings during the course of this Administration.

Executive Order 13272

Even with the additional requirements under SBREFA and the threat of judicial review, some agencies were not complying with the requirements of the RFA. On March 19, 2002, President George W. Bush announced his Small Business Agenda, which included the goal of "tearing down the regulatory barriers to job creation for small businesses and giving small business owners a voice in the complex and confusing federal regulatory process." To accomplish this goal, the President sought to strengthen the Office of Advocacy by enhancing its relationship with the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA) and creating an executive order that would direct agencies to work closely with the Office of Advocacy and properly consider the impact of their regulations on small entities. To further this goal, on August 13, 2002, the President signed Executive Order (E.O.) 13272, titled "Proper Consideration of Small Entities in Agency Rulemaking." [4]

---

[1] The annual reports on the RFA can be found on the Office of Advocacy's website at http://www.sba.gov/advo/laws/flex.

[2] It should be noted that revisions made by the Environmental Protection Agency (EPA) to its Cross Media electronic reporting and Record-Keeping rule produced an estimated savings of $18 billion. Without that rule the cost savings for FY 2002 resulted in more than $3 billion.

[3] It should be noted that the withdrawal of the Department of Housing and Urban development's rule on the Real Estate Settlement Procedures Act (RESPA) produced an estimated savings of $10.3 billion. Without that rule, the cost savings for FY 2004 would have been approximately $6 billion.

[4] E.O. 13272 can be found on the Office of Advocacy's website at http://www.sba.gov/advo/laws/eo13272.pdf.

E.O. 13272 enhances Advocacy's RFA mandate by directing Federal agencies to implement written procedures and policies for measuring the economic impact of their regulatory proposals on small entities. It also requires agencies to notify Advocacy of draft rules that are expected to have a significant economic impact on a substantial number of small entities and to give every appropriate consideration to any comments provided by Advocacy, including publishing a response to Advocacy's comments in the *Federal Register*. The Office of Advocacy must provide periodic notification, as well as training to all federal agencies on how to comply with the RFA.

The *Report on the Regulatory Flexibility Act, FY 2004* includes information about agency compliance with EO 13272. With the exception of the Department of State, all Cabinet-level departments have developed written plans in compliance with E.O. 13272. The performance of the independent agencies, however, has not been as stellar. Of the 75 independent regulatory agencies, only 16 responded to the requirements of the E.O. Of those 16, only eight have provided written procedures, six claimed that they do not regulate small entities, and two claimed to be exempt from the E.O.

In terms of training, Advocacy's goal is to train 25 agencies per fiscal year. To date, Advocacy has trained 42 agencies. Of those 42, 32 were highlighted by Advocacy as a priority for small business because of the types of regulations that those agencies issue.

Several agencies have actively sought ways to improve their compliance either through involving Advocacy early in the rulemaking process or reaching out to small entities. For example, when Congress enacted the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (Act), it authorized the Food and Drug Administration (FDA) to promulgate rules in an expedited timeframe to protect the nation's food supply. In response to the Act, FDA published four final rules, each proceeded by a notice of proposed rulemaking: prior notice of imported food shipments, registration of food facilities, establishment and maintenance of records, and administrative detention. The Act required FDA to publish the first three rules within 18 months or by December 12, 2003. FDA contacted Advocacy about the rules' impact on small businesses well before the proposed rules were published in the *Federal Register*. This early intervention allowed Advocacy to work closely with the FDA to reduce the economic effects of the rules on small businesses. As a result of the involvement of Advocacy and interested small businesses, FDA made several adjustments to the final rules including the creation of the new automated commercial environment (ACE) database and a far less onerous notice requirement (twenty-four hours notice was reduced to two hours if the food is arriving by road, four hours if the food is arriving by rail, and eight hours if the food is arriving by sea); extending the registration update requirement from 30 days to 60 days; allowing those importers subject to the rule to check a food category titled "most or all" rather than requiring them to individually list food product categories that had been previously identified in the registration form; and exempting the food packaging industry, which consists primarily of small businesses, from the FDA from the registration and prior notice requirements. The FDA also gave small businesses more time to comply with the requirements.

H.R. 682 and other Suggestions for Modifying the Regulatory Process to Reduce Burdens on Small Entities

The 109th Congress has the opportunity to amend the RFA and SBREFA to improve the regulatory climate for small entities. Even though the last few years have yielded a number of successes, there are certain loopholes in the RFA that were not addressed through the E.O. or SBREFA. H.R. 682 is a truly comprehensive bill that addresses many of the problem areas in the RFA. The Office of Advocacy vigorously supports the goals of H.R. 682 and believes that by addressing the following priority issues Congress will increase the overall effectiveness of the RFA and SBREFA:

Foreseeable Indirect Economic Impacts

The biggest loophole in the RFA is that agencies do not have to analyze indirect impacts. Pursuant to sections 603, 604 and 605(b) of the RFA, agencies are required to consider the economic impact of an action on small entities. Although the RFA does not define economic impact, the committee report for the RFA suggested that agencies should consider direct and indirect impacts of the proposed regulation. The courts, however, have interpreted the RFA differently.

The primary case on the consideration of direct versus indirect impacts for RFA purposes in promulgating regulations is Mid-Tex Electric Co-op Inc. v. F.E.R.C., 249 U.S. App. D.C. 64, 773 F.2d 327 (1985) (hereinafter Mid-Tex). Mid-Tex addressed a FERC rule which stated that electric utility companies could include amounts equal to 50% of their investments in construction work in progress (CWIP) in their rates. In promulgating the rule, FERC certified that the rule would not have a significant economic impact on a substantial number of small entities. The basis of the certification was that virtually all of the utilities did not fall within the meaning of the term "small entities" as defined by the RFA. Plaintiffs argued that FERC's certification was insufficient because it should have considered the impact on wholesale customers of the utilities as well as the regulated utilities. The court dismissed the plaintiffs' argument. The court concluded that the agency did not have to consider the economic impact of the rule on small entities that did not have to directly comply with the requirements of the rule.[5]

Post-SBREFA, the U.S. Court of Appeals for the District of Columbia applied the holding of the Mid-Tex case to American Trucking Associations, Inc. v. U.S. E.P.A., 175 F.3d 1027, 336 U.S.App.D.C.16 (D.C.Cir., May 14, 1999) (hereinafter ATA). In the ATA case, EPA established primary national ambient air quality standards (NAAQS) for ozone and particulate matter. At the time of the rulemaking, EPA certified the rule pursuant to section 605(b). The basis of the certification was that small entities were not subject to the rule because the NAAQS regulated small entities indirectly through state implementation plans (SIPs). Although the court remanded the rule to the agency, the court found that EPA had complied with the requirements of the RFA. Specifically, the court found that since the states, not EPA, had the direct authority to impose the burden on small entities, EPA's regulation did not directly impact small entities.[6] The court also

[5] Id. at 342.
[6] Id.

found that since the states would have broad discretion in obtaining compliance with the NAAQS, small entities were only indirectly affected by the standards.[7]

In Mid-Tex, compliance with FERC's regulation by the utilities was expected to have a ripple effect on customers of the small utilities. There were several unknown factors in the decision-making process that were beyond FERC's control such as whether utility companies had investments, the number of investments, costs of the investments, the decision of what would be recouped, to whom the utilities would pass the investment costs on, etc. Unfortunately, the idea of the RFA not applying to indirect economic impacts is now being used by agencies in cases where the impact is reasonably foreseeable, which undermines the spirit of the RFA.

The 2002 Immigration and Naturalization Service's (INS) rule on B-2 tourist visas illustrates the importance of having reasonably foreseeable indirect impacts analyzed under the RFA in the rulemaking process. On April 12, 2002, the Immigration and Naturalization Service (INS) published a proposed rule on *Limiting the Period of Admission for B Nonimmigrant Aliens.* The proposal eliminated the minimum six (6) months admission period of B-2 visitors for pleasure and placed the onus of explaining the amount of time for the length of stay on the foreign visitor. If the length of stay could not be determined, the INS agent would issue a visa for only thirty (30) days. Although it was foreseeable that small businesses in the travel industry could lose approximately $2 billion as a result of the proposal, INS certified that the proposal would not have a significant economic impact on a substantial number of small entities. The basis for the certification was that the proposal applied only to nonimmigrant aliens visiting the United States as visitors for business or pleasure. Because the courts have interpreted the RFA as only requiring agencies to consider the economic impact of the proposal on the entities that the proposal will directly impact, the certification was not technically erroneous. Advocacy asserted that from the standpoint of good public policy, the agency had a duty to perform a regulatory flexibility analysis and to consider less burdensome alternatives for achieving their goal when the potential impact of a regulation was foreseeable and economically devastating to a particular industry.[8] Advocacy reiterated this position at a hearing before this Committee in June 2002.[9] Representatives from the travel industry also testified at that hearing about the potential economic impacts that their businesses would have experienced as a result of INS's actions. The rule was eventually withdrawn.

In addition, if the federal regulation is something that must be implemented by the states, as in the ATA case, the federal agencies are not required to perform the detailed analysis of economic impacts and alternatives required by the RFA. The duty of regulating is passed on to the states without any corresponding analysis or requirements for states to consider less burdensome alternatives for small business. Moreover, states with RFA type laws on the books[10] must perform the economic analysis, even though the states have fewer resources to conduct small business impact analysis than the federal government. This amounts to an unfunded mandate.

---

[7] Id.
[8] The Office of Advocacy's comment letter is located at http://www.sba.gov/advo/laws/comments/ins02_0513.html.
[9] The Office of Advocacy's testimony before the U.S. House of Representatives, Committee on Small Business is located at http://www.sba.gov/advo/laws/test02_0619.html.
[10] Currently ten states and one territory have active regulatory flexibility statues. Thirty States have partial or partially used regulatory flexibility statutes. Two states have a regulatory flexibility Executive Orders.

Amending the RFA to require federal agencies to consider indirect impacts will help state officials craft less burdensome regulatory alternatives.

Because of the potentially devastating effect that not considering indirect impacts may have on small entities, Advocacy strongly supports section 3(b) of H.R. 682, which defines economic impact to include foreseeable indirect economic impacts. Requiring agencies to perform a regulatory flexibility analysis would provide the public with information about the potential economic impact of an agency's proposed action.

Section 610 Review of Existing Regulations

Section 610 of the RFA requires agencies to periodically review all rules that have or will have a significant economic impact on a substantial number of small entities at the time that they were promulgated. The purpose of the review is to determine whether such rules should be continued without change, or should be amended or rescinded, consistent with the stated objectives of applicable statutes.

Although the agencies are doing a better job of filtering out unnecessary burdens when adopting new regulations, small entities are limited in what they can do with burdensome regulations on the books. Limiting the review to only those regulations that the agency deemed to have a significant economic impact at the time of promulgation is costly to small entities. In 2001, Mark Crain and Thomas Hopkins prepared a study on *The Impact of Regulatory Costs on Small Firms*. It indicated that the overall regulatory cost to Americans was $843 billion, $497 billion of which falls on the business community.[11] Since new regulations are promulgated each year, the cumulative impact of regulations on small entities can be staggering.

Section 7 of H.R. 682 only refers to the periodic review of rules that the agency determines to have a significant economic impact on a substantial number of small entities. Advocacy recommends that the RFA be amended to review all rules periodically. This change would encourage agencies to revise their rules to ensure that regulations reflect current conditions and needs.

Section 7 also amends the RFA to require an agency to submit an annual report on the result of its plan to Congress and OIRA. Advocacy recommends that H.R. 682 be amended to include the Chief Counsel for Advocacy as a recipient of the agencies' reports at the same time they are submitted to Congress.

Codification of E.O. 13272

As noted earlier, E.O. 13272 has increased agency knowledge of and compliance with the RFA. One of the most important elements of E.O. 13272 is section 3. Section 3 requires agencies to notify the Office of Advocacy of draft rules that will have a significant economic impact on a substantial number of small entities. It also requires agencies to give appropriate consideration to Advocacy's comments and address the comments in final rules. Small entities would benefit

[11] The Crain and Hopkins report is located at http://www.sba.gov/advo/research/rs207tot.pdf.

by amending to RFA to codify the requirements of E.O. 13272, ensuring that independent agencies are covered and creating long-term certainty for small entities.

Advocacy recognizes that section 4(b)(3) of H.R. 682 requires agencies to respond to Advocacy's comments if an agency prepares a FRFA. However, it does not provide for Advocacy's comments to be addressed if the agency certifies the rule at the final stage of the rulemaking. This is particularly important since in FY 2004, 7.1% of Advocacy comments were on improper certifications and 17.6% of Advocacy comments were on inadequate or missing IRFAs. Under H.R. 682, therefore, anywhere from 7% to 25% of Advocacy's comments could go unaddressed, if agencies decide to certify final rules in lieu of preparing a FRFA. Advocacy suggests that H.R. 682 be amended to require agencies to provide written responses to all comments submitted by Advocacy, regardless of whether the agency prepares a FRFA or a certification for the final rule. Amending H.R. 682 in this way sets into law a key component of E.O. 13272 and would provide further assurance that small business has a legitimate voice in the rulemaking process.

Compliance Guides

SBREFA requires agencies to provide plain English compliance guides to clearly explain each final rule that has a significant economic impact on a substantial number of small entities. The intent of section 212 of SBREFA was to ensure that small businesses had a way to understand complex and technical federal regulations. Unfortunately, this is not being done and small businesses continue to be frustrated with rules that are published without adequate compliance information. The RFA should be amended to require agencies to publish plain language small business compliance guides whenever a final rule requires a FRFA. In addition, agencies should be required to report annually on their efforts to comply with this section.

Suggested Improvements to H.R. 682

Panel Process

In addition to having concerns over requiring SBREFA panels for all agencies, Advocacy is concerned about the changes that H.R. 682 makes to the current panel process. The panel process described in section 6 of H.R. 682 provides Advocacy with responsibility for drafting the panel report. The current process produces a consensus report negotiated between Advocacy, OMB, and EPA or OSHA. Because it is a consensus document, agencies typically follow the recommendations.

Establishment and Approval of Small Business Size Standards by Chief Counsel for Advocacy

Currently, section 601(3) of the RFA provides that the term "small business" has the same meaning as the term "small business concern" under section 3 of the Small Business Act, unless an agency, after consulting with the Office of Advocacy of the Small Business Administration and after an opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes the definition in the *Federal*

Register. The law assumes that the SBA size standard is appropriate unless the agency pursues a different one.

Section 9 of H.R. 682 amends the Small Business Act to allow the Chief Counsel for Advocacy to specify small business size definitions or standards for the purposes of any Act other than the Small Business Act or the Small Business Investment Act of 1958. The SBA's Office of Size Standards has the necessary expertise and resources to make appropriate decisions regarding industry size determinations. I do not believe that the proposed section 9 of H.R. 682 will benefit small entities. It may be more beneficial to amend the RFA to require agencies to consult with Advocacy if the agency is interested in changing the size standard for RFA purposes rather than requiring the approval of the Administrator. This change to H.R. 682 may eliminate some of the confusion that currently exists over which office determines size standards for RFA purposes only.

Conclusion

The Office of Advocacy believes that the RFA and SBREFA can be improved legislatively and commends this Committee for its leadership on behalf of small business. Thank you for allowing me to present these views. I would be happy to answer any questions.

Statement of Ms. Cecelia McCloy

On Behalf of
Women Impacting Public Policy
and
Coalition Partner
Women Presidents' Organization

Submitted to
House Small Business Committee

"Regulatory Flexibility Improvements Act"

March 16, 2005

Mr. Chairman and Ranking Member Velazquez, I am Cecelia McCloy, President of Integrated Science Solutions, Inc. (ISSi) a woman-owned science and engineering company. We specialize in engineering studies, geotechnical evaluations, health and safety services, environmental studies, and training and provide solutions for our customers' complex problems. ISSi has offices in California, Nevada, Colorado, Washington DC, and the state of Washington.

I am testifying today on behalf of Women Impacting Public Policy (WIPP), of which I am a National Founding Partner, and the Women Presidents' Organization (WPO). Women Impacting Public Policy is a bipartisan organization representing 505,000 women in business nationwide. Thank you for inviting me to testify to share WIPP's and WPO's views on H.R. 682, improvements to the Regulatory Flexibility Act.

As a business owner, I see first hand the effect regulations promulgated by federal agencies have on small business. We help our clients understand and comply with federal regulations especially in the environmental area. While we support efforts to provide a safe and clean environment, the cost of compliance for small businesses often out ways the benefit to the environment.

Just last week, this Committee held a hearing on H.Res.22 which identified reducing paperwork burdens on small business as a Congressional priority for the 109th Congress. WIPP wholeheartedly agrees that reduction of paperwork is an important goal. A U.S. Chamber of Commerce paperwork survey estimated that small business owners spend 3.5 hours on non-IRS related paperwork per week, which translates into 4.2 billion hours of time small business could be using to generate income. Although the stated goal

of H.R. 682 is not paperwork reduction, the practical implications of this legislation is a reduction in paperwork, which is good news for all small businesses.

WIPP believes requirements such as making sure compliance guides published by agencies are written in plain English are important to small businesses. After all, we are not trying to invent creative ways to skirt the law—we just need to know how to comply.

A key provision of H.R. 682 is the requirement that agencies complete a more detailed economic impact analysis of the impact on small business when formulating and finalizing their regulations. Indirect costs should be taken into account as well as direct costs. A recent interim proposed rule by GSA on Access to the Federal Procurement Data System (FPDS) is just one example of where the requirements of H.R. 682 would have been helpful.

We have attached WIPP's comments to the GSA at the end of our testimony, but let me just summarize the issue. The GSA has proposed a $2500.00 charge for a direct hookup for direct web services access to the FPDS. The FPDS site has a non-fee based data site, which the GSA says is open to all businesses. Companies participating in federal contracting use this data on a continual basis for market research.

We asked our members to test the non-fee site. Not one of our member companies was successful in retrieving the data they needed. In fact, analysts in IT companies were unsuccessful in accessing the data requested. Our conclusion is that the non-fee site does not work for small business. If our companies want to access the federal procurement data, they will have to pay the $2500.00 fee.

Yet, the GSA, in its interim rule, states that this interim rule has no effect on small business. If the GSA was required to take into account the indirect costs to small

businesses—the hours and manpower required to access the data on the non-fee based site-- they likely would have come to a different conclusion about the effect of this rule on small businesses.

Equally important, H.R. 682 requires the federal agencies to contain a detailed description of alternatives which would either minimize adverse economic impact or maximize economic benefits to small businesses.

WIPP also supports the additional enforcement authority given to the Office of Advocacy at the U.S. Small Business Administration in this bill. Last year alone, the efforts of Advocacy's Chief Counsel saved small businesses in America more than $17 billion in potential regulatory costs. One of the reasons for this success is the implementation of Executive Order 13272. H.R. 682 would place into law some of the critical authority contained in the Executive Order.

The requirement that agencies must respond to concerns raised by the Office of Advocacy is critical to small businesses. The Office of Advocacy speaks for all of small business so we must make sure its views are taken into account.

Other powers, such as Advocacy's right to intervene in any adjudication before any federal agency if it believes small business concerns were not addressed, is a powerful tool. In addition, the provision that grants the Chief Counsel of Advocacy the ability to issue rules for agency compliance with the Regulatory Flexibility Act means that small business concerns will be heard.

In conclusion, Mr. Chairman, we thank you for your leadership in making sure that small businesses do not get lost in the throes of government regulations. It is almost

impossible for a small business owner to follow every proposed regulation which may have an impact on her business. By giving the agencies a mandate to consider the total cost of regulations on small business ultimately means small business owners will be able to spend less on compliance with government regulations and more on business growth.

Thank you for giving me the opportunity to testify. I am happy to answer any questions.

February 28, 2005

VIA EMAIL
gsarcase.2004-G509@gsa.gov

General Services Administration
Regulatory Secretariat (VIR)
1800 F St., NW Room 4035
Washington, DC 20405
ATTN: Laurieann Duarte

Re: Comments on Interim Rule with Request for Comments: General Services Administration Acquisition Regulation; Access to the Federal Procurement Data System, GSAR Amendment 2004-04; GSAR Case 2004-G509 (Change 12) (December 28, 2004).

On behalf of Women Impacting Public Policy ("WIPP"), I am submitting comments on the above-referenced matter. WIPP represents 505,000 women and minorities in business nationwide that employ over 2.7 million workers. The majority of our members have founded or are associated with small businesses. Our members have identified the opportunity to bid and perform Federal government contracts as a top priority; indeed, 94% of respondents to a recent survey of our members are ready and capable to bid on Federal government contracts. Strikingly, the survey also revealed nearly a 95% gap between actual Federal government contracts awarded to women-owned businesses and those businesses willing to bid in the procurement arena.

It is clear that women-owed businesses continue to encounter significant barriers to obtaining access to federal government contracts on either the prime contract or subcontract level. In this regard, women owned businesses face unique challenges with regard to obtaining information about contracting opportunities and in securing the

financial resources necessary to compete in the federal government contracting marketplace. We thus are deeply concerned with GSA's proposal to charge small businesses for direct web access to the Federal Procurement Data System database ("FPDS").

First, we would like to commend the GSA for providing a means by which members of the public can obtain data from FPDS for no charge. We agree with your vision of providing greater transparency into the Government contracting process. For many small businesses, however, the no-charge approaches are insufficient to satisfy their need for information on contracting opportunities and they rely on direct computer access to the FPDS.

Your proposal is to charge a one-time hook-up fee of $2500.00 for direct web services access to the FPDS. While we understand this direct hookup charge is intended only for those businesses that depend on comprehensive reports from the FPDS, the regulations are not so limited in their applicability. WIPP members who are involved (or want to be involved) with federal contracting use these tools and the federal procurement data for market research on a continual basis. A service fee of $2500.00 would be financially burdensome for many of our members.

We asked our members to test the non-fee based data site and no one successfully found the information they were seeking. One of our members, who owns a sizable IT company, asked three different analysts to test the system. Not one of them was able to access the data they were seeking. A number of our members who were not computer professionals, were not even able to get past the password process. Another company was able to find the data requested, but it took over an hour to obtain the requested data. The unsatisfactory experiences of our members who have attempted to use the non-fee based access methods is another reason why the direct access method, which our members find helpful, should not be fee based.

Based on our members' responses, we believe the system is not small business friendly and is not ready for broad application. We urge the GSA to make changes to the system to ensure small business usage of the site and to make the site more user friendly to small businesses. In addition, it seems to us that GSA should initiate training for small businesses to use the FPDS data effectively.

From an overall policy standpoint, we believe GSA may be setting a dangerous precedent by imposing a fee on small businesses for accessing federal procurement information. We believe the FPDS and the report generation tools should be available at no charge to the public.

WIPP sincerely hopes the GSA will not consider the fee structure included in this interim rule an acceptable model for access to the FPDS database. Such a change would be harmful to small businesses and would put small business owners at a competitive disadvantage in the federal marketplace.

WIPP appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,

Terry Neese
President
Women Impacting Public Policy

2709 W. I-44 Service Road
Oklahoma City, OK 73112
Ph: (405) 943-4474 Fax: (405)/606-4855
www.wipp.org

TESTIMONY OF BLAIR HAAS
PRESIDENT OF BUD INDUSTRIES INC.
BEFORE THE HOUSE SMALL BUSINESS COMMITTEE
ON THE REGULATORY FLEXIBILITY IMPROVEMENTS ACT (H.R. 682)
March 16, 2005

Thank you, Mr. Chairman, Ms. Velázquez and Members of the Committee for the opportunity to appear before you today in support of H.R. 682, the Regulatory Flexibility Improvements Act. My name is Blair Haas, and I am the president of Bud Industries, the nation's best-known provider of electronic enclosures for industry. I also serve on the Board of Governors of the Electronic Industries Alliance (EIA), a partnership of electronics and high-tech trade associations, and am past chairman and a current member of the board of the Electronic Components, Assemblies & Materials Association (ECA), which is a sector of EIA.

Founded in 1928 by my grandfather, Max Haas, Bud Industries' first product was an "antenna eliminator." This revolutionary product attached to the back of radios to eliminate the need for a roof top antenna. Shortly thereafter, the company expanded into making Ham Radio parts, as well as enclosures. By the mid-1930s, the products ranged from small metal boxes to what are known as relay racks – large metal rails for mounting electrical equipment.

Today, with sales of about $15 million, we have a 165,000 square foot facility just outside of Cleveland and a sales office in Arizona. Working with two of my brothers and carrying on the legacy of our father and grandfather, we employ about 100 people with an average tenure of almost 20 years, many from multiple generations of the same families. We can produce complete products in our facility, with capabilities that include cutting sheet aluminum and steel to size, bending, piercing, welding, powder coating, and assembly. We have resisted the competitive pressures to source out metal products offshore, producing them completely in our Ohio factory.

We have a standard product line of more than 2600 parts, and about one-third of what we do is modified or custom product. We sell mostly through industrial electronic

component distribution and through them provide product to thousands of customers across North America. For example, we have sold product to virtually every company on the Fortune 500 list that has facilities in North America. Our largest distributor sold our products to more than 8500 unique companies in 2004. In a recent survey, nearly 60% of all electronic engineers knew the Bud name.

Complex Regulatory Overhead

In an internal survey by the Electronic Industries Alliance last year, nearly 60% of executives described the U.S.'s labor regulations as "costly," while only 20% considered them "fair." Regulations such as those from the Occupational Safety and Health Administration (OSHA), the Sarbanes-Oxley Act on corporate financial reporting, and Superfund cleanup spending all add to the cost of doing business in the U.S. and work to make our companies less competitive in the global market.

There are certainly powerful arguments in favor of many of the U.S.'s regulations, and consumers and workers benefit from many of the reforms and improvements implemented. However, the sheer volume of these regulations, their myriad layers and their compliance costs have also created a landscape that is increasingly expensive and burdensome for business, particularly for small business. When it comes to regulation, one size does not fit all, and many of the rules implemented by federal agencies are inflexible and overly proscriptive for a company the size of Bud. An important question is whether or not all the money and time spent on compliance contributes to the regulation's original goal.

The Regulatory Flexibility Act (RFA), which requires agencies to take the interests of small businesses into account before implementing new regulations, is an important safeguard. Therefore, I support H.R. 682, believing that even more can be done to close loopholes in this Act, compel agencies to comply with the spirit of the RFA and ensure that small businesses can remain competitive.

The RegFlex Improvement Act's requirement of more detailed economic impact analysis of proposed regulations on small business, including an examination of the indirect costs, is an important improvement to the current law. Hidden and indirect costs can prove even more burdensome than financial outlays, and it is critical that federal agencies complete a thorough assessment of their potential before imposing them on small businesses that may not be able to shoulder them.

In addition, I believe that a requirement that agencies receive more input from small businesses on proposed regulations would help ensure that our concerns are addressed and that the agencies better understand the implications of their proposals. Small business leaders would also bring expertise and insight to the process of developing alternatives when rules are deemed overly burdensome.

Examples of Regulatory Burdens Faced by Bud Industries Inc.

To cite just a few examples of regulatory burdens Bud Industries faces as a small business:

Impact of the Alternative Minimum Tax: As a small business, we find ourselves paying extra taxes under a program that was designed to prevent large businesses from avoiding tax payment. We have significant net operating loss carryforwards but still have to pay taxes under the AMT system, which is a significant burden at a time when Bud is working to rebuild our net worth.

Pension Plans: Because of the reaction to the accounting scandal at Enron, we now have to create a company-sponsored IRA for employees who do not cash out of the Bud plan at the time they leave our company. We have to be responsible for any losses and track the employee's whereabouts long after they leave our employ. We also have to pay for legal counsel to create these accounts and to keep us up-to-date with the constantly changing regulations.

OSHA: The Administration determines a formula for inspection based on lost days as a percent of total employment. When you have a smaller workforce, such as that at Bud, the impact of one employee who develops a long-term injury can be significant. As our percentage is skewed, then we have to go through the expense of preparing for, managing and responding to an OSHA inspection.

Fair Labor Standards Act: We have an employee who was categorized as "exempt" but can no longer be because she now supervises only one person instead of the two mandated by the Act. I recognize that there is a push for her to be able to receive overtime, but within a small business, the value of being exempt (no docking for sick days, late arrival, etc.) can often be meaningful for a single mother.

Environmental Protection Agency: Bud has been involved with two Superfund sites – caused by our waste being disposed of improperly by professional companies we hired. In both cases, our waste was quite minimal. However, we had to pay for legal and other costs, to set standards for deminimus standing, fighting against larger companies with significant internal legal counsel that sought to reduce their own liabilities. The EPA had not created appropriate standards for these designations, leaving us to create them and challenged by more experienced companies with deeper pockets.

While I recognize that there were good intentions and perceived improvements in the development of each of these regulations, they have had the unintended consequence of burdening small companies such as Bud. Further improvements to the process, such as those outlined in the RegFlex Improvement Act, would be helpful to companies like ours.

Conclusion

Once again, I would like to thank the Chairman and the Committee for the opportunity to comment on this legislation on behalf of Bud Industries and the Electronic Industries Alliance. I hope you will consider the merits of the Regulatory Flexibility Improvement Act and move towards swift Congressional approval of the legislation.

TESTIMONY BEFORE THE UNITED STATES CONGRESS
ON BEHALF OF THE

NATIONAL FEDERATION OF INDEPENDENT BUSINESS

NFIB
The Voice of Small Business®

Testimony of

Jay Lancaster

before the

Committee on Small Business

on the date of

March 16, 2005

on the subject of

The RFA at 25: Needed Improvements for Small Business Regulatory Relief

Good afternoon Chairman Manzullo, Ranking Member Velazquez and Members of the committee. Thank you for the invitation to be here today. It is an honor to testify before you. I am here to talk about H.R. 682, the "Regulatory Flexibility Improvements Act" sponsored by Chairman Manzullo. Also, I am also pleased to be representing the 600,000 small-business members of the National Federation of Independent Business (NFIB) in expressing our support for H.R. 682.

My name is Jay Lancaster, and I own and operate Best Inc., specializing in commercial roof installation and waterproofing. We are truly a family-run operation; we have eight full-time employees, and all are related to the two founders.

Small businesses today are being barraged by government regulation. H.R. 682 will help relieve the regulatory burden on small businesses like mine by amending the Regulatory Flexibility Act (RFA) to hold federal agencies accountable for rules they create. My goal today is to first, discuss how regulation impacts a small business like mine and second, how this bill will help reduce that burden.

Over-Regulation

There are many problems with the way the federal government regulates business, some obvious and some not. I want to take a minute to discuss what I see as the most pressing issues for small business. I will note here that I am not an expert in regulation. I am an expert in running my business. But I want to share with you a perspective from someone that is on the ground dealing with over-regulation on a day-to-day basis.

The NFIB Research Foundation released a poll listing the largest problems for small businesses when dealing with regulation. The greatest problem experienced was the amount of paperwork required by regulation, the second was the complexity of compliance and the third, but not far behind, was the cost.

Volume of Paperwork

My personal experience reflects the findings of the poll. It's almost impossible to keep track of how much regulation affects me, but I did a short inventory for this hearing. My small, eight-person business is regulated by over eight agencies, and that is just at the federal level. Of course, those eight regulatory agencies are just the tip of the iceberg. If I were to count the different bureaucracies I deal with inside each agency plus the different departments that regulate me at the state and local level, the number would be very high.

The amount of paperwork associated with these regulations is staggering and is certainly not something that one person alone can handle. A small businessperson like me does not have time to follow every change that happens here in Washington, and when a change occurs, businesses are often the last to know. NFIB polling indicates that 82 percent of small-business owners typically discover new regulatory requirements in the normal course of business activity. Only twelve percent periodically do research to find out about new requirements; the rest are too busy running their businesses.

Complexity
Once a regulation is issued, I'm sure not many small-business owners would know how to comply without some kind of help. The complexity of regulation today is daunting and sometimes reading regulatory language is like reading a foreign language. How can small businesses be expected to comply if they don't understand what they are being mandated to do? This forces us to either hire more employees or worse, hire outside consultants and contractors to do the work for us.

Small businesses don't have compliance officers, accountants and lawyers on staff. In fact, my wife acts as our "compliance officer" and my daughter, much to her dismay, is forced to spend countless hours a month just on OSHA compliance. Neither have special training in these areas, but they do the best they can.

Cost
This brings me to my next problem: cost. Smaller businesses pay 60 percent more on regulatory costs per employee than larger businesses according to the Small Business Administration. As a businessman I do not measure the cost of regulation solely in money spent on outside contractors but I also calculate it in the time my employees and I have to spend on the regulation itself. Sometimes I think this is the worst cost of all because every minute I spend on regulation takes me away from growing my business or better yet, playing with my grandchildren. Every dollar I spend on an accountant is a dollar I cannot reinvest in my business, and as ours is a family-run business, my family's future.

When I first started out, we had a simple operation, but now I am forced to employ various people to do the things I can't. Nowadays I have an accountant, I pay a person in California for regular updates on industry specific regulatory activities and I've joined groups like NFIB and other trade associations just so that I can stay on top of things. Even with all of these resources, I still can't keep track of everything. This adds to the cost of doing business and that cost has to be either passed on to the consumer or absorbed by me.

That's why your work, Chairman Manzullo, on H.R. 682 is so important to small business. From where I'm standing, it doesn't seem like there is much holding agencies back from introducing more burdens on small business. It is clear that RFA and the Small Business Regulatory Enforcement Fairness Act (SBREFA) are not doing an adequate job protecting small business.

H.R. 682 seeks to change this by holding the agencies feet to the fire when it comes to burden reductions. By closing the loopholes used to skip compliance with the RFA, this bill will ensure that all agencies determine the impact of their rulemaking on small businesses. It will also force agencies to research alternative ways of reducing burden. H.R. 682 will give small business a larger voice in the formulation of federal regulation, which in turn, helps the government produce better laws. I can't think of many people that wouldn't be for that. Better laws lead to more compliance and help to reduce the cost of doing business.

I only have a short time left so I want to highlight several provisions in this bill that I see as being extremely helpful to small business specifically: requiring the agencies to understand the indirect impacts of rules, requiring the IRS to try harder to reduce its paperwork burden and for agencies to review older regulations to find out what is and what is not working.

Indirect Impact
Under current law, agencies are required to do a regulatory flexibility analysis on rules that have a direct impact on small business. They are not required, however, to do an analysis on rules that do not directly regulate small businesses. Plenty of actions taken by agencies, such as the Environmental Protection Agency (EPA), have a significant economic impact on my business while not directly regulating it. These types of rules can include things such as environmental standards, land-use and water rights. And while not directly regulating small businesses, they can alter how businesses operate and force changes that cost money and jobs. By having agencies gauge indirect impact, small businesses are assured that their voice will be heard on every rulemaking that can affect small businesses economically.

There seems to be a disagreement over who should be doing the analysis, the states or the federal government. As a businessperson, I don't care who does it as long as it gets done. It seems to me that the federal government is in a much better position, with more money and more staff, to conduct the research than cash-strapped states.

Applying RFA to IRS Interpretative Rules
The federal paperwork burden is nearly 8.1 billion hours per year. The IRS is responsible for 80 percent of that burden. The NFIB Research Foundation estimates that it costs small businesses over $74.00 an hour to do IRS paperwork and record-keeping. That is a lot of money when you add it all up. With these kinds of numbers, you would think the IRS would be working harder than anyone to reduce this burden. It doesn't appear that they are. IRS compliance with RFA is mediocre at best. Chairman Manzullo's bill would make the IRS more responsive to small business by requiring impact analysis on rules even if they are deemed to be interpretative in nature.

Currently, the IRS only does an analysis if it creates a new form. This provision would require the IRS to do an analysis on all interpretative rulemaking that impose a recordkeeping requirement on small business. This is important because the IRS doesn't create new tax forms often, but they do make changes to existing forms. The IRS avoids RFA requirements by making these types of incremental changes.

It may not seem significant to the IRS when they add a question here or change a question there, but it is for me. Every time a change is made, I have to call my accountant and ask him what it means for me and how will it change my bottom line. This isn't my experience alone. An NFIB poll found that three of four small businesses have another firm handle their tax paperwork.

It is astonishing that these types of changes are not being backed by analysis to see whether this will hurt small businesses. Forcing the IRS to do an analysis on interpretative rules will force the agency to consider less costly alternatives.

Periodic Review

As I've mentioned, there are tons of regulations on the books. Section 7 of the bill would require agencies to review older regulations periodically to see if there is a new impact on small business. I can't think of a better concept. It is hard for me to believe that while I'm expected to comply with all of these rules, the agencies are not required to review rules issued in the past. These regulations have a direct impact on my bottom line and on the economy. I would expect that there is someone in the agency looking to see what needs to be updated, what needs to be changed and what needs to be taken off the books.

This provision will make agencies more responsive to small business by forcing a review of the impact a particular regulation has had on small business. Its just like when you are laying down a roof, you shouldn't move on to the next section until you look back to make sure the job you just did is done right. If I didn't review my work, the quality of the work done would suffer and sooner or later I would go out of business. Unfortunately for me, these agencies can't go out of business. This type of review is common sense and would give agencies a better understanding of how their actions affect businesses and therefore will help them make better rules in the future.

This concludes my testimony. Thank you Chairman Manzullo for your work to reduce the regulatory burden on small business and for holding this hearing on H.R. 682. I applaud you and your committee's efforts to reduce regulation on small business. Thank you also for allowing me to testify today, I would be happy to answer any questions that the committee may have at the appropriate time.

CORE VALUES

We believe deeply that:

Small business is essential to America.
Free enterprise is essential to the start-up and expansion of small business.
Small business is threatened by government intervention.
An informed, educated, concerned, and involved public
is the ultimate safeguard for small business.
Members determine the public policy positions of the organization.
Our employees and members, collectively and individually, determine the success of
the NFIB's endeavors, and each person has a valued contribution to make.
Honesty, integrity, and respect for human and spiritual values are important
in all aspects of life, and are essential to a sustaining work environment.

NFIB

The Voice of Small Business.

1201 F Street NW, Suite 200 • Washington, DC 20004 • 202-554-9000
www.NFIB.com

TESTIMONY BEFORE

THE COMMITTEE ON SMALL BUSINESS

OF THE

UNITED STATES HOUSE OF REPRESENTATIVES,

ON BEHALF OF THE UNITED STATES CHAMBER OF COMMERCE,

ON

H.R. 682–THE REGULATORY FLEXIBILITY IMPROVEMENTS ACT

BY

MARC FREEDMAN

MARCH 16, 2005

Good afternoon, Chairman Manzullo, Ranking Member Velazquez, members of the Committee. My name is Marc Freedman and I am Director of Labor Policy for the U.S. Chamber of Commerce. Before coming to the Chamber in October, I was the Regulatory Counsel for the Senate Small Business Committee and, among other issues, covered compliance with the Regulatory Flexibility Act (RFA) as amended by the Small Business Regulatory Enforcement Fairness Act, or SBREFA. I am here today to convey the Chamber's strong support for improving the Regulatory Flexibility Act, and in particular our support for H.R. 682, the Regulatory Flexibility Improvements Act.

During my more than five years as Regulatory Counsel for the Senate Small Business Committee, agency compliance with the various aspects of the Regulatory Flexibility Act was a constant area of concern. I was involved with hearings to examine agency compliance, GAO reports examining agency compliance, letters to agencies commenting on their compliance, legislative attempts to improve agency compliance, and

heard many accounts from small businesses about the lack of agency compliance. It is clear to me that the agencies have taken advantage of every ounce of flexibility when it comes to complying with the Regulatory Flexibility Act. The Regulatory Flexibility Improvements Act would help resolve many of these issues.

The Bush Administration has taken compliance with the RFA more seriously than previous administrations. One indication of this is Executive Order 13272, issued in August 2002, which requires agencies to develop, in concert with the Office of Advocacy, plans on how they will comply with the RFA. It also directs the Office of Advocacy to provide training to all agencies on how to comply with the RFA. The full impact of this Executive Order has yet to be determined since it is unclear how much the training sessions conducted by the Office of Advocacy have changed agency behavior, but there is no question that there is more awareness now of the RFA and the need to determine the impacts of proposed regulations on small businesses.

Another indication of the commitment this Administration has made to the Regulatory Flexibility Act is the more cooperative relationship between the Office of Advocacy and the Office of Information and Regulatory Affairs (OIRA). OIRA plays a crucial role in the regulatory process as the final arbiter of whether an agency has satisfied all of their rulemaking obligations. Through its closer working relationship with Advocacy, OIRA is able to reinforce Advocacy's concerns about an agency's compliance with the RFA.

Unfortunately, this enhanced attention to compliance with the Regulatory Flexibility Act is only as strong as the Administration in power wants it to be. Lasting reform requires legislation, such as the Regulatory Flexibility Improvements Act. With almost 25 years of experience with the RFA, we know where the problems are. The

Regulatory Flexibility Act has always enjoyed strong bipartisan support, and we hope that this pattern will continue as reforms and improvements to it are considered. It is now time to fix this law so that it can finally provide the level of regulatory relief for small businesses that Congress intended.

To be fair, one of the common responses from agencies about why they had not met expectations for compliance with the RFA, was that there are too many vague terms in the Act and they were merely operating within the terms of the Act by developing definitions for these terms that they thought suitable. Chief among the terms that need clarification are "significant economic impact" and "substantial number of small entities." These two phrases describe the threshold level of impact that triggers the requirements of the RFA. If an agency can "certify" that a regulation will not have a "significant economic impact on a substantial number of small entities" it can avoid further RFA requirements.[1] Unfortunately, defining these terms is left entirely up to the agency for each rulemaking which leads to a wide array of definitions and results. Indeed, GAO has indicated the impact of these undefined terms in various reports and testimonies that they have issued on agency compliance with the Regulatory Flexibility Act.[2] In addition to not conducting the Initial Regulatory Flexibility Analyses and the Final Regulatory Flexibility Analyses required by the Act, other requirements are also

---

[1] 5 U.S.C. 605(b).

[2] *See,* Testimony of Victor Rezendes, Managing Director Strategic Issues Team, Before the Committee on Small Business, U.S. Senate, April 24, 2001, "Regulatory Flexibility Act: Key Terms Still Need to Be Clarified," (GAO-01-669T): "In particular, Congress may need to clearly delineate—or have some other organization delineate—what is meant by the terms "significant economic impact" and "substantial number of small entities." The RFA does not define what Congress meant by these terms and does not give any entity the authority or responsibility to define them governmentwide. As a result, agencies have had to construct their own definitions, and those definitions vary. Over the past decade, we have recommended several times that Congress provide greater clarity with regard to these terms, but to date Congress has not acted on our recommendations." And Rezendes Testimony before the Committee on Small Business, U.S. House of Representatives, March 6, 2002, "Regulatory Flexibility Act: Clarification of Key Terms Still Needed," (GAO-02-491T). *See also*, GAO Report to the Chairman of the Committee on Small Business, U.S. Senate, "Regulatory Flexibility Act: Agencies' Interpretations of Review Requirements Vary," April, 1999, (GAO/GGD-99-55).

dependent on whether an agency certifies a regulation. GAO issued a report discussing Section 212 of SBREFA that requires agencies to produce compliance assistance for regulations that are determined to have a "significant economic impact on a substantial number of small entities." GAO concluded that agencies had all but ignored that section, or if they had tried to comply, their efforts did not produce effective assistance.[3]

These accumulated frustrations with agency RFA non-compliance, led Senator Bond to introduce the Agency Accountability Act in the 107th Congress (S. 849), which addressed some of the same issues raised in your bill. Among the areas of similarity are expanding the number of agencies required to conduct Advocacy review panels on proposed rules; improving the quality of regulatory flexibility analyses; requiring agencies to consider indirect impacts of regulations; closing loopholes used by the Internal Revenue Service (IRS) to avoid complying with the RFA; and making judicial review more effective. Since Senator Bond's bill, Senator Snowe also introduced a bill in the previous Congress that focused on closing loopholes used by agencies to avoid producing compliance assistance.

The provisions of the Regulatory Flexibility Improvements Act build on this momentum of concern for the impacts of regulations on small businesses. Perhaps the most significant is requiring agencies to consider the indirect impact of regulations when calculating the impact of regulations on small businesses. This is particularly helpful with respect to Environmental Protection Agency (EPA) regulations where the agency has claimed that, because some of their regulations are enforced by the states, these regulations only have an indirect impact and therefore do not trigger the range of requirements under the RFA and SBREFA. One example is with the National Ambient

[3] GAO Report to the Ranking Member of the Committee on Small Business and Entrepreneurship, U.S. Senate, "Regulatory Reform: Compliance Guide Has Had Little Effect on Agency Practices," December 2001, (GAO-02-172).

Air Quality Standards (NAAQS) under the Clean Air Act which delegates to the states the authority to develop the implementation plans on how comply with the NAAQS. Although ambient air quality standards can impose significant economic costs on businesses that may have to reduce their activities in order to comply with the state implementation plan and meet the ambient air quality standards, EPA does not comply with the RFA when it develops the standards or during the approval of the state implementation plans. The EPA argues that the RFA does not apply because the ambient air quality standards and state implementation plans only regulate states which are not small entities under the RFA.

Similarly, the requirement that agencies assess the cumulative impact of their regulations addresses another anomaly used by agencies to diminish the real impact of their regulations. Just as any given straw might not break a camel's back, so any specific regulation, considered in isolation, might not impose a crushing burden. However, many such regulations added together, especially to a small business where the same person is responsible for sales, bookkeeping, inventory, and probably getting the kids to soccer practice can indeed become an overwhelming burden.

Requiring agencies to make their regulatory flexibility analyses available on their Web sites makes complete sense. The Internet was just becoming available when SBREFA was passed in 1996. Now that access is so common, it should be exploited to increase transparency in the rulemaking process and access to important agency materials. It should also be the primary conduit for disseminating compliance assistance materials if the agencies ever manage to produce these.

We are also pleased to see that the Regulatory Flexibility Improvements Act attempts to put more teeth into judicial review of agency compliance with the RFA.

Judicial review was one of the most significant features of SBREFA, and was intended to put teeth into the original RFA. Unfortunately, because affected parties must wait for a final rule to be issued before they can challenge an agency's actions in court, the opportunity to have an impact on the rulemaking process is largely lost even if they are successful. While this bill would clarify that an action could be brought when a final rule is issued, we believe it would be more helpful to allow such an action to be brought closer to the point at which an agency makes their determination about whether to certify the proposed regulation as not having a significant economic impact on a substantial number of small entities. That determination could be deemed a final action by the agency for the purpose of determining whether to proceed with the requirements of the RFA. Once an agency certifies a regulation, they are not going to revisit that question. Therefore, aggrieved parties should be given a narrow window after the notice of proposed rulemaking is published, or whenever the certification decision is indicated, during which they would be able to bring their challenge. The challenge could be given priority and heard on an expedited schedule to avoid disrupting the rulemaking more than necessary or requiring it to be suspended. However, a judge could be given that authority if they determined it would be necessary to hear the challenge. Allowing for judicial review at this stage in the rulemaking would help preserve the value of small business' input at the time when it can have the most impact. This should also force agencies to think twice before certifying a regulation to avoid the delays such challenges would produce.[4]

We are particularly pleased to see this bill expand the use of the Advocacy panel review process to all agencies. This has proven to be a resounding success in the

[4] *See,* Agency Accountability Act, S. 849, 107th Congress, Sec. 9 as an example of how this could be done.

Occupational Safety and Health Administration and EPA rulemakings where it has been used. Not only do small businesses get a real opportunity to shape the regulation in its early stages, but the agencies are required to reveal their thinking and analyses, which provides invaluable insight into the process. The reports that have been generated by the panels that have been conducted are some of the most important information placed in the rulemaking docket for others who are following the rulemaking.

Closing loopholes used by the IRS to distinguish their rulemakings from all others is another long sought after goal. IRS regulations affect every business and the notion that they are not subject to the RFA means that small businesses are forced to absorb these regulations without the IRS having to take their impact on small businesses into account.

Finally, mandating that the Chief Counsel for Advocacy promulgate regulations that will determine how agencies must comply with the RFA is a step that is long overdue. Just as employers must rely on agencies to interpret laws and describe how they must comply, so agencies should have one office in the government that directs their compliance with this law that covers them. We would hope that the Chief Counsel would use this authority to issue regulations defining the terms "significant economic impact" and "substantial number of small entities." By doing so, not only would agency compliance with the RFA improve, but everyone would finally have a standard against which to evaluate whether an agency had met its obligation. Clarifying these terms would reduce the number of rules that might be challenged in court.

The Regulatory Flexibility Improvements Act comes at a propitious time. Attention to the needs of small businesses has never been greater, with so many sectors, such as manufacturing, coming under increasing international pressure; it is incumbent on

us to make sure that our laws and regulations are as narrowly tailored as possible to achieve their goals. By keeping the regulatory burden on small businesses to the minimum level necessary, they would be more able to comply. This would also help to ensure that the regulatory burden would not undermine the ability of the business to succeed, thereby helping to ensure more job creation. The improvements contained in your bill would go a long way towards getting us to that promised land of small business regulatory relief envisioned by the original authors of the Regulatory Flexibility Act almost 25 years ago.

Thank you for your time and attention to this matter. I would be happy to answer any questions that you might have.

TESTIMONY

OF

JERE W. GLOVER

UNITED STATES
HOUSE OF REPRESENTATIVES

COMMITTEE ON SMALL BUSINESS

WASHINGTON, D.C.

March 16, 2005

Chairman Manzullo, Ranking Member Velazquez, and Members of the Committee, it is a pleasure to appear before you today on the twenty-fifth anniversary of the Regulatory Flexibility Act (RFA). I am Jere W. Glover an attorney specializing in small business, regulatory and administrative law, and I am CEO of two high-tech small businesses. I have spent much of my career trying to reduce the regulatory burden on small businesses to create a fair economic playing field that allows small businesses to grow. I was Chief Counsel for Advocacy from 1994-2001. During my tenure as Chief Counsel, we issued over 100 reports and economic studies, testified before Congress over 30 times, participated in over 200 agency rulemaking proceedings, reviewed over 5,000 regulations and sat on 23 RFA panels at EPA and OSHA.

Let me say up front there are four changes that in my view should be given priority by the Congress. First, the small business community and this Committee need to tell the Appropriations Committee **now** that the Office of Advocacy should be line item in SBA's budget and that there should be adequate funding for the Office of Advocacy commensurate with the responsibilities given to it by Congress. Second, the judicial review provisions of the RFA need to be strengthened. Third, the RFA should be amended to require more detailed and substantiated analyses to justify FRFAs and especially agency "no impact" certifications. Finally, Executive Order 13272 should be codified to cover independent agencies.

Agencies will and have found creative and even imaginative ways to continue promulgating regulations without regard to the unnecessary and burdensome costs to small business and competition. For example, the panel process mandated by the Small Business Regulatory Enforcement Fairness Act (SBREFA) was very effective in the first few years after its enactment. Now the agencies have found ways around the panel process. (See attached chart

showing that EPA had over three times as many panels in the first four years of SBREFA than it did in the last 4 years.)

While not as widespread as we all would like, the Regulatory Flexibility Act has nevertheless altered the way some government regulators treat small business. Compared to when I first started trying to reduce the regulatory burden on small business over 25 years ago, the regulatory climate for small business has clearly improved. Despite this improvement, the regulatory burden on small business continues to grow. Small business trade associations continue to rank this as one of the top problems facing small business. To illustrate: It has been documented that RFA regulatory analyses and the Office of Advocacy actions, particularly since enactment of SBREFA, have saved small business over 70 billion dollars. Be that as it may, agency compliance is not uniform. Compliance has lagged, as I will illustrate, and the courts have seemed reluctant to enforce this law fully. This experience covering 25 years suggests that it is time for additional modifications to the RFA to ensure the law's maximum impact.

A brief history of the Regulatory Flexibility Act will help us understand the current regulatory climate for small business. Prior to 1980, small business' biggest complaint with the government was the burden of regulations. All regulations were size blind, meaning regulations were "one size fits all." A few very enlightened public servants, the late Honorable Milton Stewart, the first Chief Counsel for Advocacy at SBA, Senator Gaylord Nelson, former Chairman of the Senate Small Business Committee and a few others were in the forefront arguing for flexibility in regulatory design.

Once the concept of regulatory flexibility was developed and introduced to the Senate over 29 years ago it was my job at the time as Deputy Chief Counsel for Advocacy to convince Federal agencies to incorporate flexibility into their regulatory processes. Armed with a

Presidential directive to have each Federal agency list its significant small business accomplishments in preparation for the 1980 White House Conference on Small Business, and a presidential executive order directing agencies to use regulatory flexibility in their regulations, I met with the heads and senior staff of all of the agencies to discuss this initiative. While a few agencies were willing to try the concept on a few regulations, the effort to obtain voluntary implementation of this regulatory reform could hardly be regarded as a success. Not surprisingly, the 1980 White House Conference went on to recommend adoption of the Regulatory Flexibility Act as one of its top priorities. The RFA became law later in 1980.

The Office of Advocacy, at the time 70 employees strong, started educating the agencies and trade associations about the wonderful new law. Over time several critical flaws became apparent, e.g. no judicial review, no mandatory small business input, an imprecise role for the Office of Advocacy and the ease with which agencies could certify that a regulation did not affect a significant number of small businesses. It was difficult to escape the conclusion that agencies could ignore the RFA with impunity.

In 1996, after another White House Conference on Small Business, Congress passed and President Clinton signed the Small Business Regulatory Enforcement Fairness Act (SBREFA), which corrected some of these shortcomings. The Office of Advocacy, then with a staff of 58 employees, educated and trained over 2,000 agency and trade association employees. Compliance with the RFA clearly improved. During the past eight years, this improvement in compliance with the RFA has saved small business over 70 billion dollars. Agencies found ways to eliminate unnecessary burdens on small business without compromising their statutory missions. The RFA, as amended by SBREFA, clearly was starting to have significant impact on agency deliberations and decisions. Agencies were beginning to learn that they could craft

regulations that could accomplish their public policy objectives without unduly burdening small business. They were also learning that it was good public policy to balance their statutory objectives with another national objective, namely that of preserving small business as the growth engine in the economy – that doing so was not special treatment for small business, rather rational rule-making. As the Committee well knows, SBREFA added judicial review provisions to the RFA, at 5 U.S.C. § 611, to ensure that federal agencies would do more than pay "lip service" to the RFA in developing and implementing regulations with significant impacts on small businesses and other small entities nationwide. See 142 Cong. Rec. S3242, S3245 (daily ed., Mar. 29, 1996) (SBREFA- Joint Managers' Statement of Legislative History and Congressional Intent).

While many agencies have markedly improved their compliance with the RFA, some agencies still only give lip service to the RFA and appear to believe that compliance with the RFA is still voluntary. The Federal Communications Commission appears to have one of if not the worst compliance record of any agency. Let me list quotes about the FCC from three different Chief Counsel for Advocacy's annual reports to Congress on compliance with the RFA:

(1) "...the Federal Communications Commission's (FCC) compliance with the RFA has been inconsistent." (2003);

(2) "The Federal Communications Commission's (FCC) compliance with the RFA has been sporadic..." (2002);

(3) "...IRFA was significantly flawed and did not address the mandates of the RFA. ...The FCC is vague and fails to comply with the RFA in this regard." (2001);

(4) "The Federal Communications Commission (FCC) is notorious for its poor compliance with the RFA. (2000);

(5) "the FCC's regulatory flexibility analysis was insufficient." "...FCC's IRFA were insufficient to satisfy the statutory requirements of the RFA." (1999);

(6) "In summary, the FCC failed to meet the statutory requirements of the Administrative Procedure Act, the RFA, and the PRA." (1998);

(7) "...the regulatory flexibility analysis ... was untimely, improperly published, and inadequate." (1997).

There are over 35 letters from the Office of Advocacy pointing out failures of the FCC to comply with the RFA.

I'm pleased to report that the FCC may have finally learned that it can no longer ignore the RFA – that its independent agency status does not insulate it from compliance with the law. The agency has been admonished by the US Court of Appeals in a lawsuit brought by small entities for the agency's failure to do a Final Regulatory Flexibility Analysis. Last Friday, March 11, 2005 in a case with which I was involved, the Court found that "FCC utterly failed to follow the RFA....id § 611(a)(4)". The Court ordered the challenged FCC rule remanded to the agency for completion and publication of a final regulatory flexibility analysis and also stayed enforcement of the rule against small entities, saying that "A combination of the two specified remedies—remand coupled with a stay of enforcement against small entities—is appropriate." United States Telecom Assc., et al. v. Federal Communications Comm'n, No. 03-1414, slip op. at 26-27 (D.C. Cir. March 11, 2005)

The FCC does not stand alone, however. Other agencies such as the Internal Revenue Service and the Center for Medicare and Medicaid Services (CMS) also have often refused to comply with the RFA.

The problem with recalcitrant agencies is compounded by some court decisions that have begun to narrow the scope of the RFA, and some judges seem reluctant to enforce the law. A review of the 50 or so RFA cases finds only a handful where the small businesses have obtained relief. The amicus curiae authority of the Chief Counsel has also rarely been used. In the

absence of judicial enforcement of the law as intended by Congress when it enacted SBREFA, some agencies again have found ways to avoid compliance with the RFA. Unless Congress again strengthens the RFA, I fear the gains achieved will be lost and agency compliance will deteriorate.

This brings me once again to four priorities I believe this Committee should address.

I urge the small business community and this Committee to send a resolution and letters immediately to the Appropriations Committee requesting that the Office of Advocacy be given a separate line item in SBA's budget and that the line be sufficient to restore the Office to at least the size and funding level the Office had when I left it – a minimum of 58 employees. (Today the Office has 44 employees as compared to its high of 78 employees in previous years.) In addition, I was shocked to learn that the President's proposed budget eliminated Advocacy's line item for research. This too needs to be restored at a level that will enable the Office to fund important economic research on small business trends and contributions to the economy. Such research is essential to the formulation of sound public policy. Surely our experience demonstrates that the problems and challenges facing Advocacy and small business have not diminished so much as to warrant such a reduction in resources.

The bill we are discussing today proposes to impose significant new mandates on the Office of Advocacy --- but without recognizing the need for additional staff or expense funds. For example, the proposal before the Committee would call for more Small Business Advocacy Review Panels now mandatory only for the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA). In our report, Background Paper on The Office of Advocacy 1994-2000[1], we stated that SBREFA panels are labor intensive,

---

[1] *Background Paper On The Office of Advocacy 1994-2000,* Office of Advocacy, Small Business Administration, November 1, 2000, p. 35

requiring Advocacy to commit between 500-600 hours on average. This is but one example of the additional tasks the proposal before this Committee would impose on the Office of Advocacy. If it is to take on more panels, it needs a realistic staffing level commensurate with such additional duties.

Unquestionably, no other agency has produced the returns to small business and the taxpayer that Advocacy has generated - over 70 billion dollars to date, a phenomenal return on the mere 10 million dollar investment in the Office of Advocacy's annual budget. Advocacy can take pride in this accomplishment, but I do not see how the Office can absorb these additional duties without a significant increase in budget and staff. History shows that the SBA Administrators' control of the Office of Advocacy's budget means that the office will continue to lose funding and staff. Given this reality, expectations from the enactment of this bill will not be fulfilled. Failure will be assured. Thus, independent budget authority has to be our first priority. The budget review process will give Congress the opportunity to measure the Office of Advocacy's effectiveness in exercising the mandates given to it.

Second, the judicial review provisions of the RFA need to be strengthened. The RFA should specifically state that courts should defer to any review and determination by SBA's Chief Counsel for Advocacy that a particular agency action is subject to the RFA, that an agency must comply with its provisions and that any attempted final regulatory action will be overturned by the courts.[2] The RFA establishes the Chief Counsel as the RFA "watch dog,"[3] and he and his

---

[2] Some thought should be given to whether the Chief Counsel should be given "standing" to seek a temporary injunction when he/she determines an agency is not complying with the RFA.

[3] See Southern Offshore Fishing Ass'n, 995 F. Supp. at 1434; Greater Dallas Home Care Alliance, 36 F. Supp.2d at 767 & n.8. United States Telecom Assc., et al. v. Federal Communications Comm'n, No. 03-1414, slip op. at 26-27 (D.C. Cir. March 11, 2005)

experienced staff have a detailed familiarity with when the RFA should apply, as well as the benefit of an overall perspective on the many and varied ways that agencies attempt to avoid or defeat their RFA compliance obligations.[4] Congress should resolve any potential conflict between the cases in favor of deference to the SBA Chief Counsel for Advocacy on issues within his or her area of expertise.

Third, an amendment is needed to require more detailed analyses to substantiate FRFAs and especially agency "no impact" certifications. Finally, here is no reason why independent agencies should not be covered by the principles in E.O. 13272 and it should be codified.

The proposal under consideration by the Committee includes several other provisions for strengthening the law. Amendments to the Administrative Procedure Act have been rare. Enactment of the RFA and SBREFA occurred over fierce opposition. Thus any proposed amendment to strengthen the RFA will face significant challenges from various Executive Branch and independent agencies, some of which may raise objections worthy of serious consideration. This should not discourage enactment of those provisions deemed most important. I think the fight is worth taking.

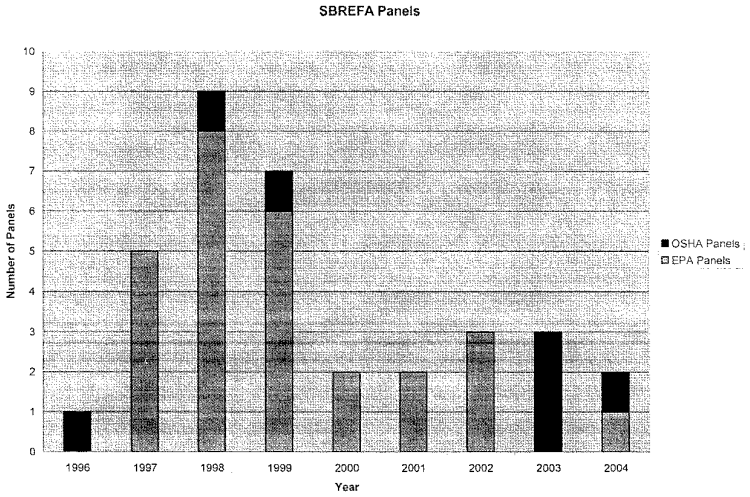
In closing I think it is important to keep in mind that those of us seeking reform bear the burden of persuading agencies and policy makers that preserving competition is a significant national policy - that small business is the force that ensures competition in a market economy --

---

[4] Compare Southern Offshore Fishing Ass'n, supra, n.9, with American Trucking Ass'ns v. EPA, 175 F.3d 1027, 1044 (D.C. Cir. 1999) (no deference owed to either EPA's or SBA's RFA interpretations), modified on other grounds, 195 F.3d 4 (D.C. Cir. 1999), aff'd in part and rev'd in part on other grounds, sub nom., Whitman v. American Trucking Ass'ns, 531 U.S. 457 (2001). Congress should resolve this potential conflict between the cases in favor of deference to the SBA Chief Counsel for Advocacy on RFA issues.

that considering regulatory alternatives that have less adverse and unnecessary impact on small business is not special treatment but rather a way to ensure that all agencies accommodate their regulations to help preserve competition without compromising their statutory mandates.. Preserving competition need not conflict with other congressional mandates to protect the environment, to ensure worker safety, to construct a telecommunications industry that serves all the people, etc. Avoiding unnecessary regulatory harm to small business, results in sound public policy. Agencies need to understand and come to believe that this is the goal of the RFA and that it is good for America.

Jere W. Glover
923 Fifteenth Street, N.W.
Washington, D.C. 20005
202-662-9700
Jereglover@brand-frulla.com


SBREFA Panels
Number of Panels
0
1
2
3
4
5
6
7
8
9
10
1996
1997
1998
1999
2000
2001
2002
2003
2004
Year
OSHA Panels
EPA Panels