# FULL COMMITTEE HEARING REDUCING THE REGULATORY BURDEN ON SMALL BUSINESS: IMPROVING THE REGULATORY FLEXIBILITY ACT

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# FULL COMMITTEE HEARING ON REDUCING THE REGULATORY BURDEN ON SMALL BUSINESS: IMPROVING THE REGULATORY FLEXIBILITY ACT

**Thursday, November 15, 2007**

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON SMALL BUSINESS,
*Washington, DC.*

The Committee met, pursuant to call, at 10:09 a.m., inRoom 2360, Rayburn House Office Building, Hon. Nydia M. Velázquez [Chairwoman of the Committee] Presiding.

Present: Representatives Velázquez, González, Cuellar, Altmire, Clarke, Ellsworth, Hirono, Chabot, Graves, Akin, and Buchanan.

## OPENING STATEMENT OF CHAIRWOMAN VELÁZQUEZ

ChairwomanVELÁZQUEZ. I call this hearing to order to address Reducing the Regulatory Burden on Small Business: Improving the Regulatory Flexibility Act.

We all know that small businesses are the drivers of the American economy. However, small businesses are challenged in their efforts to grow by an ever-increasing Federal regulatory burden. Federal agencies continue to release tens of thousands of pages of regulations each year.

Last year the Federal Register contained nearly 80,000 pages. In its first year of print, it contained only 2,400. The growth in regulations not only increases compliance costs for small businesses, but it also makes it harder for them to compete with larger firms. This is why Congress had the foresight to give small businesses a voice in the regulatory process by passing the Regulatory Flexibility Act or RegFlex in 1980.

This hearing today will look at how RegFlex has worked and how it can be strengthened to help small businesses. The act was originally designed to ensure that the Federal Government considers the impact of its regulations on small entities. On the RegFlex, anytime a regulation has a significant economic impact on a substantial number of small businesses, an agency must consider if there are less burdensome alternatives.

While this Committee is working to ensure the law is being followed, regulators have exploited weaknesses in the law to avoid complying with key requirements. As an example, they have avoided critical requirements by certifying that a rule will not have a significant impact on small businesses. While agencies are required to provide a factual basis for such certification, they often provide

only a simple statement which dismisses the concerns of small firms. This behavior must stop and we will be seeking legislative means to prevent it.

RegFlex can be improved in other areas as well. For example, the act apparently does not define what constitutes an economic impact on small businesses. Courts have said agencies do not have to consider impacts to small businesses that are not directly regulated by the rule. I think regulators should. Agencies need to contemplate the true economic effect of regulations on small firms regardless of whether the firms are directly or indirectly impacted.

There are also many regulations on the books that are outdated, yet continue to create costs for small businesses. While RegFlex requires agencies to periodically review existing rules and consider eliminating all necessary requirements, this section of the law is vague and agencies do not apply these laws with consistency. As a consequence, this part of RegFlex has been much less effective than it could be.

Congress must clarify to agencies when these reviews are to take place, what rules must be reviewed, and how the reviews should be conducted. RegFlex can play a critical role in reducing the regulatory burden on small businesses when agencies properly follow it. However, agencies do not always comply. The litigation over the DHS no-match letter rule illustrates this fact. Fortunately Judge Breyer recognized that the agency may have violated RegFlex in this rulemaking and prevented DHS from enforcing the rule.

That was not an isolated case, and more must be done to strengthen RegFlex compliance.

I look forward to today's discussion and the panelists' experience with RegFlex and how it could be improved. I also want to thank all the witnesses that are here this morning for your participation. It is critical because small businesses bear a disproportionate share of the Federal regulatory burden. A recent study conducted for SBA found that regulatory costs for small businesses are 45 percent greater than that for larger firms. Small businesses must have input in this process to help agencies identify existing rules that are problematic. We need to ensure that there is a meaningful way to enforce this part of the act too. I look forward to working with Ranking Member Chabot in crafting a bill that will make RegFlex even better.

ChairwomanVELÁZQUEZ. I yield to the Ranking Member for his opening statement.

**OPENING STATEMENT OF MR. CHABOT**

Mr.CHABOT. Thank you very much. And I want to thank you, Madam Chair, for holding this hearing on the implementation of the Regulatory Flexibility Act. This hearing continues the Committee's tradition of annually examining agency compliance with the RFA in asking whether the statute needs amendment. The RFA is an important law that, if fully complied with both in letter and spirit, has the potential to significantly reduce the regulatory burdens on small businesses without undermining protections inherent in various Federal statutes.

Efforts led by the President, the Office of Information and Regulatory Affairs, and the Chief Counsel for Advocacy have resulted in

improving agency compliance with the RFA. However, these efforts continue to be hindered by bureaucrats who seek to perform the minimum amount of analysis possible and courts that seek to abet them in these efforts. Federal agencies that fail to comply with the mandates of the Regulatory Flexibility Act undermine a basic premise of the act, that being to create an economic impact statement that was akin to an environmental impact statement that agencies must prepare pursuant to the National Environmental Policy Act.

The parallels between the two statutes, recognized by the courts, take that parallel only so far since the detail required by the RFA is far less than that required by the NEPA. The Small Business Committee regularly sees the impact that regulations have on small businesses struggling to survive and grow. Detailed analysis of the impact of regulations on small businesses is necessary to ensure that regulators are not making irreversible decisions that will reduce the competitive ability of small businesses, prevent them from expanding, allow them to raise capital or harm the growth of the American economy.

When the RFA was enacted, opponents said it would slow the promulgation of rules. Any examination of the Federal Register today as opposed to the way it was back in 1980, I think, puts to rest that concern. Ultimately what is at stake is the ability of small businesses to stay in business based not on the whims and dictates of Federal bureaucrats, but on their capacities in the marketplace. Better, sounder rules will lead to improved compliance and lower costs.

I hope that this hearing spurs Congress to improve the Regulatory Flexibility Act to ensure that Federal bureaucrats care that the law is on the books.

I want to thank the witnesses for taking the time to provide their insights into agency rulemaking and how the RFA fits or does not fit into that process. And I again want to thank you, Madam Chair, for holding this hearing, and I will yield back the balance of my time.

ChairwomanVELÁZQUEZ. Thank you.

ChairwomanVELÁZQUEZ. And now I recognize Mr. Graves for the purpose of introducing our first witness.

Mr.GRAVES. Thank you, Madam Chair. Thank you very much for having this hearing on regulatory relief, and it is a pleasure of mine to introduce a constituent of mine, Joe Rajkovacz from northwest Missouri, actually from the Blue Springs area. Joe has made a successful career out of truck driving over the last 30 years, and he is currently employed by the Owner-Operator Independent Drivers Association, which is also headquartered in my district.

He is the regulatory affairs specialist, and today he is speaking on their behalf this morning. I do look forward to his insight into the business and how the Federal Government impacts the trucking industry. And I want to thank you for making the trip to Washington. I know very well how long a trip that is. And I appreciate you being here.

ChairwomanVELÁZQUEZ. Mr. Rajkovacz, welcome. You have 5 minutes. Look at the clock there, the green light means that you

have 5 minutes, and then the red light means your time is expired. Thank you.

**STATEMENT OF JOE RAJKOVACZ, REGULATORY AFFAIRS SPECIALIST, OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION**

Mr.RAJKOVACZ. Good morning Madam Chairwoman, Ranking Member Chabot, and distinguished members of the Committee. My name is Joe Rajkovacz and I have been involved in the trucking industry for more than 30 years and currently serve as regulatory affairs specialist for OOIDA. Prior to joining the staff, I was a small business trucker for more than two decades. I owned both my truck and trailer and leased them, along with my services, to a motor carrier.

Small businesses dominate the trucking industry in the U.S. One-truck motor carriers represent roughly half the total number of motor carriers operating in our country, while approximately 90 percent of U.S. motor carriers operate six or fewer trucks in their fleets.

Considering that roughly 69 percent of rate tonnage in the U.S. is moved by truck, it is certainly not a stretch to say that small business truckers are truly the backbone of our Nation's economy.

Small business truckers support a safe and efficient industry as well as rules that safeguard our national security interests. However, they expect the Federal Government to implement regulations with some level of commonsense and fairness and take into consideration the tremendous economic impact and operational burdens that regulations promulgate on the small businesses that drive our economy.

OOIDA's experience has shown us that small business issues and regulatory flexibility analysis are all too often an afterthought with Federal agencies. Some improvement needs to be made to strengthen and expand the Regulatory Flexibility Act so that it better serves its purpose, to require agencies to choose regulatory schemes and rules that achieve their goal in the least burdensome manner on small businesses.

My first suggestion is expanding the RFA to require Federal agencies to make a greater effort to coordinate the regulatory efforts. The jurisdictional separation of Federal agencies, and even constraints within single agencies, can oftentimes be an obstacle to the creation of clear, consistent regulations that would be less burdensome to small businesses.

An obvious example is the identical threat assessment required by the TSA for both the trucking Hazmat endorsement and the TWIC card. The cost for a Hazmat endorsement background check ranges from $94 to $129. Truckers are also required to go through an identical background check for the TWIC program at an added cost of $105 to $132. The TSA also did not take into consideration the additional cost to small business truckers from lost operational time while they are securing these credentials.

OOIDA believes that clarification from Congress will break down the jurisdictional walls that prevent agencies from working together or working within themselves to reduce the burden of its rules on small businesses.

My next suggestion is that the RFA be expanded to apply to agency actions beyond rulemaking, such as informal adjudications and pilot programs. As you know, the USDOT is conducting a pilot program permitting Mexico domicile trucking companies and truck drivers to operate throughout the U.S. In creating this program the DOT has completely disregarded the impact it will have on small businesses. This program will most certainly mean a loss of economic opportunity for thousands of small business truckers in the U.S., while jeopardizing the safety and security in their operating environments.

DOT has undertaken no estimate of how many U.S. jobs will be lost to their pilot program or how freight rates paid to small business truckers will be affected. Only large U.S. motor carriers appear to have the resources and infrastructure necessary to have a realistic opportunity to do business and expand their operations in Mexico. As an informal adjudication, the pilot program is not a rulemaking subject to the RFA. If DOT had been required to review the impact of this program on small businesses, the public and Congress would have had much more information on which to evaluate the wisdom of this undertaking. Again, agencies should be required to consider the impact of all their actions on small businesses, not just rulemakings.

Next, I would suggest requiring agencies to make more concrete findings of fact and cost analysis on the economic impact of their actions on small businesses. An example is the FMCSA's electronic onboard recorder proposal. This is a potential expensive and burdensome mandate requiring truck drivers to install new equipment on their vehicles to monitor their compliance with the Federal hours of service regulations. This mandate will not achieve its intended safety goals. So far the agency has provided no analysis to support conclusions that EOBRs will improve safety and justify their cost. OOIDA feels that the agency paid no attention to the impact of the rulemakings as a whole on small business. The only impact of the rule on small businesses noted by the agency is the potential cost of equipping the truck with an EOBR. There are numerous other costs associated with this rulemaking that were not even considered by the agency.

I see my time is up. I thank the Committee very much.

ChairwomanVELÁZQUEZ. Thank you.

[The prepared statement of Mr. Rajkovacz may be found in the Appendix on page 30.]

ChairwomanVELÁZQUEZ. Our next witness is Mr. Christian A. Klein. He is the executive vice president to the Aeronautical Repair Station Association and a managing member in the law firm of Obadal, Filler, MacLeod & Klein, P.L.C. He represents the interests of ARSA members on Capitol Hill. ARSA represents over 700 and was founded in 1994.

Welcome, sir.

**STATEMENT OF CHRISTIAN A KLEIN, EXECUTIVE VICE PRESIDENT, AERONAUTICAL REPAIR STATION ASSOCIATION**

Mr.KLEIN. Thank you very much, Chairwoman Velázquez, Ranking Member Chabot, other distinguished members of this Com-

mittee. Its my pleasure to be with you today in my capacity as executive vice president of ARSA. For those of you who aren't familiar with us, ARSA is a 670-member strong trade association that represents aviation maintenance, design and manufacturing companies. Our members fit squarely into the small business demographic.

By way of example, we did a member survey a couple months ago that found that close to two-thirds of our members have 50 or fewer employees and that close to half of our members are owned by a single individual or a single family. Nationwide there are about 4,200 FAA-certificated repair stations, and just to give you a sense of the economic footprint of our industry, we have included as appendix A of our testimony a State-by-State breakdown, showing the number of repair stations in each State and the number of people they employ.

I have been asked to comment today on the lessons that ARSA has learned over the last 2 years in the course of challenging the new FAA rule under the RegFlex Act and suggest some modifications to the RegFlex Act.

The background in our case is as follows. In early 2006, January of 2006, the FAA issued a new rule that dramatically expanded the scope of the agency's drug and alcohol testing program. And under the new rule, machine shops, dry cleaners, local electronic repair stores that occasionally and incidentally did business with us, with certificated repair stations, would be forced—was basically given a difficult choice, either implement a Department of Transportation-approved drug and alcohol testing program or stop doing business with the aviation industry.

Now during the rulemaking process, the FAA estimated the impact—that the rule would impact fewer than 300 entities and that a RegFlex analysis wasn't necessary. We conducted a survey of our members and the results were analyzed by a well-known aviation industry economist and our survey suggested that, in fact, the rule would impact between 12,000 and 22,000 companies. Based on this information, the Small Business Administration's Office of Advocacy got involved in the process and urged FAA to conduct a full RegFlex analysis, consider policy alternatives et cetera.

Unfortunately, when the FAA issued its regulation in January of 2006, the agency completely ignored ARSA's data, they ignored the SBA Office of Advocacy, they even ignored Members of Congress who, during the rulemaking process, had weighed in and expressed concerns about the way the FAA was handling the regulatory flexibility issues. So last March ARSA filed a lawsuit challenging the new FAA rule on, among other theories, a RegFlex theory. In a decision that was issued this past summer, the court agreed with ARSA on the RegFlex issue; that it found the FAA had violated the RegFlex Act and remanded the rule to the FAA for a complete RegFlex analysis.

So what does this case teach us? And what lessons can be learned, and what does it suggest about ways to improve the RegFlex Act?

The first thing we learned is that courts are willing to forgive violations of the Regulatory Flexibility Act when agencies use safety arguments as justification, regardless of the real merit of those

safety arguments. In our case, the court refused to stay the enforcement of this new rule despite the fact that the FAA had blatantly violated the law and despite the fact that tens of thousands of businesses were potentially going to be affected.

So we think this is a substantial hole in the RegFlex Act and it suggests to us that Congress should consider amending the RegFlex Act to prohibit the enforcement of rules that have been successfully challenged in court of the RegFlex Act unless some extraordinarily high standard of public interest is met.

The second suggestion we have, or the second lesson we learned is that the costs of bringing RegFlex lawsuits are prohibitive, and that the prohibitive costs of the lawsuits probably means that many agency actions are never challenged.

To put it in perspective for you, in the course of our case, we accrued about $300,000 in legal bills, and that is a lot of money for a small association with an annual budget of less than $1 million. So it creates a situation in which a statute that was crafted to protect small businesses may in fact cripple small businesses that try to enforce their rights under the law.

So it suggests to us that Congress should consider creating some sort of loser-pay standard in which, if an agency action is successfully challenged under a RegFlex Act, that a court be able to order agencies to pay attorney's fees and legal fees and court costs for agencies and small businesses that successfully challenge agency actions under the RFA.

And finally, you know, just to comment on the small business Office of Advocacy, throughout the process the Office of Advocacy played the role of the honest broker between business and industry. And, unfortunately, the FAA ignored everything the Office of Advocacy said. So it suggests to us that something should be done to improve the authority of Office of Advocacy.

Madam Chair, I see that my time is about to expire, and I wonder if I might be granted one more minute to make a final point.

ChairwomanVELÁZQUEZ. Without objection.

Mr.KLEIN. In concluding, I just would like to point out that, unfortunately, Congress bears some of the burden or some of the culpability for the fact that agencies are flouting the RFA. Unfortunately, we see with increasing frequency that the House and the Senate are passing bills that artificially limit the amount of time that agencies are given to conduct rulemakings. And this in turn limits the amount of time that agencies have to conduct RegFlex analyses and the amount of time they have to consider other real policy options.

An example that was near and dear to our heart was a recent inclusion in the 9/11 Commission bill provision that artificially shortened the amount of time available for repair station security rulemaking. I know that there are organizations out there concerned about similar provisions in the S-MINER bill that are going to limit the amount of time available for rulemakings.

So I would just suggest that Congress consider the mixed messages it is sending to agencies. On the one hand, it tells agencies to do it fast rather than doing it right, and on the other hand turns around and takes agencies to task for failing to abide by the RegFlex Act.

So thank you very much again, Madam Chair, for holding this hearing. We appreciate this opportunity and we look forward to working with you and Ranking Member Chabot to craft meaningful RegFlex reform.

ChairwomanVELÁZQUEZ. Thank you, Mr. Klein.

[The prepared statement of Mr. Klein may be found in the Appendix on page 38.]

ChairwomanVELÁZQUEZ. Our next witness is Mr. William A. Dombi. He is the vice president for law with the National Association for Home Care and Hospice. Mr. Dombi is an attorney with more than 27 years of experience in administrative law and has acted as the director for the Center For Health Care Law with a membership base of 6,000 members. NAHC represents home care agencies, hospices, home care aid associations, and medical equipment suppliers. Welcome, Mr. Dombi.

**STATEMENT OF WILLIAM A. DOMBI, VICE PRESIDENT FOR LAW, NATIONAL ASSOCIATION FOR HOME CARE AND HOSPICE**

Mr.DOMBI. Good morning. Thank you, Madam Chair and Ranking Member Chabot, to be here today to testify on what we consider one of the more important areas of law: regulating the administrative agency action.

Home care and hospice is small business. By the nature of the service, it is local and it will probably always be a small business because it has to be so localized. There are over 8,800 Medicare home health agencies that provide service and the vast majority, over 80 percent, fit the definition of small business. Hospices, there are about 3,000 now in the country, and about 2,700 of those meet the definition of small business. So we are well within the realm of the Regulatory Flexibility Act.

Over the years when we uncovered the Regulatory Flexibility Act as a potential protection for our constituency, we saw great strengths and some weaknesses as well. And today I am here to offer a few recommendations on how we can strengthen it further.

To start with, we just would like the Committee to recognize that we are not only regulated as an industry delivering care, but we are the customer of the Federal Government, in most instances. They purchase services from our membership, primarily Medicare and Medicaid services. And in our experiences with the regulatory actions of the Centers for Medicare & Medicaid Services, we come to these three recommendations.

First—and this mirrors what we have seen from testimony from other witnesses as well—there needs to be some strengthening of the design and criteria for undertaking an impact analysis. As an illustration, my testimony focuses in on a recent rule of the Medicare program which sets payment rate structures for the Medicare home health benefit. It encompasses a $6 billion cut in spending for home health services over the next 5 years in a program where spending is well within control. In fact, it has been for the last 10 years lower than anticipated expenditures that CBO and OMB have projected for that benefit.

But when looking at it from the Regulatory Flexibility Act perspective, what we see is that it offers no transparency. To this date, 3 months after the final rule has been issued, we still do not know why that cut is in that regulation. The technical report which is supposed to be the foundation for the analysis on that cut has yet to be released publicly. But most importantly, when we look at the impact analysis that the Medicare program issued on this, they simply looked at a 1-year impact on a regulatory action that has 4 consecutive years of cuts. And beyond that, when looking at it, they looked at it simply from the perspective of what percentage change in revenue would exist.

In my testimony in addendum A, I included a map of the United States, which uses the colors that you normally have when there is alarm struck—yellow, orange, and red—indicating the percentage of Medicare home health agencies where Medicare margins will be less than zero after this regulation takes effect.

Madam Chair, in your State between 70 and 90 percent of all home health agencies will be losing money delivering services to Medicare patients. And Medicare is the best payer home care has. So this is a serious issue, RegFlex, in terms of the impact analysis requirements.

Second recommendation. The breadth of coverage of the Regulatory Flexibility Act should be expanded to include guidelines and policies of general applicability. Rarely does the Medicare program engage in formal rulemaking in what would be constituted as a legislative rule subject to RegFlex.

An example of a disastrous policy that just was recently released by the Medicare program affects hospices. As of July 1, all hospices will be required to bill on a discipline-specific, per-visit basis with charges based on those disciplines of service. And that may not sound too concerning to people at first blush, but when you understand that hospice, since its inception, has been a per diem service with bundled disciplines of care, the hospices that deliver the services do not even record the number of visits by discipline. Medicare is suggesting that they also include the number of visits by discipline for when the person is an inpatient in a hospital, counting the number of times a nurse walks in the room for that individual, and then to create a charge for that service, which doesn't exist at this point too. Entirely new billing systems, entirely new business practices would be required.

And finally, the recommendation goes through a progeny of the RegFlex Act—that is the Congressional Review Act—where Congress has the power to invalidate a regulation.

We recently had an experience with this where Congress was interested in invalidating a regulation affecting home health services, but was told by a legislative counsel in the House that we could only invalidate the entire regulation, not just the offending portion.

Medicare has been issuing regulations that are apples and oranges. Recently a regulation of physician fees was combined with the regulation on therapy services criteria, completely unrelated.

But I thank you for the opportunity to be here today and I look forward to working with the Committee.

ChairwomanVELÁZQUEZ. Thank you, Mr. Dombi.

[The prepared statement of Mr. Dombi may be found in the Appendix on page 49.]

ChairwomanVELÁZQUEZ. Our next witness is Mr. Jeffrey S. Lubbers. Professor Lubbers is a fellow in law and government at American University's Washington College of Law. Prior to joining American University he served in various positions with the Administrative Conference of the United States. From 1982 through 1995 he was the ACUS research director and coauthor of the 1992 study, ″The Federal Administrative Judiciary.″ Welcome.

**STATEMENT OF PROFESSOR JEFFREY LUBBERS, WASHINGTON COLLEGE OF LAW, AMERICAN UNIVERSITY**

Mr.LUBBERS. Thank you very much and good morning, Madam Chair and members of the Committee. I am pleased to be here this morning to discuss the Regulatory Flexibility Act.

My impression is that the act has had a beneficial act under the stewardship of the SBA's Office of Advocacy, but I welcome this Committee's review of the need for improvements. My written testimony describes the requirements of the act.

Today I would like to focus on several issues raised by its implementation. First, the RFA's triggering language. The RFA's central provision allows agencies to omit a RegFlex analysis if the agency head certifies that the rule would not have a significant economic impact on a substantial number of small entities. The meaning of this unwieldy phrase, which has been given the unfortunate acronym of SEISNOSE, has become the pivotal threshold issue for agencies when they determine whether or not to undertake the drafting of an initial RegFlex analysis.

The GAO has concluded that the lack of clarity in the SEISNOSE phrase is hampering the success of the entire act. The phrase raises at least three questions. First, what is a significant economic impact? Second, what is a substantial number? And third, what are small entities? Despite the chief counsel's useful compliance guide that describes the legislative history and court decisions on the meaning of SEISNOSE, there still seems to be uncertainty as to this key issue. The GAO suggested that perhaps the chief counsel should be delegated the responsibility to make such interpretations. I would defer to the chief counsel's view on this, but I note that in the analogous area of environmental impact statements, the President has authorized the CEQ to issue binding regulations concerning the implementation of NEPA by Federal agencies. And you may wish to consider this for the chief counsel.

Another apparent problem is that many independent agencies assert they are not subject to President Bush's Executive Order 13272 that enhances the chief counsel's role. It has been recommended that Congress codify the executive accord, and that is certainly worth considering.

Another triggering issue is that the act does not apply to the vast amount of administrative activity that is not rulemaking, such as adjudication, consent decrees, and other types of informal actions. It also does not reach most rulemaking that is not subject to notice

in common, such as policy statements and other subject matter rules exempted from notice in common under the APA. I think it would be difficult to draft a provision that would apply the act to the wide variety of nonbinding guidance that agencies issue to the public. And OMB is attempting to rein that in right now. So I don't advocate expanding the act's coverage in this regard at this time.

I do think that Congress should amend the APA to eliminate the exemption from notice and comment for rules relating to public property loans, grants, benefits or contracts, however.

Second issue concerns the role of judicial review. The courts have by and large used a reasonableness test to review agency compliance with the statute. But they have been willing to invalidate agency certifications in enough cases, including the ARSA case and one involving the Homeland Security Department, that agencies should now know that they have to take their RFA responsibility seriously.

But I do agree with Madam Chair that perhaps you should consider making indirect impacts covered under the act as well. I think that would be reasonable. Even though agencies can't consider every possible ripple effect, they should be able to consider substantial indirect impacts on small entities.

In terms of the role of the chief counsel, I think they have been doing an excellent job. I guess the main issues are whether the office should be given even more authority, as mentioned before, and perhaps whether the office should be established as an independent agency with its own budget, more along the lines of the Office of Special Counsel that was set up to protect whistle-blowers. In terms of the tenure review required by section 610, the recent commentaries on that have suggested that it is not working very well.

My own view is that some of the cures that have been mentioned, such as automatic sunsets and so forth, might be worse than the disease. I would prefer to see the mandatory tenure review scrapped in favor of a more targeted approach.

A recent GAO report concluded that agencies feel that their discretionary review of existing rules is much more effective than mandatory reviews. So I believe that the approach that OMB has been using since 1997 of seeking nominations from the affected public about which existing rules to review should be used.

In terms of the advocacy review panel requirements in section 609, according to the chief counsel's Web site, there have only been 31 EPA panels and 8 OSHA panels since 1996, which is a low number. And I believe that is because EPA has started to not certify—or started to certify rules as not affecting small business to avoid these panels. And I think this might be a good issue for a study by a revived administrative conference.

If I could take one more minute?

ChairwomanVELÁZQUEZ. Sure.

Mr.LUBBERS. Thank you very much. I also want to mention that RFA, of course, is one of many statutes and executive orders that requires agencies to take over a dozen separate analyses whenever they do a rulemaking. And I just heard that the administration is considering a new one with respect to impact analysis on international trade. Each one of these, of course, is defensible and has its own constituency. But at some point, the agency's rulemaking

role becomes hampered if the task of doing these analyses is not made more straightforward and coordinated.

I think we have to keep in mind that even though rules have costs, they also can have great benefits. And OMB recently reported that estimated quantified and monetized annual benefits of the major Federal regulations it reviewed far exceeded the estimated costs.

I would also note in conjunction with Mr. Chabot's comment that the Federal Register is increasing, but actually the number of rules issued by Federal agencies has dropped significantly since the 1980s period. The government is now publishing 48 percent fewer final rules and 61 percent fewer proposed rules as compared to 1979.

Agencies' budgets, of course, are flat lined these days, so I would also suggest that in addition to perhaps considering new requirements for the agencies to do things under the act, perhaps the Committee could pursue ways to provide additional funding for agencies based on the number of analyses they have to do, the number of panels they set up, the number of reviews that they do; and also to respond to ARSA to perhaps provide for attorney's fees in situations like where ARSA won their case, where they in effect acted as a private enforcer of the law.

So I would hope the Committee might consider that. Thank you very much.

ChairwomanVELÁZQUEZ. Thank you, Professor Lubbers.

[The prepared statement of Mr. Lubbers may be found in the Appendix on page 65.]

ChairwomanVELÁZQUEZ. Our next witness is Ms. Maureen Morrissey, the assistant general counsel for the Americas Tupperware Brands Corporation. Prior to joining Tupperware in 1993, Ms. Morrissey worked in a private practice as a tax attorney with two boutique law firms as its tax specialist. Her current responsibility as assistant general counsel of the Americas include responsibility for Tupperware sales organizations in the United States. Tupperware has a sales force of over 1.9 million people.

Welcome.

**STATEMENT OF MAUREEN M. MORRISSEY, ASSISTANT GENERAL COUNSEL, THE AMERICAS TUPPERWARE BRANDS CORPORATION**

Ms.MORRISSEY. Thank you, Madam Chairwoman and esteemed members of the Committee. Good morning. My name is Maureen Morrissey and I am assistant general counsel for the Americas Tupperware Brands Corporation. My testimony focuses on the Federal Trade Commission's business opportunity rule, a proposed regulation published in April 2006 that generated over 17,000 comment letters.

Specifically, I want to address how the FTC has analyzed the regulation pursuant to the Regulatory Flexibility Act. Tupperware Brands Corporation is a publicly traded direct seller of premium innovative products, headquartered in Orlando. For over 60 years

Tupperware has been one of the best known brands in America and a leader in the direct selling industry. The term ″Tupperware parties″ has now entered the American lexicon due to their widespread popularity.

Tupperware products are sold primarily through the party plan. Our business model is based on direct sales to customers by our individual sales consultants, each of whom is a self-employed business owner. Today Tupperware has more than 180,000 independent contractor sales consultants in the United States. They are working in every district served by the members of this Committee. Through Tupperware, these individuals are able to operate their own small businesses and earn significant incomes. For many, selling our company's products is a full-time job.

Tupperware is very concerned about the impact of the FTC's business opportunity rule on these small businesses. In a nutshell, the regulation proposes burdensome new requirements that must be met before individuals can enter into a new business opportunity that requires any level of up-front investment. The stated objective of the regulation is to target fraudulent schemes. And I want to stress that Tupperware fully supports the FTC's efforts to crack down on arrangements that involve misrepresentations and fraud. However, the true scope of the regulation is far broader. The new requirements also would apply to legitimate direct selling opportunities, such as those offered by Tupperware.

The proposed requirements of the business opportunity rule are indeed onerous. Of greatest concern, the regulation would impose a waiting period requirement under which business opportunity purchasers would have to wait for 7 days from the time they first receive information from the seller before they begin setting up their business. In practice, however, the rule would mean new Tupperware sales consultants would have to wait for weeks before they could begin making sales. This would fundamentally alter the direct selling business which today is marked by ease of entry.

The waiting period requirement would mean fewer recruits. And for those recruits who do eventually become consultants, the waiting period would significantly dampen their enthusiasm at the time of their first recruiting contact. As a result, recruits would end up being less successful. The individual sales consultants who recruit them also would suffer through lost commissions on downstream sales.

Now I would like to turn to the Regulatory Flexibility Act. As you know, the RFA requires agencies to prepare an initial regulatory flexibility analysis, or IRFA, when proposing a new rule with potentially significant impact on small entities. The FTC stated in a preamble to the regulation that it did not expect that the business opportunity rule would have a significant economic impact on substantial numbers of small entities. The FTC nevertheless prepared an IRFA for the regulation, and, in doing so, concluded that the regulation would only affect 3,200 small businesses, including 2,500 vending machine and related opportunity sellers and 550 work-at-home companies. Nowhere is there any mention of the impact on individual sales consultants whose very real income earning opportunities would be restricted by the rule. Yet the impact

on these independent small businesses should have been readily apparent.

It is telling that the FTC received more than 17,000 comments on the proposed rule, far more than the 3,200 potentially affected entities identified by the FTC. Most of the comments were submitted by individual sales consultants harshly critical of the impact on their ability to earn income. These are the small business owners whom the RFA is supposed to protect and whose livelihoods are the subject of this Committee's jurisdiction.

Simply put, the objectives of the RFA are not being met when an agency overlooks the impact of a rule on the types of small businesses operated by Tupperware sales consultants.

And it is not just Tupperware consultants who are at issue here. There are more than 10 million direct sales consultants in this country selling products offered by Mary Kay, Avon, Longaberger and others. The impact is real. My phone is still ringing with the complaints from our sales force consultants who are worried about their futures. The Regulatory Flexibility Act needs to protect their interests.

Either the FTC did not comply with the act in issuing the business opportunity rule or the act itself needs to be strengthened to ensure that these types of small businesses are not overlooked in the future.

Thank you for permitting me the opportunity to testify today and to represent the interests of our 180,000 consultants whose small businesses are at risk.

ChairwomanVELÁZQUEZ. Thank you, Ms. Morrissey.

[The prepared statement of Ms. Morrissey may be found in the Appendix on page 81.]

ChairwomanVELÁZQUEZ. Mr. Rajkovacz, I would like to address my first question to you.

The Regulatory Flexibility Act requires agencies to prepare a regulatory flexibility analysis when proposing a rule that may impact small businesses. The current law allows agency heads to avoid conducting an analysis if they certify that there will be no impact on small businesses. Agencies often exploit this loophole by providing a short dismissive statement.

Should the law be changed to close this loophole? And do you believe it would be beneficial to require agencies to provide greater detail why there would be no impact on small businesses?

Mr.RAJKOVACZ. Yes, I do. What you described is an agency, in essence, waving a magic wand and saying there is no impact when, in fact, there can be a very severe impact to small businesses. You are absolutely correct in how you raised that.

ChairwomanVELÁZQUEZ. Mr. Klein, RegFlex requires the Federal Government, when conducting an analysis, to describe significant alternatives to a rule that could minimize the economic impact on small businesses. I know that regulators don't always make a great effort to examine those alternatives.

What has been your experience as to rulemaking on this front? And are agencies taking a serious enough look at alternatives to the rules that minimize burden to small businesses?

Mr.KLEIN. Well, again, I certainly don't want to speak for every agency in every situation. I can certainly say in our case the FAA didn't meet the responsibility. And the good news is that from what we are hearing from inside the FAA, that they have felt the sting of our lawsuit and they are taking their responsibilities somewhat more seriously internally and they are giving RegFlex issues some more scrutiny.

But, again, I think that to go back to my statement, I think that there are things that Congress should consider doing to tighten up the RegFlex Act. Again, I think some sort of concept of—sorry.

ChairwomanVELÁZQUEZ. Do you think if it requires loser-pay standards that also will be an incentive for agencies to be more cautious?

Mr.KLEIN. Exactly right. I think that holding a Sword of Damocles would make a big difference.

ChairwomanVELÁZQUEZ. Could you talk to us about any other ways that we could strengthen RegFlex to ensure that agencies do a better job of considering alternatives to the rule?

Mr.KLEIN. Well, again, I think number one would be to—again, the loser pays thing would be one great way to do it. I think that giving the Office of Advocacy a greater role in the process to—you know, again I think right now you have a watchman who is supposed to be watching the watchman. But unfortunately the watchman has a .357 Magnum, and the watchman watching the watchman has a little butter knife. And I think if there was a way to beef up the authority of the Office of Advocacy and we give them more authority to prod the agencies—because again, in our case, the FAA just ignored the Office of Advocacy—I think that would make a big difference.

ChairwomanVELÁZQUEZ. Professor Lubbers, in September I sent a letter to Secretary Chertoff regarding the agency's failure to comply with RegFlex in promulgating the no-match letter rule. In litigation over the rule, Judge Breyer enjoined it largely due to RegFlex issues.

Can you discuss the importance of judicial review of RegFlex in the context of this case and how critical is judicial scrutiny in ensuring RegFlex compliance.

Mr.LUBBERS. Well, I think the judicial review is the backstop for complying with all of our Federal procedural laws. And we have seen that the courts have been very vigilant in enforcing the Administrative Procedure Act's requirements on agencies. And here with the ARSA case and the case in California that you mentioned, I think the agencies are probably getting the message now that they really have to take the RegFlex Act seriously as well. But also point out that the Chief Counsel's Office has the power to go into court and support small businesses as an amicus curiae, as a friend of the court, and I don't know how often the Chief Counsel's Office has been doing that or is able to do that. I suspect the Department of Justice might not particularly like that when they come in and sort of argue against the government's position. But I think that is another thing the Committee might want to look at.

ChairwomanVELÁZQUEZ. Thank you. Mr. Dombi, not all agencies' actions are subject to the requirements of RegFlex. And even though some of those actions will have an impact on small busi-

nesses. The act only applies to rulemakings that are required to be published pursuant to notice and common rulemaking under the APA. In your testimony, you touch upon this issue.

Can you further discuss some of the agency's actions that your industry has monitored that were not covered by RegFlex but have had a significant impact on small businesses?

Mr.DOMBI. Certainly. Actually, Medicare's habitual approach is to use policy guidelines that change seemingly at their whim. In addition to the hospice rule that I mentioned to you on billing practices, they have made major changes in what we call the oasis patient assessment instrument, which is a uniform data collection device which is all driven by both time and technology to have it be accomplished. They do not do a RegFlex analysis at all relative to this oasis instrument. That is one of the more time-consuming elements of the delivery of services for home health service.

The Medicare coverage standards themselves for home health and hospice services are built into regulations. But the real meat of the coverage standards are in what is known as the health insurance manuals, which are these Internet-based manuals where transmittals are issued without any opportunity for public notice or comment and certainly no RegFlex analysis.

When you look at the Medicare regulations on home health and hospice, they may compromise 20 or 30 pages of a CFR, but the guidelines themselves compose somewhere in the neighborhood of 4,000 to 5,000 pages.

ChairwomanVELÁZQUEZ. Thank you.

Ms. Morrissey, I would like to talk to you about—the FTC certified that there will not be significant economic impact on small entities from the business opportunity rule. Even though the agencies certify no impact, it still conducted an initial regulatory flexibility analysis. Was the FTC's regulatory flexibility analysis deficient in any way?

Ms.MORRISSEY. We certainly believe that it was. It appears that it was very, very cryptic on its face. And even considering just one of the industries, such as direct sales that clearly was impacted by the rule, they seem to have assumed that it would only apply at the entity level, such as a Tupperware Brands Corporation level, rather than taking into account the persons within a sales organization who are themselves self-employed business entities who would actually be directly impacted by the rule. And in that instance we certainly think that there was a wide miss when they took aim.

ChairwomanVELÁZQUEZ. Thank you. And now I recognize Mr. Chabot.

Mr.CHABOT. Thank you very much, Madam Chair. Ms. Morrissey, I will begin with you if I can. First of all, I just might note, I wasn't even aware you could still get Tupperware out there, because I thought my wife had already bought it all. She has been to a lot of those parties over the years. It is pretty popular.

Ms.MORRISSEY. We like to hear that.

Mr.CHABOT. Okay. But in all seriousness, you mentioned, I think, that you were aware of about 17,000 comments I think at one point. And I am just curious. How much weight do you believe—or how much confidence do you have that the government

agency involved either in this case, or really in any of them, fully take into consideration that input when they issue a rule or make a decision or whatever? Just as a person that is out there in the private sector, what do you feel about it and what do you think generally people think about that?

Ms.MORRISSEY. Well, I think that everyone would like to believe that when people are given the opportunity to speak out on a rulemaking process, that the officials who are charged with enacting rules and regulations in good faith take heed of the comments that are being submitted.

I think in this case perhaps the volume of them in and of itself was so overwhelming that I think it has caused the FTC, certainly in this instance, to pause and reflect. At least that is our expectation and that is our belief currently. Whether or not that will actually translate into anything meaningful for small business remains to be seen. But we are certainly optimistic that the FTC will reach out to those who did submit substantive comments and ask for their opinions, and hopefully hold public hearings and really delve into some of the crucial issues that were raised during the comment period.

Mr.CHABOT. Right. And I would agree. That is what should happen. I certainly hope it does happen in most if not all cases because we—us being, I guess, the faces to some degree of the Federal Government and the agencies, when people take the time to comment to the government, we certainly ought to factor that into our decisions.

Let's see. Professor, I will move to you next if I can. You had mentioned that you were—you know that there is an awful lot of analyses oftentimes that are done now whenever there is a rule that is being considered by a specific agency. And it can be pretty overwhelming, and that maybe that slows down the process or whatever.

I was just wondering if you could expound upon that just a little bit. I know that you have got environmental impact statements. I was a cosponsor of a bill that would—we were concerned that the government was issuing rules. Oftentimes it wasn't necessarily factoring into consideration the impact on privacy of people when we do things, and that had to be a thing which was well-intended, but we knew that was another level of kind of bureaucracy, or it slows things down. And I am just kind of interested to hear you talk a little bit more about that.

Mr.LUBBERS. Sure. In addition to the statutes you have mentioned, there is also the Paperwork Reduction Act, the Unfunded Mandates Reform Act, and many executive orders issued by various—various Presidents that are still in effect that mandates specific impact analyses. There is analyses that are required on federalism issues, impact on State, local and tribal governments, on energy distribution and usage, on the health of—environmental health of children, environmental justice issues in terms of citing things in minority communities. I know I am forgetting some.

Mr.CHABOT. Do I hear what your point is, is that maybe each one of those individually seems like a well-intentioned concern?

Mr.LUBBERS. Exactly.

Mr.CHABOT. But maybe cumulatively we maybe need to step back and—

Mr.LUBBERS. That is my point. And I think that, you know, you mentioned the pages of the Federal Register. And one of the reasons the Federal Register has expanded so much is that when you look at the preambles of these rules now, they are very long. And one of the reasons that they are long is the agency has to go through sort of a boilerplate litany; this rule does not affect x, does not affect y, does not affect z. And sometimes, of course, they have to actually sometimes do these analyses and that is not cost-free for the agencies.

I am sure this Committee is not a great venue to talk about the needs of Federal agencies to do more regulation. But you know, I think we have to recognize that Congress does delegate a lot of responsibility to the agencies to issue regulations.

Mr.CHABOT. Thank you very much.

Mr. Dombi, you had mentioned—I know being in the hospice and the health care industry that you are—you had talked about, I think, the $6 billion or so in the Medicare—the cuts that you were concerned about. And the thing I was thinking about as you were talking about that was, it seems that Congress over the years—this was whether it was under Republican control or under Democrat control, it happened I think under both sides. Oftentimes there will be the cuts that are in either the budget at the early part of the year or in some authorization bill—and you all get all that information out there that there are going to be these cuts—and you have to be very concerned about them. And ultimately Congress doesn't pass all its spending bills—we call them appropriations bills—on time. And a lot of them will get thrown together in one huge omnibus at the end of the year, and either gets passed very late, and you all are looking at this stuff all along, trying to plan things out for the next year and it leaves you kind of hanging. Whereas if you knew where you really were going to be, and if there were going to be cuts, what they really would be—and maybe there won't be any cuts at all— but we kind of scare you all to death all year until the last minute.

Is that problem—I think I probably answered my own question by asking it.

Mr.DOMBI. It is a very serious problem that we are facing once again this year. In fact, there have been times when this Congress has retroactively cut payment rates. A few years back, in 2003, they retroactively cut home health services 3 months earlier, and there was a payback obligation that occurred from that.

The regulatory process, we have the same issues on. When the proposed rule came out on home health payment rates this year, it had 3 years of cuts. When the final rule came out after we were able to convince Medicare that it was wrong in their analysis, they gave us a fourth year of cuts. It is kind of tough to budget your business in that respect.

Mr.CHABOT. Thank you.

Mr. Klein, you mentioned perhaps going to—you know, if you bring a regulatory flexibility violation-type case, you had talked about the concept of loser pays, for example. And I was advised that we have the—currently you can essentially get that under the

Equal Access to Justice Act. However, the attorney's fees are capped at $125 an hour. And you indicated that your cost in the one case that you referred to was $300,000. So even though perhaps there is some remedy on the books, it sounds like that is woefully inadequate.

Mr.KLEIN. I think two points, Congressman. The first would be that the remedy is woefully inadequate. And the second is that one of—the other holes that exist in the RegFlex Act is the fact that agencies can go ahead and enforce rules found to violate the RegFlex Act, as our case showed.

Again, we think there should be some addition. It is not just about the money. It is also about the principle. And it is also about the reason we undertook this litigation was we were genuinely concerned about the impact this was going to have on as many as 22,000 companies that our members are working with or our industry is working with.

So some sort of bar to enforcement of rules found to violate the law we also think would also be appropriate.

Mr.CHABOT. Thank you. And then finally, I am just going to call you Joe if that is okay.

Mr.RAJKOVACZ. That is okay.

Mr.CHABOT. You had suggested that the RFA needs more concrete requirements concerning the mandate to study the costs on small businesses. What specific statutory changes would you recommend?

Mr.RAJKOVACZ. Well, one of the examples—with reference to the TWIC card and Hazmat endorsement, and it is simply not just those two. There is an additional fast card under CBP, there is the coming pass card, passport requirements for drivers across border operations, DOD clearances, DOE clearances, individual States, Port Everglades in the State of Florida, they have individual requirements for each port in order to access those ports. So it seems somehow this all needs to be unified, at least under one national credential.

There is tremendous cost involved in this, not to mention the more cards—you have got truck drivers running around with a stack of cards that they have to hand out to everybody, it seems counterintuitive to the very sought-for security that the more cards an individual has, the more likely for things like fraud, lost cards, et cetera, et cetera. So it does seem that somehow these agencies need to be forced to speak with one another and streamline these processes where they each are making an identical requirement.

Mr.CHABOT. Thank you. And I think you were dead-on when you said that the trucking folks, independent truckers and the rest, really are the backbone of the economy of this country. And so I think we always need to be careful about what we do. We want the public to be safe, and you all to be safe too. But I think you all need to be careful because you all do such a great service to the country.

Thank you, Madam Chair. I yield back.

ChairwomanVELÁZQUEZ. Mr. González.

Mr.GONZÁLEZ. Thank you very much, Madam Chairwoman Velázquez.

My first question goes to Mr. Dombi. And that is, it appears in your testimony, what you are pointing out, that we have statutes in place that would insist that agencies and departments of the Federal Government as they promulgate rules and especially what would be reimbursement rates and such, that there would be transparency, that you would be able to participate and such. But that has not been the case.

In the latest rulemaking that you point out in your testimony, my observation—and with CMS especially, you know, they kind of work backwards. And I don't know how much protection we can actually give. But I do believe the regulatory scheme or the legislation that we have in place that would make it not only transparent, but again to justify and substantiate the basis for the amounts that they are finally settling on, which you have been frustrated in doing.

The problem as I see it, and I think other Members may agree with me, is they start off with a budgetary figure and then work backwards and figure out, all right, we are going to allow you to charge no more than this in order that we don't bust this particular cap that has been artificially set for us at the very beginning by our budgetary process.

But do you still believe if that is the case, that you still would be given greater input and we would be able to at least establish that there is a disconnect with what is being determined as a reimbursement rate as to what is really happening for delivering, let's say, the home care service that your members deliver?

Mr.DOMBI. I strongly believe that if CMS were to be more transparent in its regulatory undertakings and disclose what is the basis for their action and to do a complete impact analysis, it would put everybody in a much better position, including this Congress. Because right now, when we have come to this Congress—and there is a bill pending in the House here, H.R. 3865, that some members of this Committee are cosponsoring already, that would stop this regulatory action and send CMS back to the drawing board and say be transparent, make a process that everybody can understand and have it open so that there is an opportunity for public comment and input on that process, then I think we would end up with a much better result.

Maybe I am that eternal optimist in that respect. But I still believe, you know, that if CMS were to be hold the criteria that they have to follow, there would be fewer gains that they could play in using the RegFlex Act and providing an impact analysis.

In this regulation I mentioned, the impact analysis looked at the percentage change in revenue for 1 year for groups of agencies that are in New England, the mid-Atlantic States, the far West, when home care is a local service.

And as I pointed out earlier in my testimony, 52 percent of all home health agencies will be bankrupt with this system. They never looked locally. Those kinds of changes and an impact analysis would be very helpful for them to advise this Committee and other Committees of Congress as to what the effect of the regulatory action would be, because we are not only blind on this until we do our own analysis, but you are as well.

Mr.GONZÁLEZ. Exactly, because I don't have good answers for my home care providers back in San Antonio. Thank you for your testimony today.

This is in a way an observation, Professor Lubbers. I always think in terms that we are going to try to have some sort of legislative fix that may incorporate some of your suggestions or recommendations, and we still may be frustrated at the end of the day in identifying that which really causes the greatest heartburn and such for the small businessman or -woman.

For years now we have been trying to get HUD just to reduce our contract or a lease agreement from, let's say, 8 to 12 pages or something that is reasonable, and we still can't do it. But I am thinking in terms of how do we make it—is there a practical tool out there?

And I am going to recommend something out here, Chairwoman Velázquez. I have got it here. It is called tellnydia.com. And what it is—we are going to inform every small businessman and -woman in the United States, if they come across a regulation, paperwork, whatever, that is totally wasteful, they don't understand its relevance or whatever, doesn't serve any useful purpose, that they would simply advise Chairwoman Velázquez. And then we would take the top 10 every year and figure that we have got a problem out there.

That is just a suggestion, and I hope it wouldn't be tellgonzalez.com. We are going to leave it with the Chairwoman.

Mr. Klein, if you think you have run into problems with the FAA, I am just going to tell you one of my stories so everybody understands. It is also Members of Congress.

ChairwomanVELÁZQUEZ. I have been reminded that you are the Subcommittee chair on Regulatory Affairs. I may delegate that to you.

Mr.GONZÁLEZ. But I think people quake in their boots when they hear the name Nydia Velázquez. It will get a lot more attention.

Mr. Klein, FAA—I get a letter and I am trying to assist the aircraft mechanic in San Antonio to get certification. The regional Dallas office simply ignores it and can't even tell him when they are going to come and inspect him and certify him.

It is a simple thing. A Member of Congress writes a letter to the Dallas regional FAA. I get some sort of form letter that tells me, hey, you guys just don't provide us enough money to do what we need to do, Congressman; but doesn't tell me anything about timeline, when the poor mechanic can await the inspection and certification process. And then the administrator tells me, and if you have any further questions, please get ahold of Dan Smith.

So I am upset with this thing. So I go to the chair of the Subcommittee on Aviation, Mr. Costello from Illinois. And he writes a letter directly to the FAA Administrator Peters. And in it he says, and by the way, will you please advise your Dallas regional head that Dan is no longer working for FAA and hasn't worked for you guys for 6 months?

I mean that is the kind of pushback we get. Now, I did get a follow-up letter that gave us a timeline of, you know, between now and 20 months, so it wasn't really that helpful to my poor constituent. We understand your problems. The whole thing is how

would you get to communicate those things in a useful way that we can act. Again, thank you very much for your participation today.

ChairwomanVELÁZQUEZ. The time has expired. And Mr. Ellsworth.

Mr.ELLSWORTH. Thank you, Madam Chair. Why do you think that we leave these seats in between? Everybody sits this way. Mr. Chabot is brave to be there. Maybe we don't quake in our boots that much.

Mr. Klein, I would like to start with you. First, let me thank you for asking for that extra minute in your testimony. That helps for us to hear what we need to improve upon. So I appreciate that. I also appreciate your analogy of the butter knife 357; things we can understand and relate to.

Talk to me a little bit about the agendas required that could have a significant impact on small entities. And I think I have your opinion on the FAA doing a good job at crafting these. But talk about the small business, the accessibility of these reports to small businesses. Are they accessible? And are they written in such a way—you made a good analogy. People would know what a butter knife and a 357 is. Can't a small business owner-operator understand the way they are written?

I think it was the professor that talked about the preamble and how lengthy that is and how tough that is on a small business to understand that, if that is in your bailiwick?

Mr.KLEIN. Well, I certainly don't consider myself an expert on that subject. I do know that we do receive a document from the various regulatory agencies each year describing their plan and it is published. But I also know that the Reg Flex Act does give them the authority. I would defer to Professor Lubbers on this question. I may be incorrect, but it is my understanding it basically does not limit agencies to doing what they put in that regulatory plan, that they can basically undertake other rulemakings that aren't in that agenda. So that basically has limited value.

I will also say that the regulatory compliance aspect for the person at the ground level, I think that agencies do a very bad job of estimating the impact and sort of the opportunity cost impact of regulatory compliance. They don't understand that 15 minutes that a small business owner spends trying to fill out a form is 15 minutes that she is not spending running her business, making money, doing what she is best at. And so I think that aspect of the regulatory compliance and the review of the regulatory documents like that is lost on rulemakers unfortunately.

Mr.ELLSWORTH. Thank you very much. Joe, I am going to use the first name, too, since the ranking member did. It appears from the testimony that the small firm pays substantially more than the large firm to comply with the larger counterparts. And it appears that it is more difficult for independent truckers to comply, or is it more difficult for the independent trucker to apply to the large agencies just because they don't have the manpower, the people that go through those documents. Tell me how it affects the competition, how you stay in and how you compete with the larger trucking firms. And obviously we are looking for a level playing field so you can stay in business, too.

Mr.RAJKOVACZ. Well, one of the examples, I was an appointee by the Secretary of Transportation to the Commercial Driver's License Advisory Committee, and it was charged with writing a report to Congress about ways to improve commercial driver's licensing. I was the only small business representative on that. When you look at an industry that is so predominantly represented by small business truckers, this is something you see continually. Through the regulatory process of agencies, when they have advisory committees, there will not be a single small business representative on that. In fact, I would characterize it sometimes as putting the fox in the hen house when you have large businesses sitting on committees that are going to decide the regulations that they are going to play by. Small businesses are tremendously handicapped by that. They are not included in a proportional number on these advisory committees.

Mr.ELLSWORTH. Let me ask you something. I have still got a green light, and that was my question. But I want to ask you something a little off subject. And I have got a good friend that owns a trucking company back in southern Indiana, and one of the concerns he had—and since you are here I am going to go ahead and ask you. Talk about making life easier for you all and these regulations that don't seem to make any sense. He was telling me about a situation where a trucker is involved in an accident, totally not his fault, and yet the regulation says that if that person operating a truck is involved in an accident, he is subject to the automatic audit that then costs these trucking firms an inordinate amount of money. Normally it is just a random they get pulled out when they can. They get a come-up on a normal traffic accident and they are then put into a more frequent audit.

Do you find that to be true, and is that something—and I apologize, Ms. Chairwoman, but I have got a trucking representative here—is that true and is that something that we should be working on? Because if it is not the trucker's fault, they shouldn't be unduly penalized for being in an accident that they had no cause in.

Mr.RAJKOVACZ. There is a formulary that is used by the Federal Motor Carrier Safety Administration in determining when to conduct a compliance review. And that is what they would call safe stat. And there is a mathematical formula. I mean, these are all PhDs that come up with this formula.

Mr.ELLSWORTH. So it is messed up.

Mr.RAJKOVACZ. And they are in the process, and it has been a process going on now for at least a couple of years, of reviewing and trying to come up with a more effective formula. Right now one truck operator ends up being judged by the same formula that a 17,000-truck motor carrier does. And so I am aware that they are looking at peer review and all this. It is an ongoing process.

But, yes, what your constituent told you is exactly correct, is that he faces the same exposure that a large motor carrier would.

ChairwomanVELÁZQUEZ. Your time has expired. I would like to ask the three members, Cuellar, Ms. Clarke and Ms. Hirono, if you prefer to make your questions now or come back after the votes? We have three votes—four.

Ms.HIRONO. I don't know what my schedule is. Could I just ask all of the panelists just one question?

ChairwomanVELÁZQUEZ. Okay.

Ms.HIRONO. Thank you, Madam Chair. All of you have made various suggestions on how we can improve the regulatory process for small businesses. And I would just like to ask each of the panel members what is the most important change that this committee could make that would assist the small business communities, in your view? Start with you, Joe.

Mr.RAJKOVACZ. In my view, one of the very significant things would be the requirement that the agencies must actually do a real cost benefit analysis and how they affect small businesses and have to publish this. Not, as I mentioned before, wave a magic wand and just move on. It totally leaves small businesses in the dust.

Ms.HIRONO. Thank you. Mr. Klein.

Mr.KLEIN. I think the best case scenario again is this concept of a loser pays for agencies that violate the regulation or I think that strengthen the Office of Advocacy. We have a very pragmatic approach as well.

Mr.DOMBI. Actually, I am going to combine the two gentlemen's first comments. Strengthening the Office of Advocacy to engage in some of their own rulemaking to establish criteria for that cost-benefit impact analysis would go a long way.

Ms.HIRONO. Do they currently have the authority to engage in their own rulemaking?

Mr.DOMBI. I do not believe they have any such authority at all.

Ms.HIRONO. Then we probably need to give it to them. Go ahead.

Mr.LUBBERS. I would agree with those suggestions. And I would also just say that if there is a way to give some incentive to the agencies to do more of these things through some kind of a carrot approach, like providing some more funding for doing specific things under the act, that would be good, too.

Ms.HIRONO. Thank you.

Ms.MORRISSEY. I concur with all of the recommendations that have been made thus far. But I would also suggest that I think that in order to make the agencies truly accountable to small businesses and the impacts that they create on them, that there needs to be either some sort of verification process that is undertaken by the SBA or the Office of Advocacy once an IRFA or other analysis is done. But then if there is a flaw in that analysis, that the agency be made to go back and redo it before moving forward with the rulemaking process. Because I think it is imperative that the impact on small business not be a fix-it situation, but something that is included in the analysis of any proposed rulemaking from the outset so that there is a requisite parity that will protect small business interests.

Ms.HIRONO. And who would make the agencies be accountable? Would it be the Office of Advocacy?

Ms.MORRISSEY. That seems to me to be an appropriate place to put that sort of watchdog characteristic, provided that they have the requisite authority to be effective in that role.

Ms.HIRONO. Thank you. I yield back.

ChairwomanVELÁZQUEZ. Ms. Clarke.

Ms.CLARKE. Thank you very much, Madam Chair and ranking member. My first question is to Mr. Dombi. I have a very large home care industry in Brooklyn, New York, and I would like to sort

of get your take on this. As you state in your written testimony, Federal regulations are part of everyday life for home care and hospice. And as you know, Federal regulations have the greatest impact on the Centers of Medicare and Medicaid Services.

What will be the significant economic impact on small businesses if Congress does not step in to address regulatory Medicare home health cuts?

Mr.DOMBI. I can only look back at a similar action that the Medicare program took in 1998. At that point there were over 10,000 providers of home health services nationwide. Three years later there were 6,600, and there were multiple parts of the country that had no access to home health services at all. That is what I fear will come from this.

Ms.CLARKE. And have expenditures for Medicare home health services exceeded projections from 2000 to 2005, as estimated when PPS was instituted in 2000, and how do actual expenditures compare to estimated expenditures?

Mr.DOMBI. Actual expenditures are significantly below projected expenditures. To put it into some context, in 1997 dollars there were over $17 billion Medicare spent on home health services. In 2007, the estimate is going to be under $15 billion. So this is a program that is not out of control spending wise, yet on the table are additional cuts.

Ms.CLARKE. To Mr. Klein, section 223 of Reg Flex requires Federal agencies to establish a policy for the reduction and waiver of civil penalties on small entities. Some agencies, however, provide small entities with no greater penalty relief than large entities.

Should Congress amend Reg Flex to compel agencies to comply with section 223, as well as other provisions, and if they fail to comply, craft consequences for these agencies?

Mr.KLEIN. Well, if I understand your question, and to be honest with you, I may be out of my water a little bit on that particular question, but I think that anything Congress can do to encourage the agencies to comply with laws already on the books, absolutely.

Ms.CLARKE. Just as a follow-up, should Congress include a judicial review provision which would allow small entities to recover court costs and legal fees from successful Reg Flex challenges?

Mr.KLEIN. We would very much like to see that. Thank you.

Ms.CLARKE. I yield back, Madam Chair.

ChairwomanVELÁZQUEZ. As you know, we have votes going on the House floor. I want to thank all of you for coming here. And we understand these important issues for small businesses. We are going to continue to look at the concerns that you raised here to decide if we can come up with some legislative fixes.

With no further questions, I would like to thank the panel for their testimony today. Members have 5 legislative days to submit additional materials or statement for the record.

Thank you again, and this hearing is adjourned.

[Whereupon, at 11:30 a.m., the committee was adjourned.]

STATEMENT
Of the Honorable Nydia M. Velázquez, Chairwoman
United States House of Representatives, Committee on Small Business
Full Committee Hearing: "Reducing the Regulatory Burden on Small Business: Improving the Regulatory Flexibility Act"
Thursday, November 15, 2007 at 10:00 am

I call this hearing to order to address "Reducing the Regulatory Burden on Small Business: Improving the Regulatory Flexibility Act."

We all know that small businesses are the drivers of the American economy. However, small businesses are challenged in their efforts to grow by an ever increasing federal regulatory burden. Federal agencies continue to release tens of thousands of pages of regulations each year. Last year the Federal Register contained nearly 80,000 pages. In its first year of print, it contained only 2,400 pages.

The growth in regulations not only increases compliance costs for small businesses, it also makes it harder for them to compete with larger firms. This is why Congress had the foresight to give small businesses a voice in the regulatory process by passing the Regulatory Flexibility Act or RegFlex in 1980.

This hearing today will look at how RegFlex has worked and how it can be strengthened to help small businesses. The Act was originally designed to ensure that the federal government considers the impact of its regulations on small entities. Under RegFlex, any time a regulation has a significant economic impact on a substantial number of small businesses, an agency must consider if there are less burdensome alternatives.

While this committee is working to ensure the law is being followed, regulators have exploited weaknesses in the law to avoid complying with key requirements. As an example, they have avoided critical requirements by certifying that a rule will have no significant economic impact on small businesses.

While agencies are required to provide a factual basis for such certification, they often provide only a simple statement which dismisses the concerns of small firms. This behavior must stop and we will be seeking legislative means to prevent this.

RegFlex can be improved in other areas as well. For example, the Act currently does not define what constitutes an economic impact on small businesses. Courts have said agencies do not have to consider impacts to small businesses that are not directly regulated by a rule, I think regulators should. Agencies need to contemplate the true economic effect of regulations on small firms regardless of whether the firms are directly or indirectly impacted.

There are also many regulations on the books that are outdated, yet continue to create costs for small businesses. While RegFlex requires agencies to periodically review

There are also many regulations on the books that are outdated, yet continue to create costs for small businesses. While RegFlex requires agencies to periodically review existing rules and consider eliminating unnecessary requirements, this section of the law is vague and agencies don't apply it with consistency. As a consequence, this part of RegFlex has been much less effective than it could be.

Congress must clarify to agencies when these reviews are to take place; what rules must be reviewed; and how the reviews should be conducted.

RegFlex can play a critical role in reducing the regulatory burden on small business—when agencies properly follow it; however, agencies do not always comply. The litigation over the DHS No-Match Letter Rule illustrates this fact. Fortunately, Judge Breyer recognized that the agency may have violated RegFlex in this rulemaking and prevented DHS from enforcing the rule. That was not an isolated case and more must be done to strengthen RegFlex compliance.

I look forward to today's discussion and the panelists' experience with RegFlex and how it could be improved. It is critical because small businesses bear a disproportionate share of the federal regulatory burden. A recent study conducted for SBA found that regulatory costs for small businesses are 45 percent greater than for larger firms.

Small businesses must have input in this process to help agencies identify existing rules that are problematic. We need to ensure that there is a meaningful way to enforce this part of the Act too.

I look forward to working with Ranking Member Chabot in crafting a bill which would make RegFlex even better.

I yield to the Ranking Member for his opening statement.

**Opening Statement**

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|---|---|
| **Hearing Name** | Reducing the Regulatory Burden on Small Business: Improving the Regulatory Flexibility Act |
| **Committee** | Full Committee |
| **Date** | 11/15/2007 |

**Opening Statement of Ranking Member Chabot**

"I would like to thank the Chairwoman for holding this hearing on the implementation of the Regulatory Flexibility Act. This hearing continues the Committee's tradition of annually examining agency compliance with the RFA and asking whether the statute needs amendment.

"The RFA is an important law that, if fully complied with in both letter and spirit, has the potential to significantly reduce the regulatory burdens on small businesses without undermining protections inherent in various federal statutes.

"Efforts led by the President, the Office of Information and Regulatory Affairs, and the Chief Counsel for Advocacy resulted in improving agency compliance with the RFA. However, they continued to be hindered by bureaucrats that seek to perform the minimum amount of analysis possible and courts that seek to abet them in those efforts.

"Federal agencies that fail to comply with the mandates of the RFA undermine a basic premise of the Act – to create an economic impact statement that was akin to an environmental impact statement that agencies must prepare pursuant to the National Environmental Policy Act. The parallels between the two statutes, recognized by the courts, take that parallel only so far since the detail required by the RFA is far less than that required by NEPA.

"The Small Business Committee regularly sees the impact that regulations have on small businesses struggling to survive and grow. Detailed analysis of the impact of regulations on small businesses is necessary to ensure that regulators are not making irreversible decisions that will reduce the competitive ability of small businesses, prevent them from expanding, allow them to raise capital, and harm the growth of the American economy.

"When the RFA was enacted, opponents said it would slow the promulgation of rules. Any examination of the Federal Register today and the Federal Register in 1980 belies that asseveration.

"Ultimately, what is at stake is the ability of small businesses to stay in business based, not on the whims and dictates of federal bureaucrats, but on their capacities in the marketplace. Better, sounder rules will lead to improved compliance and lower costs. I hope that this hearing spurs Congress to improve the RFA to ensure

that federal bureaucrats care that the law is on the books.

"I want to thank witnesses for taking the time to provide their insights into agency rulemaking and how the RFA fits, or does not fit, into that process.

"With that, I yield back."

Testimony of

**JOE RAJKOVACZ**
**REGULATORY AFFAIRS SPECIALIST**
**OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION**

Before the

**UNITED STATES HOUSE OF REPRESENTATIVES**
**COMMITTEE ON SMALL BUSINESS**

Regarding

**REDUCING THE REGULATORY BURDEN ON SMALL BUSINESS:**
**IMPROVING THE REGULATORY FLEXIBILITY ACT**

***NOVEMBER 15, 2007***

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Submitted by

**Owner-Operator Independent Drivers Association**
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Good morning Chairwoman Velazquez, Ranking Member Chabot and distinguished members of the Committee. Thank you for inviting me to testify this morning on a subject that is of great significance to the men and women who the United States depends upon to move our goods and commodities as well as to keep our nation's economy healthy and vibrant.

My name is Joe Rajkovacz. I have been involved with the trucking industry for more than 30 years and currently serve as a Regulatory Affairs Specialist for the Owner-Operator Independent Drivers Association (OOIDA). Prior to joining the staff at OOIDA, I was a small business trucker for over two decades. I owned both my truck and trailer and leased them along with my driving services to a motor carrier.

OOIDA is the national trade association representing the interests of small business trucking professionals and professional drivers on matters that affect their industry. The Association actively promotes the views of small business truckers through its interaction with state and federal regulatory agencies, legislatures, the courts, other trade associations and private entities to advance an equitable business environment and safe working conditions for commercial drivers. OOIDA currently has more than 157,000 members who collectively own and operate more than 250,000 individual heavy-duty trucks.

It was once said "what's good for General Motors is good for the nation." In reality, that should be revised to reference small business. They are the locomotive of growth in our economy.

Small businesses dominate the trucking industry in the United States. One-truck motor carriers represent roughly half the total number of active motor carriers operating in our country while approximately 90 percent of U.S. motor carriers operate 6 or fewer trucks in their fleets. In fact, while there are over 4.5 million trucks registered in Federal Motor Carrier Safety Administration (FMCSA) databases, the largest 100 "for hire" and largest 100 "private" fleets together account for only about 385,000 trucks. Considering that roughly 69 percent of freight tonnage in the United States is moved by truck, it is certainly not a stretch to say that small business truckers are truly the backbone of our nation's economy.

As you can appreciate, OOIDA and the truckers it represents support a safe and efficient industry as well as rules that safeguard our national security interests. However, they expect the federal government to implement regulations with some level of common sense and fairness, and take into consideration the tremendous economic impact and operational burdens that regulations it promulgates may have on the small businesses that drive our economy.

But when it comes to agency action, OOIDA believes that small business issues and regulatory flexibility analyses are, at best, an afterthought in the rulemaking process. I would like to provide you with some examples of how small business concerns were not considered in particular instances of agency action. I would also like to suggest that improvements need to be made to strengthen and expand the Regulatory Flexibility Act so that it better serves its purpose: to require agencies to choose regulatory schemes and rules that achieve their goal in the least burdensome manner on small businesses.

These suggestions include:

**1) Requiring the Regulatory Flexibility Act to apply to executive branch agency actions beyond rulemakings, such as informal adjudications and pilot programs.**

**2) Requiring agencies to make more concrete findings of fact and cost analyses on the economic impact of its action on small business.**

**3) Explicitly requiring agencies to consider the impact of its actions on small businesses who are not those in the regulated community but who are directly affected by agency action.**

**4) Requiring agencies to periodically request public comment and review the impact of all of its regulatory actions on small businesses, and consider changes to its rules to lessen their impact on small businesses.**

**5) Requiring federal agencies to make a greater effort to coordinate their regulatory efforts.**

Taking each in turn:

**Requiring the Regulatory Flexibility Act to apply to agency actions beyond rulemakings, such as informal adjudications and pilot programs.**

At this time, the U.S. Department of Transportation (DOT) is conducting a pilot program permitting Mexico-domiciled trucking companies and truck drivers to operate throughout the United States. The DOT's stated goal is to bring our country into compliance with the North American Free Trade Agreement (NAFTA). Earlier this year the U.S. House of Representatives passed an amendment by voice vote to de-fund this program in the pending FY2008 transportation appropriations bill and the Senate later acted likewise passing a similar amendment with a vote of 75-23. OOIDA has also launched a legal challenge to this program based on the belief that the DOT ignored the legal requirements for establishing a pilot program.

DOT has completely disregarded the impact of its cross-border trucking program on small businesses. OOIDA believes that this program will mean the loss of economic opportunities for thousands of small business truckers in the United States while also jeopardizing the safety and security of their operating environments, namely U.S. highways. Only large motor carriers with the wherewithal to establish operations in Mexico will gain new business opportunities

Until just two months ago, Mexico-domiciled trucking companies and drivers were only permitted to deliver international loads from Mexico to commercial trade zones within the first twenty-five miles of the U.S. border area. U.S.-based drivers would pick up those loads and deliver them to their destination within the United States. DOT's plan is to have

less qualified and lower paid Mexican workers deliver those loads to their destination within the United States. DOT has undertaken no estimate of how many U.S. jobs will be lost to Mexican drivers or how freight rates from which small business truckers are compensated will be affected. The first Mexico-domiciled truck driver permitted to come into the country under the new pilot program was paid 13 cents per mile, less than one-third of what U.S. employee truckers make.

Correspondingly, only large U.S. motor carriers appear to have the resources and infrastructure necessary to have a realistic opportunity to operate and do business in Mexico. OOIDA understands that there are winners and losers in foreign trade agreements. However, this is the first instance that I can think of where U.S. workers face the loss of jobs to foreign workers *on our own soil.*

Under NAFTA, the U.S. promised to permit Mexican motor carriers and drivers to operate within the United States under the *same* conditions as U.S. motor carriers and drivers. But the U.S. DOT has decided to accept Mexican driver compliance with less stringent and fewer commercial driver's licensing, medical qualification, and drug testing standards. Permitting drivers who face fewer and less stringent qualifications to enter the United States simply exacerbates the economic loss to U.S. drivers. This is not what our country agreed to in NAFTA, and U.S. small businesses will be impacted much worse than could have been anticipated by our trade negotiators.

This pilot program is not a rulemaking subject to the Regulatory Flexibility Act. In the parlance of administrative law, it is an informal adjudication. If DOT had been required to review the impact of this program on small businesses in the trucking industry, the public and Congress would have had much more information on which to evaluate the wisdom of its undertaking. Agencies should be required to consider the impact of all of their actions on small business, not just rulemakings.

**Requiring agencies to make more concrete findings of fact and cost analyses on the economic impact of its action on small business.**

Despite the fact that small businesses make up the overwhelming majority of motor carriers in our country, the Federal Motor Carrier Safety Administration (FMCSA) appears to treat its regulatory flexibility duties as an afterthought, rather than central to its rulemaking processes. An example of this is FMCSA's Electronic-On-Board-Recorder (EOBR) proposal. This is a potentially expensive mandate requiring truck drivers to install new equipment in their vehicle to monitor their compliance with the federal hours-of-service regulations. So far, the agency has provided no analysis to support its conclusion that EOBRs will improve safety and justify their cost.

FMCSA is using a carrot and stick approach to this rulemaking. Unfortunately, their carrots are largely being offered to large motor carriers and the stick is being waived primarily at small business motor carriers. FMCSA recognizes that because EOBRs can possess certain tracking technology, motor carriers with large fleets may find value in adopting such equipment to track and make more efficient use of their trucks and

equipment. For small motor carriers, there would be little or no ancillary business benefit to employing EOBRs. In addition, FMCSA's proposal would mandate a costly system for retrieving, storing and accessing electronic EOBR data at the carrier's place of business.

Under the FMCSA proposal, motor carriers who voluntarily adopt EOBRs will be permitted to comply with less stringent versions of other safety rules. On the other hand, those motor carriers who, through FMCSA audits, are determined to have a poor safety record will be mandated to adopt EOBRs. OOIDA believes that the audit selection methodology being considered by FMCSA will over-select small business motor carriers and under-select large motor carriers. Therefore, under the proposed rule small business carriers will be at greater risk for mandated EOBR use.

OOIDA feels that the agency paid no attention to the impact of the rulemaking as a whole on small businesses. The only impact of the rule on small businesses noted by the agency is the potential cost of equipping the truck with an EOBR. OOIDA believes there may need to be more concrete requirements in the Regulatory Flexibility Act to require agencies to review the impact of its rules on small businesses beyond the obvious costs associated with a regulation.

**Explicitly requiring agencies to consider the impact of its actions on small businesses who are not those in the regulated community but who are directly affected by agency action.**

Regulations can have an enormous impact on small businesses who are not part the directly regulated community. For example, Occupational Health and Safety Administration (OSHA) rules are intended to place requirements on employers to protect the safety of their employees. Those regulations require employers to place rules and conditions on the actions of all persons in their work place, not just its employees. Approximately ten years ago OSHA created a regulation that requires persons using "powered industrial trucks" to have *site-specific* certification in the safe use of motorized forklifts and other like equipment.

Because long-haul truck drivers can make deliveries to dozens of different locations each year, such certification is all but impossible for truck drivers to obtain. Therefore, as OSHA interpreted its own rule, employers must deny uncertified truck drivers the use of powered equipment to unload their own truck. Therefore, drivers usually have two choices, pay out-of-pocket fees to the receiver to unload the receiver's own freight or use a manual pallet jack to unload it him or herself.

With regard to the first option, requiring someone to pay for unloading help (commonly known as "lumping") is against federal law 49 U.S.C. 14103. In regards to the alternative, it is frequently unsafe to move freight using a manual pallet jack. Freight is routinely stacked high on pallets and in significant weights (as much as 2,500 pounds) with the intentions of it being moved quickly and efficiently by powered equipment.

If a trucker does not have the money to pay off a receiver to unload the receiver's freight, they face an uncompensated physical chore that will likely lead to significant fatigue or even injury. I have personally collapsed, spent a week unable to move and been bedridden as a result of having to manually remove freight because I would not allow myself to be subjected to this sort of extortion. With little hope for attention or relief, small business owners seldom report workplace injury to any agency. Meanwhile, large corporations with vested interests in maintaining the status quo utilize their clout to be appointed to government advisory committees where their interests are anything but pure.

OOIDA has called OSHA on many occasions over the past few years trying to bring their attention to this issue. The standard response we receive is: "You represent owner-operators? Those are independent contractors. Our mission is to protect employees. Sorry we can't help you." Is OSHA's mission so constrained that it is exempt from considering the impact of its rulemaking on the health of non-employees?

Perhaps requiring federal agencies to have small business representation on advisory committees would help resolve such issues. In 2002, OSHA formed a committee to make recommendations on ergonomics to Labor Secretary Elaine Chao. The committee was dominated by accomplished people from academia and industry. There were no small business representatives that likely could have added significant insight to the discussion related to musculoskeletal disorders (MSDs). There was, however, a member of this particular committee from one of the larger receivers who very likely saw an increase in fees paid to its unloaders because of the powered industrial truck regulation. A small business representative would have provided a completely different perspective on these issues and would have encouraged OSHA to look at the impact of its rules outside of its regulated community.

**Requiring agencies to periodically request public comment and review the impact of all of its regulatory actions on small businesses, and consider changes to its rules to lessen their impact on small businesses.**

Of course, not all of the impacts of federal regulations on small businesses can be anticipated by an agency or the public from reading Federal Register notices. OOIDA believes that agencies must be required to invite public comment on a periodic basis to understand the impact of its rules and regulatory actions on small businesses. They should be required to consider and adopt changes to the regulations as well as other programs and agency actions that would be equally or more effective while being less burdensome to small businesses. The OSHA powered industrial truck rule would be one example of a regulation deserving such attention.

Another illustration of the need for periodic public input is the Automated Commercial Environment (ACE) manifest requirement promulgated by the Bureau of Customs and Border Protection (CBP). This regulation requires all truckers to electronically notify the CBP prior to their in-bound (from Canada or Mexico) arrival at the US border. When CBP designed the program they apparently assumed everyone had access to high speed internet. However, while small business truckers play a significant role in facilitating cross-border

trade, they often do not have access to high speed internet, especially when they are on the road.

OOIDA member Keith Jibben from Graceville, Minnesota is a one-truck motor carrier. He operates between the upper Midwest and central to western Canadian provinces. Mr. Jibben often delivers loads to destinations less than 50 miles across the border into Canada. Many of these areas lack any internet accessibility. His wife cannot file his e-manifest because they do not have high speed availability in their hometown area. Mr. Jibben must either use a third-party provider to submit his e-manifests at a cost of $15-20 per load or take his chances on a friendly border agent not issuing him a fine when he shows up at the border.

This lack of consideration severely handicaps and dissuades small business truckers from competing for cross-border international freight. Mr. Jibben has told me the first fine he gets will be his last because he will opt to discontinue serving the market he has trucked in for decades. Designing a program that essentially excludes those without high-speed internet access is indeed a failure to consider the impact on small businesses. OOIDA believes that many issues such as this could be resolved if agencies were required to annually review the negative impact of their rules on small businesses and were required to periodically consider the adoption of reasonable changes that would reduce that impact.

**Requiring federal agencies to make a greater effort to coordinate their regulatory efforts**

The The jurisdictional separation of federal agencies and even constraints within single agencies can oftentimes be an obstacle to the creation of clear, consistent regulations that would be less burdensome to small businesses. Recent examples reveal this complexity in the implementation of the Hazardous Materials Endorsement (HME) and Transportation Workers Identification Credential (TWIC), both of which are under the direction of the Department of Homeland Security, but with the Transportation Security Administration (TSA) in the lead.

As part of the USA PATRIOT Act of 2001, the TSA was required to implement a Hazardous Materials Endorsement (HME) through state departments of transportation, requiring truckers who haul hazardous materials to undergo background checks at a cost of $94 to $129. The HME is obtained through a third-party contractor that is chosen by individual states and the endorsement appears on the truck drivers CDL.

The Transportation Workers Identification Credential (TWIC), required for some truckers today, was created by the Congress through the Maritime Transportation Security Act (MTSA) of 2002. The TWIC program is an initiative of the Transportation Security Administration and the U.S. Coast Guard and also requires background checks in order for a trucker to gain access to certain transportation facilities. The cost of a TWIC card is $132.50.

To their credit, the Department of Homeland Security (DHS) has determined that the security threat assessments/background checks for obtaining an HME and TWIC are the

same. But to the dismay of truckers who haul hazardous materials and also access certain transportation facilities, there remains a clear disconnect between this determination by DHS and actual implementation by TSA of both of these requirements, creating more redundancy and hurdles for small business truckers. In fact, DHS has determined that those truckers who already have an HME endorsement will *"only"* have to pay $105.25 for the TWIC. That is $105.25 on top of the $94-$129 that the trucker is already paying for an identical background check as the HME requires.

Again, the background requirements for the HME and TWIC are identical. It is clear that the left hand does not know what the right hand is doing, and small business truckers get caught in between paying the tab. Truck drivers who are getting an HME should also qualify for a TWIC without paying additional, redundant and exorbitant fees to the federal government because those crafting and enforcing the regulations within these government agencies do not talk with each other, or fully consider the impact that such redundant behavior will have on small businesses.

Finally, and as important, it should be noted that along with the financial cost of compliance for HME and TWIC, valuable time and resources are expended by small business truckers. Many times these men and women are required to give up work days and income to travel to specific locations, often times far from their homes to apply for each card. This is lost time and income that was never considered by the TSA. If two applications with similar requirements are necessary, that doubles the time, and loss of income needed for the small business trucker to comply. Bottom line, these men and women should not be penalized because of the lack of communication between, and within, government agencies.

OOIDA believes that clarification from Congress will break down the jurisdictional walls that prevent agencies from working together to reduce the burden of its rules on small businesses. We look forward to continuing our work with the Small Business Committee on these and other important issues.

In conclusion, small business trucking professionals support regulations that promote a safe and efficient industry as well as rules that safeguard our national security interests. However, they expect the federal government to implement regulations with some level of common sense and fairness and take into consideration the tremendous economic impact and operational burdens that regulations it promulgates may have on the small businesses that drive our economy.

Chairwoman Velazquez, Ranking Member Chabot and distinguished members of the Committee, thank you for your consideration of this testimony. I would be pleased to answer any questions that you may have.

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**Reducing the Regulatory Burden on Small Business:**
**Improving the Regulatory Flexibility Act**

**Testimony of Christian A. Klein**
**Executive Vice President**
**Aeronautical Repair Station Association**
**Before the United States House of Representatives**
**Committee on Small Business**

**November 15, 2007**

Chairwoman Velázquez, Ranking Member Chabot, and members of the Committee, thank you for inviting our association to testify this morning about the Regulatory Flexibility Act (RFA) (5 U.S.C. § 601 et seq.) and the association's experience with the rulemaking process.

My name is Christian Klein and I am the executive vice president of the Aeronautical Repair Station Association (ARSA). ARSA is a 670 member-strong international trade association with a distinguished 22-year record of representing certificated aviation design, production, and maintenance facilities before Congress, the Federal Aviation Administration (FAA), the European Aviation Safety Agency (EASA), and other national aviation regulators and legislative bodies.

ARSA regular members are certificated repair stations that perform maintenance, preventive maintenance, and alteration of civil aircraft and related components throughout the world. The association's members also design, produce, and distribute aircraft parts.

Certificated facilities provide expert, quality service for general and commercial aircraft owners and operators. Through the skill and care of their employees, ARSA member companies help ensure the safety of aircraft worldwide. And through its publications, training programs, and Annual Repair Symposium, ARSA educates regulators, legislators, and industry on aviation design, production, and maintenance regulatory compliance issues.

While we represent a wide cross-section of the aviation industry, the vast majority of our members are small businesses. A spring 2007 survey of ARSA's membership confirmed that approximately two out of three members employ fewer than 50 people and nearly half of the businesses are owned by a single individual or family. These numbers are confirmed by Appendix A, which is a listing derived from FAA data of the certificated repair stations in each state and the total number of workers each employs. Given the demographic representation and the fact that the aviation industry is so strictly regulated, the RFA and agency rulemaking activities have a substantive impact on our association and our members.

This morning I will discuss our association's recent experience challenging an FAA rule under the RFA. I will also propose ways that Congress can improve the RFA and the way federal agencies conduct rulemakings.

**FAA's D&A rulemaking fails to fulfill RFA requirements**
In 2006, ARSA filed a lawsuit challenging an FAA rule that dramatically expanded the agency's drug and alcohol (D&A) testing requirements. The prior rule required testing for maintenance personnel at air carrier and independent, FAA-certificated maintenance companies (repair stations) that work on air carrier aircraft. The expanded rule extended the testing requirements to employees at subcontractor companies (and indeed to subcontractors of subcontractors to any tier) that repair stations rely on for specialized services. Businesses such as dry cleaners, metal finishers, machine shops, electronic repair shops, and a host of other traditional small businesses provide maintenance-related services to the aviation industry.

As a result of the expanded rule, these small businesses have to implement a U.S. Department of Transportation-approved drug and alcohol testing program for their employees or agree to be covered by an air carrier or repair station's program, or stop serving the aviation industry altogether. For most of these subcontractors, aviation work was a small portion of their overall business. Many simply stopped serving the industry and took the loss in business. This forced repair stations to bring the work back in-house or search for new outside specialists willing to accept the burden of implementing a D&A testing program or stop providing the repairs for the air carrier customer. We are speaking in the past tense here because the rule is in effect and the damage has been done; but, more on that later.

When an agency engages in rulemaking, the RFA requires it to prepare and make available for public comment an initial regulatory flexibility analysis that describes the impact of the proposed rule on small businesses. When the final rule is issued the agency must prepare a final analysis that contains a description of the steps the agency took to minimize economic impact on small businesses, including reasons for selecting or rejecting the alternatives to the final rule.

In an effort to avoid having to do a full regulatory flexibility analysis, the FAA stated that its expanded rule would only affect 297 subcontractors being used by repair stations. From these numbers it reasoned that an RFA analysis was not necessary because its rule did not have a significant economic impact on a substantial number of small businesses. It did not judge the impact on the repair stations since it reasoned most were already subjected to the testing requirements; therefore, any residual effects were already being felt.

To address the FAA's estimates, ARSA conducted a member survey and noted aviation economist Daryl Jenkins, Ph.D. estimated that the number of subcontractors affected

was actually between 12,000 and 22,000. This information was submitted to the FAA as part of the association's comments to the proposed rule. The discrepancy caused the Small Business Administration's Office of Advocacy (SBA OA) to weigh in against the FAA's analysis. SBA OA reasoned that the FAA's analysis did not consider all the industries actually affected by the expanded rule and that therefore the agency's economic analysis was flawed due to the use of inadequate data. SBA OA recommended the FAA conduct a full regulatory flexibility analysis, expanding the analysis to small entities outside of the aviation industry. It also recommended the agency provide more specific data on the economic impact and further explain the criteria it actually used to determine the rule would not have a significant economic impact on a substantial number of small entities. Members of the House Aviation Subcommittee also sent a letter to the FAA echoing SBA OA's concerns.

The FAA ultimately refused to consider either ARSA's or SBA OA's opposition to its economic analysis and issued a final rule on January 10, 2006 (71 Fed. Reg. 1666.) Ironically, during the initial notice and comment rulemaking period, the agency stated that some repair stations and most of their contractors were small entities that needed to be considered under the RFA. However, in issuing the final rule, the FAA changed course 180 degrees and stated that repair stations and their contractors were not even regulated by the rule and therefore were not the targets. As a result the agency concluded that an RFA analysis was not needed because the only persons impacted by the expanded rule were air carriers, the vast majority of which were not small businesses.

**ARSA challenges the rule in court**

On March 10, 2006, ARSA filed a lawsuit in the U.S. Court of Appeals for the District of Columbia Circuit challenging the new rule on several grounds, including the FAA's violation of the RFA.

In a 2-1 decision issued this past summer, the court agreed with ARSA that the FAA violated the RFA by not properly considering the impact of its drug and alcohol testing rule on small businesses. The court ruled that despite the FAA's contentions to the contrary, repair stations and their subcontractors are directly affected by the expanded rule. It reasoned that although the regulations are immediately addressed to air carriers, the employees of their contractors are actually required to be tested. Thus the rule imposes responsibilities directly on the contractors and the small businesses to which the expanded rule will apply. Therefore, the FAA must to consider the impact of the rule on those entities.

Since it abrogated this duty, the court instructed the FAA to conduct a proper analysis under the RFA. It further stated that the analysis conducted during the rulemaking stages was not enough to satisfy the requirement because it was not a final regulatory flexibility analysis and did not properly consider any alternatives to the final rule.

However, the court ruled against ARSA's challenge that the FAA had exceeded its statutory authority in issuing the rule and allowed the agency to continue enforcing the final rule against small entities (the only ones affected by the RFA issue) while it conducts the full RFA analysis. This reasoning was based on the public's manifest interest in aviation safety and the final rule's impact on this interest.

**The implications of ARSA's win in court**
After the decision was handed down, leaders in the small business community agreed that three important lessons could be taken from the decision:

- The RFA imposes real obligations on federal agencies, which must harmonize the interests advanced in a proposed rule with the interests of small business;
- Agencies must take the precise, specific steps outlined in the RFA – there is no RFA-like compliance or substitute; and
- If the regulation "directly imposes" responsibilities on small entities, the rule and the RFA apply to those entities.

Perhaps the most important lesson learned was the need for trade associations and small businesses themselves to be thoroughly involved in every step of the rulemaking process. ARSA's insistence on challenging and commenting on the FAA's reasoning throughout the process helped build the administrative record that ultimately won the day in court.

There is the distinct possibility that this victory may in the end be hollow when dealing with an agency such as the FAA that is responsible for "safety." This point is alluded to in the court's decision. Despite the fact that the agency wholly failed to comply with the RFA mandate, the court was still unwilling to stay enforcement of the expanded rule on remand because of perceived significance of the rule to aviation safety. The agency blatantly flouted the congressional mandate to conduct an RFA analysis even when "reminded" of its obligations to do so by SBA OA. And despite the FAA's disregard for the law, the court was still unwilling to strike down the underlying rule.

Thus, when agencies assert that safety or security are at stake (regardless of the veracity of those assertions) they apparently feel free to ignore the RFA. This undermines the rule of law and ability of the legislative branch to impose checks on the executive branch.

**What's the price of going to battle?**
At the end of the day, many associations that represent small entities are themselves small "businesses." The costs of fighting an agency from the outset of its rulemaking and ultimately dragging the agency into court can be staggering. The court costs and legal fees alone make this sort of fight impossible for many associations.

Indeed ARSA will be paying for its "big win for small business" for years to come. ARSA is a small association with an annual operating budget of under $1 million. The court case alone cost over $300,000 in legal fees. To date, the association has collected $28,125 as part of its drug and alcohol legal defense fund to help recoup some of its expenditures. Such costs with so little return would sink many small businesses, making similar cases purely pyrrhic victories.

These facts suggest one of the holes in the RFA: A statute designed to protect small business from oppressive regulations could cripple small businesses that seek to enforce the requirements of the law.

**Congressional complicity in bypassing the RFA**
Because our members effectively receive their licenses to do business from the FAA, they are greatly impacted by regulatory policies which may at first blush seem insignificant to the agency rule makers. Thus, it is critical that small businesses like ours have ample opportunity to respond to proposed rulemakings to help agencies understand the real impact of new regulations. Likewise agencies must be permitted sufficient time to consider the impact these rules will have on regulated parties.

This is where Congress and the agencies intertwine. Legislative mandates must solve specific problems without creating new difficulties or unintended consequences. There have been several recent instances in which Congress has effectively directed agencies to circumvent the RFA by artificially limiting the time available for rulemaking. In so doing, Congress itself will further undermine the RFA.

RFA analysis and compliance is a process which must be done right rather than fast. It takes time for small businesses to digest proposed regulations and efficiently determine the extent of potential impact. Therefore agencies must be allowed time to review, consider, and dispose of those small business comments and alter regulatory proposals accordingly. Unfortunately, Congress does not always make this possible.

In 2003, during the last FAA reauthorization, Congress mandated that the Transportation Security Administration (TSA) enact repair station security rules within 240 days of enactment of the law (i.e., by August 9, 2004) (see § 611 of Public Law 108-176.) Once the rules were enacted, the agency had 18 months to audit foreign repair stations for compliance with the "new" regulations. If the TSA failed to meet the deadline for conducting the audits, the FAA would be barred from issuing new foreign repair station certificates. The repair station security rules are now more than three years past due and Congress has grown increasingly impatient with TSA's foot-dragging.

Thus, in a recently enacted law implementing the recommendations of the 9/11 Commission, Congress included a provision designed to prod TSA into issuing the rules

(see § 1616 of Public Law 110–53). Enacted on August 3, 2007, the new law directs TSA to adopt final repair station security regulations within one year (i.e., by August 3, 2008) and to complete audits in accordance with those regulations within six months (instead of 18 as originally provided for in 2003.) If it does not meet those deadlines, the FAA Administrator is barred from certifying any foreign repair stations unless an existing repair station is being re-certificated or a new application is in process.

Although the new law is a direct result of bipartisan congressional frustration with TSA, the aviation industry is the victim. The law threatens existing and pending U.S. treaty obligations, may precipitate a trade war in the market for aviation maintenance services (in which the U.S. has traditionally had a strong competitive advantage), and will hurt U.S. air carriers, particularly those operating overseas.

Of great concern is the fact that small businesses are being punished for the failure of a government agency to follow Congress' directions. While the TSA has set a spring 2008 date for publication of a notice for proposed rulemaking, the possibility of the agency fully complying the requirements of the RFA while also meeting the new deadline is slim. The new rules will be binding on foreign and domestic maintenance providers alike, regardless of size. Thus, small businesses in the U.S. aviation industry are in the unenviable position of desiring both expedited government action in this area *and* thorough analysis of the impact the new rules will have on small companies.

Following the promulgation of the final rule, the TSA, in a period of just six months, must audit nearly 700 foreign repair stations with over 265,000 employees to ensure compliance. (A complete listing of international repair stations and their locations is listed in Appendix B.) Given these demands, it is highly unlikely that the agency will be able to meet the deadlines Congress has imposed.

The foregoing is merely one example of the conflicting messages sent by Congress. On the one hand, Congress created the RFA to force agencies to thoroughly consider the impact on small business and less burdensome alternatives. On the other hand, agencies are told to rush out rules. When crafting a rule with such far-reaching consequences, input from the nation's small businesses is an essential element. However, in some cases, congressional pressure has supplanted the RFA with a "do it fast rather than doing it right" mentality.

The House is currently considering legislation that would similarly limit the ability of a federal agency to consider the impact of new rules on small businesses. The Supplemental Mine Improvement and New Emergency Response Act (S-MINER) of 2007 (H.R. 2768), seeks to reinforce safety measures established under the Mine Improvement and New Emergency Response Act (MINER) of 2006 (Public Law 109-236.)

S-MINER includes provisions mandating that the National Institute of Occupational Safety and Health (NIOSH) forward all Recommended Exposure Limits (RELs) for air contaminants to the Secretary of Labor, who must then require the Mine Safety and Health Administration (MSHA) to adopt the RELs as Permissible Exposure Limits (PELs), which are enforceable health standards. The bill mandates that MSHA issue the PELs without modification. A significant problem arises because NIOSH RELs are subject neither to public comment nor tests for economic and technological feasibility. The result is a process that circumvents input from the industry's small businesses and deprives them of a thorough analysis under the RFA.

Groups representing businesses regulated by MSHA have expressed concern that in S-MINER Congress is subverting the goals of the RFA. While I am no expert on mine safety and commenting on the underlying goals of the S-MINER legislation is beyond the scope of my expertise, I do believe that the provisions of the bill referenced above threaten to undermine established administrative procedures, including the RFA.

**Improving the RFA**
The foregoing examples provide some sense of the challenges facing small business advocates who are seeking to improve the quality and effectiveness of federal regulation. We believe it is time to improve the RFA.

ARSA's experience in dealing with federal agencies reveals that the RFA is treated as an annoying burden to the rulemaking process. The agency's objective seems to be finding a way to avoid engaging in the daunting task of compiling the economic data and considering alternatives to a proposed rule. The following are just a few suggestions on how to improve the RFA so agencies will be more compelled to comply.

- **Create consequences for failure to comply with the RFA.** Small businesses and the nonprofit associations that represent them have the greatest stake in seeing agencies comply with the RFA. However, unlike the government and large corporations, these groups lack the resources to challenge agency action in court. Congress should therefore allow small businesses and nonprofit associations that *successfully* mount RFA challenges to recover court costs and legal fees. With this sword of Damocles hanging over them (and their budgets), agencies are certain to be more mindful of their RFA obligations.

- **Prohibit the use of nonconsensus standards.** In order to ensure more transparency in the regulatory process, Congress should prohibit regulatory agencies such as the Occupational Safety and Health Administration (OSHA) and Mine Safety Administration (MSHA) from promulgating or incorporating by reference nonconsensus standards developed by non-governmental standard setting organizations. These standards can be incorporated by reference into regulations and circumvent the typical notice and comment rulemaking process.

As a result, the effect these standards have on small business is never considered and the intent of the RFA is completely voided. Legislation to accomplish this objective was introduced in the 109th Congress as the Workplace Safety and Health Transparency Act (H.R. 5554).

- **Prevent agency backpedaling on small business impact statement.** The RFA could be amended to prevent agencies from reversing determinations made during its threshold analysis as to what entities are affected by a proposed rule. This was the case in ARSA's battle with the FAA, where the agency at one stage indicated that repair stations and their contractors at all tiers were affected by the rule and most were small businesses. In the case of the D&A rule, once the FAA realized the vast number of entities it had to account for in a full RFA analysis, it quickly reversed course in its final rule and stated that repair stations and their contractors were not even regulated. This sort of mid-stream reversal should not be an option. It gives the agency ample opportunity to devise a plan to get out from under the RFA if it determines proper compliance is too daunting.

- **Better statement of congressional intent.** Congress could ensure that any legislation it passes contains language, either in the bill itself or in legislative history, that it does not intend the law to have adverse effects on small businesses. This would show Congress' clear and unambiguous intent to protect small businesses from unintended costs associated with regulatory compliance.

- **Further empower SBA OA.** Throughout ARSA's struggle with the FAA's expanded drug and alcohol testing rule, the SBA OA always acted as a neutral party in its analysis of the rule. In the end it determined that the FAA was clearly attempting to abrogate its duties and called on the agency to conduct a full, proper RFA analysis. The SBA OA provided the agency with comments on the class of small businesses that would be affected and demonstrated how the prior RFA analysis the FAA provided was flawed. The agency still chose to ignore the SBA OA and performed absolutely no RFA analysis. This situation could be avoided if Congress empowered the SBA OA to make small business determinations for agencies. An agency would be forced to conduct an analysis when the SBA said one was warranted, it would be forced to consider the class (or classes) of affected small businesses the SBA determines is appropriate, and would have to clear the initial and final regulatory flexibility analysis with the SBA.

**Conclusion**

Small businesses are a critical part of the aviation industry and the U.S. economy. When it enacted the RFA, Congress created an important mechanism to protect small businesses from unnecessarily restrictive and intrusive federal regulations. However, the small businesses in your districts will only benefit from the protections of the RFA if federal agencies obey the law. As I have described today, agencies can be reluctant to

do so. And the situation is not improved when congressional mandates force agencies to take shortcuts and circumvent rulemaking procedures.

As a small organization, ARSA knows that scoring a win for small business costs big money. Congress needs to step up to the plate, and not only add teeth to the RFA, but make a conscious effort to ensure that agencies are given the time and resources to conduct the proper analysis.

Thank you for your time, for holding this hearing, and for inviting ARSA to be a part of it. I would be happy to answer any questions.

Appendix A

## FAA Repair Stations by State (Including Territories)

| State | Number of Repair Stations | Number of Employees |
|---|---|---|
| AK | 53 | 475 |
| AL | 56 | 6,545 |
| AR | 43 | 3,115 |
| AZ | 156 | 6,469 |
| CA | 683 | 30,811 |
| CO | 73 | 1,219 |
| CT | 102 | 7,730 |
| DC | 1 | 7 |
| DE | 6 | 823 |
| FL | 512 | 16,356 |
| GA | 114 | 9,840 |
| GU | 1 | 6 |
| HI | 13 | 113 |
| IA | 38 | 2,985 |
| ID | 31 | 399 |
| IL | 93 | 3,346 |
| IN | 72 | 3,506 |
| KS | 107 | 7,109 |
| KY | 37 | 581 |
| LA | 40 | 2,251 |
| MA | 57 | 1,893 |
| MD | 30 | 1,100 |
| ME | 11 | 857 |
| MI | 114 | 4,469 |
| MN | 59 | 2,204 |
| MO | 55 | 2,643 |
| MS | 20 | 1,019 |
| MT | 25 | 336 |
| NC | 65 | 3,704 |
| ND | 11 | 101 |
| NE | 13 | 1,213 |
| NH | 24 | 590 |
| NJ | 69 | 2,440 |
| NM | 21 | 624 |
| NV | 30 | 748 |
| NY | 129 | 5,450 |
| OH | 142 | 4,599 |
| OK | 139 | 12,059 |
| OR | 48 | 1,444 |
| PA | 99 | 2,699 |
| PR | 18 | 144 |
| RI | 9 | 385 |
| SC | 32 | 2,388 |
| SD | 14 | 73 |
| TN | 51 | 2,090 |
| TX | 428 | 25,801 |
| UT | 29 | 294 |
| VA | 45 | 1,292 |
| VI | 1 | 1 |
| VT | 11 | 158 |
| WA | 119 | 7,547 |
| WI | 46 | 1,537 |
| WV | 12 | 1,517 |
| WY | 9 | 78 |
| Grand | 4,216 | 197,183 |

Based on FAA Air Agency Data Dated: June 10, 2007

# Appendix B

## FAA Repair Stations on Foreign Soil by Country

| Country | Number of Repair Stations | Number of Employees |
|---|---|---|
| AE | 4 | 4,224 |
| AR | 8 | 1,727 |
| AS | 13 | 6,868 |
| AU | 1 | 1,150 |
| BA | 1 | 5 |
| BE | 12 | 4,618 |
| BR | 15 | 6,160 |
| CH | 30 | 15,171 |
| CI | 4 | 754 |
| CO | 4 | 1,471 |
| CS | 3 | 480 |
| DA | 2 | 859 |
| DR | 2 | 43 |
| EC | 2 | 131 |
| EG | 1 | 3,500 |
| EI | 12 | 3,429 |
| ES | 1 | 1,200 |
| ET | 1 | 2,230 |
| EZ | 2 | 1,213 |
| FI | 1 | 1,800 |
| FJ | 1 | 26 |
| FR | 101 | 25,972 |
| GM | 53 | 30,457 |
| GR | 2 | 914 |
| GT | 2 | 70 |
| HK | 7 | 5,650 |
| HU | 2 | 806 |
| ID | 2 | 2,832 |
| IN | 2 | 806 |
| IS | 13 | 5,567 |
| IT | 20 | 6,659 |
| JA | 20 | 17,332 |
| JO | 2 | 944 |
| KE | 1 | 5 |
| KS | 9 | 5,629 |
| KZ | 1 | 33 |
| LU | 1 | 329 |
| MO | 2 | 995 |
| MT | 1 | 42 |
| MX | 20 | 4,279 |
| MY | 8 | 4,107 |
| NL | 20 | 7,034 |
| NO | 4 | 1,052 |
| NZ | 4 | 3,377 |
| PE | 4 | 670 |
| PM | 1 | 192 |
| PO | 2 | 3,174 |
| QA | 1 | 41 |
| RO | 2 | 864 |
| RP | 8 | 3,249 |
| RS | 1 | 2,350 |
| SA | 5 | 6,423 |
| SF | 4 | 3,690 |
| SN | 48 | 15,475 |
| SP | 6 | 4,360 |
| SW | 8 | 2,481 |
| SZ | 8 | 4,524 |
| TD | 1 | 153 |
| TH | 6 | 5,650 |
| TU | 2 | 3,006 |
| TW | 6 | 4,844 |
| UK | 161 | 23,998 |
| UP | 1 | 91 |
| VE | 4 | 304 |
| WI | 1 | 100 |
| YI | 1 | - |
| Grand | 698 | 267,589 |

Based on FAA Air Agency Data Dated: June 10, 2007

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**TESTIMONY**

**BEFORE THE**

**COMMITTEE ON SMALL BUSINESS**

**UNITED STATES HOUSE OF REPRESENTATIVES**

**ON**

**Reducing the Regulatory Burden on Small Business:**

**Improving the Regulatory Flexibility Act**

**PRESENTED BY**

**William A. Dombi**
**Vice President for Law**

**ON BEHALF OF THE**

**NATIONAL ASSOCIATION FOR HOME CARE & HOSPICE, INC.**

**November 15, 2007**

Madam Chair and distinguished members of the Committee on Small Business, thank you for the opportunity to present testimony regarding the regulatory burden on small business and potential improvements in the Regulatory Flexibility Act ("RFA"). The RFA and its progeny, the Small Business Regulatory Enforcement Act ("SBREFA") and the Congressional Review Act ("CRA") are extremely valuable to small businesses as those businesses work to efficiently operate in an environment subject to federal regulation.

My name is William A. Dombi. I am Vice President for Law at the National Association for Home Care & Hospice, Inc.("NAHC"), located in Washington, D.C. NAHC is a trade association that represents the interests of home care providers and hospices nationwide. NAHC has over 6000 members that serve over 5 million of our nation's most vulnerable populations—the elderly and disabled of all ages in need of health services for recovery, rehabilitation, or end of life care. The vast majority of these entities are small businesses with many having annual revenues under $2 million. They serve patients in the large metropolitan areas as well as the most hard to reach frontier areas of Montana, Alaska, and Wyoming. Services are provided in homes throughout nearly 99% of the nation's zip code areas. Whether by car, bus, snowmobile, or float planes, home care and hospice providers find a way to provide high quality health care to people in need.

Federal regulations are a part of the everyday life of home care and hospice. The primary payers of these services are Medicare and Medicaid with estimated combined expenditures of those programs at over $50 billion annually. The applicable federal regulations focus on quality of care, service coverage standards, and reimbursement requirements. Literally all facets of the delivery of this care are touched by federal regulations. The federal agency with the greatest degree of federal regulatory impact is the Centers for Medicare & Medicaid Services of the U.S. Department of Health and Human Services. ("CMS").

Relative to its compliance with the RFA, CMS has improved, but can still do better to consider the impact of its rules on small businesses. Further, the Congress can take steps that can strengthen the RFA, leading to an increased likelihood that

CMS regulations will fully consider the impact of its policies on small businesses while achieve reasonable and appropriate regulatory results.

NAHC recommends that the following three steps be taken to strengthen the RFA:

1. Uniform RFA compliance standards should be implemented to ensure that federal agencies conduct a comprehensive impact analysis of proposed and final rules that includes consideration of all permissible options in the rulemaking.
2. The RFA should be amended to expand its application to interpretative policies and guidelines as well as the "legislative" rules currently subject to its protections.
3. The Congressional Review Act should be amended to allow for a congressional Resolution of Disapproval on an element of a regulatory action instead of the entire rule, provided that the targeted rule is not a part of an integrated regulatory scheme that would be affected as a whole.

I offer the following illustrations of recent CMS regulatory action to demonstrate the need for these reforms.

**The Medicare Home Health Prospective Payment System Rulemaking**

On April 26, 2007, CMS published its Notice of Proposed Rulemaking ("NPRM") regarding refinements and reforms to the Medicare Home Health Prospective Payment System ("HHPPS"). These long awaited changes affected the payment model that has been in effect without change since October 2000. Most of the proposed changes were anticipated and welcomed by the home health services community. CMS had developed the proposal in a fairly transparent fashion through Open Door meetings, discussions with industry representatives, and the use of technical advisory groups that included non-CMS representatives. However,

the proposed rule also included an element that had not been expected. The rule proposed to reduce base payment rates by nearly 10% over a three year period through three consecutive rate reductions of 2.75%. These reductions would be permanent, cumulative, and result in a compounded financial impact.

In the NPRM, CMS disclosed little of the basis for the rate reduction proposal. CMS alleged that home health agencies had engaged in "upscoring" of patients to achieve higher amounts of payment under HHPPS since base payment rates are adjusted upwards and downwards dependent on the assessment score of the specific patient. Few details regarding the evidentiary foundation for the CMS conclusion of so-called "case mix weight creep" were disclosed in the NPRM. Nevertheless, NAHC and others in home care undertook detailed analysis of the potential reasons for changes in the case mix weight scores. Under Medicare law, a rate adjustment is authorized only to the extent that case mix weight changes are unrelated to changes in patient characteristics. NAHC's analysis showed significant changes in patients receiving home health services such as higher incidence of knee replacement patients and patients of advanced age. In comparison, CMS alleged that all the change in case mix weight scores was unrelated to changes in patient characteristics.

In the final rule issued by CMS, the three year rate reduction is extended to four years with an additional 2.71% cut proposed for 2011. These total cuts represent an 11.75% reduction in payment rates for home health services. NAHC estimates that by 2011, nearly 52% of home health agencies ("HHAs") across the country will receive Medicare payment that is less than the cost of care with no subsidization available through other payers to cover that financial shortfall. In many states, over 70% of HHAs will have negative Medicare margins. Access to care is in serious jeopardy. The loss of home health services will adversely affect both Medicare patients and Medicare itself as the affected patients end up with higher cost institutional care.

Where does the RFA fit into this matter? First, CMS has pursued its regulatory action in a non-transparent manner. The RFA impact analysis that is

displayed in the NPRM and Final Rule is not subject to evaluation and public comment unless the basis for the underlying action is fully disclosed. While it is readily apparent that CMS applied two completely different methodologies in evaluating alleged case mix creep in the NPRM and the Final Rule, CMS consistently withheld the details of those methodologies and accompanying analyses from the public. Still today, CMS has yet to release the technical report that sets out the analysis despite repeated requests from the public as well as several congressional offices. Offering impact conclusions is useless unless the public is afforded the opportunity to test those conclusions and to validate/invalidate them as appropriate.

Second, the impact analyses displayed in the NPRM and Final Rule fall far short of what should be RFA compliance standards. Both the NPRM and the Final Rule merely express the change in average case mix weights that will be experienced in aggregate segments of the home care community such as type of HHA and geographic location. In addition, the impact analyses merely set out the forecasted change in Medicare revenue for these same segments. Glaringly absent is an impact analysis that evaluates the likely impact of the rule on the ability of the affected businesses to stay in operation or its affect on the operation of that business that continues to exist after the payment cuts. Most notable is the absence of an analysis of the impact of the rule for the full four years of the payment rate cuts that are included in the rule. CMS sets out its meager evaluation only in relationship to the potential 2008 effect rather than through 2011, the fourth year of the planned rate cuts.

As stated earlier, NAHC's analysis shows nearly 52% of all HHAs nationwide in the red on Medicare payments by 2011, likely meaning the closure of many businesses. Addendum A highlights the extent of impact of the CMS rule. This map shows the percentage of HHAs in each state that will end up with Medicare financial margins below zero after the planned cuts take effect. Nowhere in the CMS impact analysis is this type of review given although the potential

closure of thousands of HHAs would seem to be an impact worthy of consideration under the RFA.

Addendum B further illustrates the financial impact of the CMS regulatory cuts. While the RFA impact analysis by CMS references 1-2% changes in revenue based on type and location of HHAs, Addendum B sets out the multi-billion dollar loss of revenue in the congressional districts of the Committee's members that will accrue over the four years of cuts set out in the CMS rule. All told, these regulatory cuts will cut Medicare revenues for home health services by over $6 billion by 2012 in a program where spending continues well below estimates of the Congressional Budget Office at $13.1 billion in 2006 and only 3.2% of total Medicare spending.

This illustration of the depth and quality of the RFA impact analysis by CMS strongly demonstrates the need for either a more detailed statutory standard for the RFA impact analysis or a uniform RFA regulatory standard that offers detailed criteria for RFA impact analysis compliance by CMS and other federal agencies. NAHC suggests that the Small Business Administration be empowered to promulgate RFA compliance standards.

**Medicare Hospice Billing Standards**

In an effort to secure more detailed data on Medicare hospice services, CMS issued a Transmittal earlier this year that requires hospices throughout the nation to completely amend their billing submissions. Ultimately, CMS decided to postpone the compliance date for the new guidelines in response to complaints raised by NAHC and others in the hospice community. However, the lack of a formalized responsibility for CMS to evaluate the propriety and impact of its planned policy changes on hospices lead to extensive efforts by hospices and their billing vendors to attempt to comply with new requirements that do not fit hospice care. Presently, the hospice community remains hopeful that CMS will eventually understand the irrationality of its guidelines and rescind the policy altogether.

The Transmittal, 1304 (July 20, 2007) http://www.cms.hhs.gov/transmittals/downloads/R1304CP.pdf, requires hospices to completely revise their Medicare billing processes in two ways. First, the hospices would be required to include a listing of each discipline-specific visit rendered during the course of hospice care for the billing period. For over 20 years, hospices billed Medicare consistent with coverage and payment standards that set payment on a "per diem" rather than a per visit basis. Medicare covers hospice care, with varying coverage standards and payment rates, based on the number of days of routine home care, continuous care, inpatient services, and respite care. While a hospice is fairly capable of visit-based billing for those days considered "routine home care," it is unrealistic to require a hospice to record "visits" during those days when the patient is an inpatient at a hospital or skilled nursing facility receiving 24/7 care or during a "continuous care" day when the coverage requirements focus on the hours of ongoing care. The Transmittal has been rescinded recently, but the effect of that rescission is nothing more than a postponement of the application date from January 1, 2008 to July 1, 2008. Transmittal 1372 (Rescission of Transmittal 1304 changing the effective date).

Second, the Transmittal requires that hospices include per visit charges on the Medicare billings. This requirement exists even though Medicare payment is not based on charges nor has it ever been based on charges. Further, this requirement ignores the fact that hospices do not have visit charges since payers of services generally conform to the Medicare "per diem" method. When confronted with the fact that visit charges do not exist, CMS officials offered a range of suggestions that included "make them up" to "figure it out."

CMS took no steps to implement these controversial guidelines through formal rulemaking. The Transmittal was issued by CMS through its electronic publishing process without notice in the Federal Register and without providing any opportunity for public comment on the matter as a proposal. Since the Transmittal did not represent a formal legislative rule under the Administrative

Procedures Act, CMS undertook no action related to the RFA. No impact analysis was conducted. No options were publicly explored and disclosed.

The concepts of the RFA have as much value in CMS action that does not rise to the level of formal regulation as they have in a formal legislative rule. The Transmittal requirements discussed herein will necessitate significant changes in billing practices and operations of hospices if compliance is to be achieved. Failure to comply will mean the claim is rejected by Medicare. The denial of Medicare payment translates into the demise of the hospice since at least 90% of the revenue for most hospices comes from Medicare. This Transmittal will require hospices to establish methods for calculating reasonable visit charges even though their existing cost accounting systems are not designed to accommodate such. In addition, the new requirements will necessitate the expensive acquisition of new billing software from outside vendors. Finally, the requirements will mean that hospices will need to develop visit tracking and documentation systems for inpatient and continuous care where such care documentation approaches are the equivalent of a foreign language. All of these changes come at a significant cost to hospices with no anticipated increase in payment and no understanding of their real purpose or value.

As currently devised, the RFA does not apply to guidelines, interpretative policies, and other rulemaking that does not involve a legislative rule. However, it is these less formal actions that have the most profound impact on the day-to-day operations of health care providers in their relationships with CMS. It is these actions that often represent the greatest change and have the greatest cost for small health care businesses. Amending the RFA to include guidelines such as this hospice Transmittal will go a long way toward bringing about reasonable and rational standards for health care providers to do business with CMS.

**The Congressional Review Act: Needed Improvements**

The Congressional Review Act ("CRA") provides a last chance (short of litigation) opportunity to address regulatory action that oversteps congressional design and interests expressed in statutory authorizations. Under the CRA, Congress is permitted through a Resolution of Disapproval to invalidate a regulation issued by a federal agency. 5 USC 801-808. The CRA provides for an expedited process for consideration of the resolution by each house of Congress.

While the CRA has been fully used only in a few circumstances, it has proven to be of significant value to small businesses in its ability to provide a process to allow the conveyance of a message from Congress concerning dissatisfaction with a promulgated rule. Statement of J. Christopher Mihm, Government Accountability Office, *FEDERAL RULEMAKING: Perspectives on 10 Years of Congressional Review Act Implementation*: Testimony Before the Subcommittee on Commercial and Administrative Law, Committee on the Judiciary, House of Representatives, GAO-06-601T . http://www.gao.gov/new.items/d06601t.pdf. However, the CRA does maintain some weaknesses that could benefit from some statutory reform. These weaknesses are set out in detail in a report issued by the Congressional Research Service. *Congressional Review of Agency Rulemaking: An Update and Assessment After Nullification of OSHA's Ergonomics Standard*, Congressional Research Service, Library of Congress (January 6, 2003).

One such weakness is the apparent requirement that the Resolution of Disapproval must be directed at the entire rule issued by the federal agency rather than a portion of that rule. CRS Report, pp.13-15. This weakness may be intentionally or inadvertently exploited by CMS through its recently instituted method of publishing unrelated rules in a single rulemaking proceeding.

This odd CMS approach to rulemaking has no logical basis. Two recent examples illustrate the strange character of the process and the resulting weakness in the CRA. In the NPRM and Final Rule setting out the changes to the Medicare HHPPS for 2007, CMS included the wholly unrelated rule modifying standards

applicable to the Medicare Durable Medical Equipment benefit under Medicare Part B. 71 F.R. 44082 (August 3, 3006); 71 .F.R 65884 (November 9, 2006). Beyond the confusion that such an approach triggers for the general public attempting to monitor and respond to rules of concern, it adds a potential barrier to Congress when there is interest in pursuing a Resolution of Disapproval of an element of that published rule. For example, if Congress wished to invalidate the DME rule, it may be dissuaded from doing so if Congress prefers not to invalidate the home health services rule at the same time.

The first example is not isolated within CMS. A second recent example is the publication of the physician fee schedule for 2008. http://www.cms.hhs.gov/PhysicianFeeSched/downloads/CMS-1385-FC.pdf. That rule not only contains extensive standards and comprehensive payment rates for the wide range of physician services, it also contains the wholly unrelated standards for professional qualifications of Physical and Occupational Therapists. With this rule, public notice of the therapist standards is masked by the rule title: "Revision to Payment Policies Under the Physician Fee Schedule, and Other Part B Payment Policies for CY 2008...." At the same time, the CRA powers of Congress are impacted in that any consideration of a Resolution of Disapproval on the physician fee schedule or therapist qualification rules is burdened by a CRA requirement to address both in the resolution.

One final example of the CRS weakness is the recent HHPPS rule discussed otherwise in this testimony. Certain congressional offices were forced to submit a legislative proposal outside the efficient CRA process to invalidate the case mix creep part of the HHPPS rule because congressional legislative counsel concluded that the CRA required the resolution to affect the whole rule rather than an element. Since these offices did not wish to disturb the important refinements of HHPPS, a separate bill was introduced in the House and Senate as the only viable alternative means to invalidate the portion of the whole rulemaking of concern. see, S. 2181 and H.R. 3865. An amendment to the CRA allowing for a targeted

resolution in circumstances where the element addressed by the resolution is not an integral part of the whole rulemaking would bring the CRA efficiencies into reality.

**CONCLUSION**

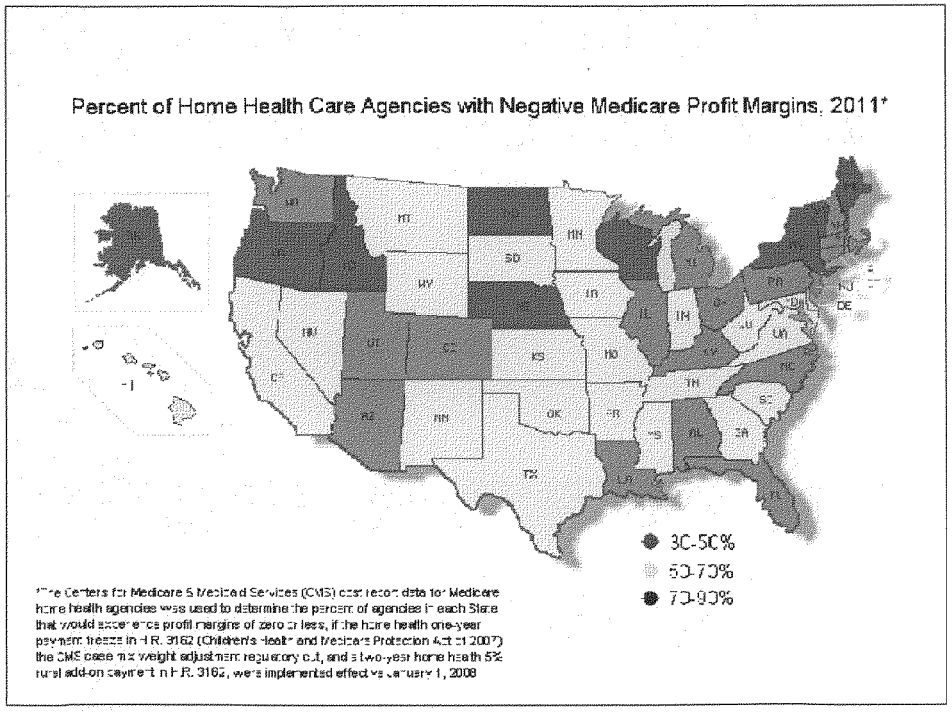
Thank you for the opportunity to provide this testimony. While CMS has made great strides towards RFA compliance, continued improvement in both its actions and the RFA standards will go a long way to providing small business with the protections against unwise and unwarranted federal regulation expressed by Congress in the RFA and its progeny, SBREFA and CRA. We look forward to the opportunity to work with the Committee on these matters.

**ADDENDA**

**Addendum A: Percent of Home Health Care Agencies with Negative Medicare Profit Margins, 2011**

**Addendum B: Impact on Home Health: Legislative and Regulatory Cuts**

**Addendum A**


Percent of Home Health Care Agencies with Negative Medicare Profit Margins, 2011*
30-50%
50-70%
70-90%
*The Centers for Medicare & Medicaid Services (CMS) cost report data for Medicare home health agencies was used to determine the percent of agencies in each State that would experience profit margins of zero or less, if the home health one-year payment freeze in H.R. 3162 (Children's Health and Medicare Protection Act of 2007) the CMS case mix weight adjustment regulatory cut, and a two-year home health 5% rural add-on payment in H.R. 3162, were implemented effective January 1, 2008

**Addendum B**

# Impact on Home Health: Proposed Legislative and Regulatory Cuts

## Small Business Committee Democrats

### Proposed Legislative Cuts to Home Care
### Market Basket Update

*H.R. 3162 'The Children's Health and Medicare Act of 2007' provides a one year reduction in Medicare home health services payment rates through a one year freeze of the market basket update for FY 2008. Over five years, this proposal would reduce outlays for home health by $2.6 Billion.

### Proposed Regulatory Cuts to Home Care
### **Case Mix Weight Adjustment

The Centers for Medicare and Medicaid Services (CMS) has proposed a 2.75% across-the-board rate reduction for home health services for each of 2008, 2009, and 2010, as well as a 2.71% reduction in 2011. This reduction is based on an unfounded allegation that the "case mix weight" that is used to calculate payment rates has increased unrelated to changes in patient characteristics. Over five years, this proposal would reduce outlays for home health by $6.03 Billion.

**HCIS 2005 Data Set for Medicare Home Health**

| National Data Set | Projected Losses H.R. 3162 (SCHIP/Medicare Bill) | | Projected Losses from Case Mix Weight Adjustment | |
|---|---|---|---|---|
| Total National Reimbursement | FY 2008 | FY 2008-12 | FY 2008 | FY 2008-12 |
| $12,885,434,991 | ($410M) | ($2.6B) | ($400M) | ($6.03B) |

| District Data Set | | | Projected Losses H.R. 3162 (SCHIP/Medicare Bill) | | Projected Losses from Case Mix Weight Adjustment | |
|---|---|---|---|---|---|---|
| | Medicare Reimbursement | % of National Reimbursement | FY 2008 | FY 2008-12 | FY 2008 | FY 2008-12 |
| Nydia M. Velazquez (D-NY-12) | $273,027 | 0.0021% | ($8,610) | ($54,600) | ($8,400) | ($126,630) |
| Heath Shuler (D-NC-11) | $35,473,940 | 0.2753% | ($1,128,730) | ($7,157,800) | ($1,101,200) | ($16,600,590) |
| Charles A. Gonzalez (D-TX-20) | $73,690,273 | 0.5719% | ($2,344,790) | ($14,869,400) | ($2,287,600) | ($34,485,570) |
| Rick Larsen (D-WA-02) | $13,023,061 | 0.1011% | ($414,510) | ($2,628,600) | ($404,400) | ($6,096,330) |
| Raul M. Grijalva (D-AZ-07) | $6,258,534 | 0.0486% | ($199,260) | ($1,263,600) | ($194,400) | ($2,930,580) |
| Michael H Michaud (D-ME-02) | $34,390,220 | 0.2669% | ($1,094,290) | ($6,939,400) | ($1,067,600) | ($16,094,070) |
| Melissa L. Bean (D-IL-08) | $21,699,038 | 0.1684% | ($690,440) | ($4,378,400) | ($673,600) | ($10,154,520) |
| Henry Cuellar (D-TX-28) | $79,025,325 | 0.6133% | ($2,514,530) | ($15,945,800) | ($2,453,200) | ($36,981,990) |
| Daniel Lipinski (D-IL-03) | $34,184,562 | 0.2653% | ($1,087,730) | ($6,897,800) | ($1,061,200) | ($15,997,590) |
| Gwen Moore (D-WI-04) | $12,162,374 | 0.0944% | ($387,040) | ($2,454,400) | ($377,600) | ($5,692,320) |
| Jason Altmire (D-PA-04) | $40,555,562 | 0.3147% | ($1,290,270) | ($8,182,200) | ($1,258,800) | ($18,976,410) |
| Bruce L. Braley (D-IA-01) | $18,507,734 | 0.1436% | ($588,760) | ($3,733,600) | ($574,400) | ($8,659,080) |
| Yvette Diane Clarke (D-NY-11) | $20,132,012 | 0.1562% | ($640,420) | ($4,061,200) | ($624,800) | ($9,418,860) |
| Brad Ellsworth (D-IN-08) | $24,994,677 | 0.1940% | ($795,400) | ($5,044,000) | ($776,000) | ($11,698,200) |

| | | | | | | |
|---|---|---|---|---|---|---|
| Henry C. Johnson (D-GA-04) | $15,737,359 | 0.1221% | ($500,610) | ($3,174,600) | ($488,400) | ($7,362,630) |
| Joseph A. Sestak (D-PA-07) | $27,248,434 | 0.2115% | ($867,150) | ($5,499,000) | ($846,000) | ($12,753,450) |

**Addendum B**

## Impact on Home Health: Proposed Legislative and Regulatory Cuts

### Small Business Committee Republicans

**Proposed Legislative Cuts to Home Care**
**Market Basket Update**

*H.R. 3162 'The Children's Health and Medicare Act of 2007' provides a one year reduction in Medicare home health services payment rates through a one year freeze of the market basket update for FY 2008. Over five years, this proposal would reduce outlays for home health by $2.6 Billion.

**Proposed Regulatory Cuts to Home Care**
****Case Mix Weight Adjustment**

The Centers for Medicare and Medicaid Services (CMS) has proposed a 2.75% across-the-board rate reduction for home health services for each of 2008, 2009, and 2010, as well as a 2.71% reduction in 2011. This reduction is based on an unfounded allegation that the "case mix weight" that is used to calculate payment rates has increased unrelated to changes in patient characteristics. Over five years, this proposal would reduce outlays for home health by $6.03 Billion.

**HCIS 2005 Data Set for Medicare Home Health**

| National Data Set | Projected Losses H.R. 3162 (SCHIP/Medicare Bill) | | Projected Losses from Case Mix Weight Adjustment | |
|---|---|---|---|---|
| Total National Reimbursement | FY 2008 | FY 2008-12 | FY 2008 | FY 2008-12 |
| $12,885,434,991 | ($410M) | ($2.6B) | ($400M) | ($6.03B) |

| District Data Set | | | Projected Losses H.R. 3162 (SCHIP/Medicare Bill) | | Projected Losses from Case Mix Weight Adjustment | |
|---|---|---|---|---|---|---|
| | Medicare Reimbursement | % of National Reimbursement | FY 2008 | FY 2008-12 | FY 2008 | FY 2008-12 |
| Steve Chabot (R-OH-01) | $17,877,868 | 0.1387% | ($568,670) | ($3,606,200) | ($554,800) | ($8,363,610) |
| Roscoe G. Bartlett (R-MD-06) | $20,369,344 | 0.1581% | ($648,210) | ($4,110,600) | ($632,400) | ($9,533,430) |
| Sam Graves (R-MO-06) | $20,774,900 | 0.1612% | ($660,920) | ($4,191,200) | ($644,800) | ($9,720,360) |
| W. Todd Akin (R-MO-02) | $52,391,196 | 0.4066% | ($1,667,060) | ($10,571,600) | ($1,626,400) | ($24,517,980) |
| William Shuster (R-PA-09) | $16,326,910 | 0.1267% | ($519,470) | ($3,294,200) | ($506,800) | ($7,640,010) |
| Marilyn N. Musgrave (R-CO-04) | $15,019,454 | 0.1166% | ($478,060) | ($3,031,600) | ($466,400) | ($7,030,980) |
| Steven A. King (R-IA-05) | $11,516,665 | 0.0894% | ($366,540) | ($2,324,400) | ($357,600) | ($5,390,820) |
| Jeffrey Fortenberry (R-NE-01) | $13,004,461 | 0.1009% | ($413,690) | ($2,623,400) | ($403,600) | ($6,084,270) |
| Lynn A. Westmoreland (R-GA-03) | $17,423,103 | 0.1352% | ($554,320) | ($3,515,200) | ($540,800) | ($8,152,560) |
| Louie Gohmert (R-TX-01) | $82,068,800 | 0.6369% | ($2,611,290) | ($16,559,400) | ($2,547,600) | ($38,405,070) |
| Dean Heller (R-NV-02) | $27,077,309 | 0.2101% | ($861,410) | ($5,462,600) | ($840,400) | ($12,669,030) |
| David Davis (R-TN-01) | $44,347,106 | 0.3442% | ($1,411,220) | ($8,949,200) | ($1,376,800) | ($20,755,260) |

| | | | | | | |
|---|---|---|---|---|---|---|
| Mary Fallin (R-OK-05) | $53,776,294 | 0.4173% | ($1,710,930) | ($10,849,800) | ($1,669,200) | ($25,163,190) |
| Vern Buchanan (R-FL-13) | $42,791,357 | 0.3321% | ($1,361,610) | ($8,634,600) | ($1,328,400) | ($20,025,630) |
| James D. Jordan (R-OH-04) | $18,473,921 | 0.1434% | ($587,940) | ($3,728,400) | ($573,600) | ($8,647,020) |

**STATEMENT OF JEFFREY S. LUBBERS**
**(FELLOW IN LAW AND GOVERNMENT**
**WASHINGTON COLLEGE OF LAW**
**AMERICAN UNIVERSITY)**

**HEARING BEFORE THE**
**COMMITTEE ON SMALL BUSINESS**
**U.S. HOUSE OF REPRESENTATIVES**
**ON**
**"REDUCING THE REGULATORY BURDEN ON SMALL BUSINESS: IMPROVING THE REGULATORY FLEXIBILITY ACT."**

**NOVEMBER 15, 2007**

**STATEMENT OF JEFFREY S. LUBBERS***

**HEARING BEFORE THE**
**COMMITTEE ON SMALL BUSINESS**
**U.S. HOUSE OF REPRESENTATIVES**
**ON**
**"REDUCING THE REGULATORY BURDEN ON SMALL BUSINESS: IMPROVING THE REGULATORY FLEXIBILITY ACT."**

**NOVEMBER 15, 2007**

Madam Chair and Members of the Committee:

I am pleased to be here today to discuss the Regulatory Flexibility Act with you. This Act is a recognition of the importance of our small business community and of the fact that federal regulation may have a disproportionate impact on small businesses and small communities. I attended the SBA Office of Advocacy's Symposium on the 25th Anniversary Symposium Act two years ago and came away with the impression that the Act is generally working well under the stewardship of that Office. But I welcome this Committee's review of the need for improvements.

Background[1]

The Regulatory Flexibility Act (RFA)[2] adopts the "impact-statement" approach originated in the 1970 National Environmental Policy Act by directing agencies to consider the potential impact of regulations on small business and other small entities. Originally enacted in 1980, it mandates consideration of regulatory alternatives that accomplish the stated objectives of the proposed rule and that minimize any significant economic impact on such entities. In follow-up legislation, in 1996, Congress enacted the Small Business Regulatory Enforcement Fairness Act (SBREFA),[3] which

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* Fellow in Law and Government, Washington College of Law, American University. Formerly Research Director, Administrative Conference of the United States (1982-1995).

[1] This section (pages 1-6) is adapted from JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING (4th ed.) 151-58, 255-58 (American Bar Ass'n 2006).

[2] Pub. L. No. 96-354, 94 Stat. 864 (1980) (codified as amended at 5 U.S.C. §§ 601-612).

[3] Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996) (codified in scattered sections of 5 U.S.C.). *See generally* Thomas O. Sargentich, *The Small Business Regulatory Enforcement Fairness Act*, 49 ADMIN. L.

strengthened the RFA, required agencies to produce new regulatory compliance guides and guidance materials,[4] and added additional consultation requirements for "covered agencies" (currently only EPA and OSHA).[5]

Coverage

The Regulatory Flexibility Act incorporates the Administrative Procedure Act's (APA's) broad definition of "agency,"[6] making it applicable to independent regulatory agencies as well as executive agencies. Despite the significant strengthening amendments in SBREFA, the RFA's coverage still has a few important limitations. First, it applies only to rules for which an agency publishes a notice of proposed rulemaking, either pursuant to the APA or some other law, and it does not apply to ratemaking.[7] The RFA's flexibility analysis requirements also are limited to rulemaking for which the agency "is *required* by section 553 . . . or any other law, to publish general notice of proposed rulemaking for any proposed rule or publishes a notice of proposed rulemaking for an interpretative rule involving the internal revenue laws of the United States . . . ."[8] Thus, technically, the flexibility analysis requirements do not apply where the agency voluntarily follows notice-and-comment procedure, although they may well be found to

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REV. 123 (1997). A key change was the addition of judicial review of compliance with the RFA. SBREFA § 242, 110 Stat. at 865.

[4] 110 Stat. at 858 (codified at 5 U.S.C. § 601 note). The compliance guides are to be issued with each rule having a significant economic impact on a substantial number of small entities and are to assist small entities in complying with the rule. For a critical review of agency activities under this requirement, see U.S. GEN. ACCOUNTING OFFICE, REGULATORY REFORM: COMPLIANCE GUIDE REQUIREMENT HAS HAD LITTLE EFFECT ON AGENCY PRACTICES (GAO-02-172) (Dec. 2001). For an example of an agency that takes this mandate seriously, see the Department of Labor's website, http://www.dol.gov/compliance.

[5] SBREFA also created a Small Business and Agriculture Regulatory Enforcement Ombudsman and the congressional review process. 15 U.S.C. § 657; 5 U.S.C. §§ 801-08.

[6] 5 U.S.C. § 601(1).

[7] *Id.* § 601(2). *Compare* Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs, 417 F.3d 1272, 1284-85 (D.C. Cir. 2005) (requiring Corps to conduct regulatory flexibility analyses before issuing nationwide dredge-and-fill permits because that action was rulemaking and binding nature of rule made it a legislative rule that should have required notice of proposed rulemaking) *with* Am. Moving & Storage Ass'n, Inc. v. U.S. Dep't. of Defense, 91 F. Supp. 2d 132 (D.D.C. 2000) (holding that a DOD change in procurement policies was not a "rule" under RFA, notwithstanding a DOD statute requiring an opportunity for comment on such changes; alternatively, the nature of the change amounted to "ratemaking" and was therefore was not within RFA definition of rule for that reason).

This provision in the RFA also makes the Act inapplicable to final (and interim-final) rules issued pursuant to an exemption from notice and comment. *See also* Nat'l Ass'n for Home Care v. Shalala, 135 F. Supp. 2d 161, 165-66 (D.D.C. 2001) (Act does not apply to interpretive rules; finding HHS's rule to be interpretive because HHS was interpreting the Balanced Budget Act of 1997, which was itself written with "remarkable specificity"). *Compare* U.S. Telecom Ass'n v. FCC, 400 F.3d 29 (D.C. Cir. 2005) (finding that Act applies because the challenged action was a legislative rule) *with* Cent. Texas Tel. Co-op., Inc. v. FCC, 402 F.3d 205, 213 (D.C. Cir. 2005) (finding the Act did not apply because the challenged action was an interpretive rule).

[8] *Id.* § 603(a) (emphasis added). The language pertaining to IRS interpretive rules was added by SBREFA. *Id.* § 604(a).

apply to rulemaking where the agency has, by regulation, subjected itself to notice-and-comment procedure.[9]

Through requirements for notice and analysis, the RFA requires agencies to consider the impact of proposed rules on "small entities"—including "small businesses," "small (not-for-profit) organizations," and "small governmental jurisdictions."[10] The Act does not, however, mandate any particular outcome in rulemaking. It only requires consideration of alternatives that are less burdensome to small entities and an agency explanation of why alternatives were rejected.[11] Four regulatory alternatives are included in the Act as examples of alternatives to be considered in rulemaking: "tiering," classification and simplification, performance rather than design standards, and exemptions.[12]

Role of the Chief Counsel for Advocacy

The RFA charges the Chief Counsel for Advocacy of the Small Business Administration ("Chief Counsel for Advocacy") with overseeing agency compliance with the flexibility analysis requirements.[13] In 2002, President Bush signed Executive Order 13,272, entitled "Proper Consideration of Small Entities in Agency Rulemaking."[14] For the most part the

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[9] This interpretation is suggested in Paul R. Verkuil, *A Critical Guide to the Regulatory Flexibility Act*, 1982 DUKE L.J. 213, 240.

[10] The Act contains definitions of these terms, but they are open-ended in the sense that agencies can establish alternative definitions appropriate to their activities. 5 U.S.C. § 601(3)-(5). The Department of Commerce also provides the following definitions:

> A small business is any business that meets the size standards set forth in part 121 of Title 13, Code of Federal Regulations (CFR). Part 121 sets forth, by the North American Industry Classification System (NACIS), the maximum number of employees or maximum average annual receipts a business may have to be considered a small entity. Provision is made for an agency to develop industry-specific definitions. The NACIS is available at http://www.sba.gov/size/sizetable2002.html. A small organization is any not-for-profit enterprise that is independently owned and operated and not dominant in its field. A small government jurisdiction is any government or district with a population of less than 50,000.

GUIDELINES FOR PROPER CONSIDERATION OF SMALL ENTITIES IN AGENCY RULEMAKING, *available at* http://www.ogc.doc.gov/ogc/legreg/zregs/guidelines.htm.

[11] 5 U.S.C. § 603(a)(3). The declaration of purpose in the note accompanying 5 U.S.C. § 601 states in part:

> It is the purpose of this Act to establish as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.

It should be pointed out that the agency's explanation, as set forth in any regulatory flexibility analysis, will be part of the "whole record of agency action" if judicial review of a final rule is sought. *Id.* § 611(b).

[12] 5 U.S.C. § 603(c).

[13] *Id.* § 612(a).

[14] Issued August 13, 2002, 67 Fed. Reg. 53,461 (Aug. 16, 2002).

Order simply restates the requirements of the RFA, but the Order gives greater prominence to the role of the Chief Counsel for Advocacy and specifically requires an agency to provide the Chief Counsel with a draft of any proposed rule that may require a flexibility analysis at the same time the agency provides it to the Office of Information and Regulatory Affairs (OIRA) under E.O. 12,866[15] or, if the draft is not required to be sent to OIRA, at a reasonable time prior to publication of the proposed rule.

The Chief Counsel not only advises agencies as to his views on proposed rules, he also reports at least annually on agency compliance to the President and Congress,[16] and unlike any other federal official, he also has the statutory authority to participate in litigation as an amicus curiae is support of challenges to agency rules.[17] For example, in one case, the Chief Counsel submitted an amicus brief supporting a small business's claim that the RFA exception under Section 605—waiving the flexibility analysis requirement when the head of the agency believes the rule would not have a "significant economic impact on a substantial number of small entities"—should not apply. The court agreed with the Chief Counsel that in defining "small entity," agencies should use the SBA's definition. In this case the rulemaking agency did not, and therefore did not comply with the RFA.[18]

The Regulatory Flexibility Act operates within the APA rulemaking process in the following fashion: Unless the agency head certifies to the Chief Counsel for Advocacy and publishes such certification in the Federal Register that the rule will not have a "significant economic impact on a substantial number of small entities,"[19] an agency must prepare an "initial regulatory flexibility analysis" (IRFA). The IRFA, or a summary thereof, must be published in the Federal Register along with the proposed rule. Courts now regularly review such certifications.

Judicial Review

Courts are instructed to conduct their review in accordance with Chapter 7 of the APA. Accordingly, several courts have held that the standard of review is one of reasonableness, meaning that the agency must have made a reasonable, good-faith effort to carry out the requirements of the statute. *Associated Fisheries of Maine, Inc. v. Daley*, 127 F.3d 104, 114 (1st Cir. 1997); *see also Southern Offshore Fishing Association v. Daley*, 995 F. Supp. 1411 (M.D. Fl. 1998). Under the reasonableness standard, an agency need only consider significant alternatives to a rule, rather than all alternatives, when doing a final regulatory flexibility analysis (FRFA). *Associated Fisheries*, 127 F.3d at

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[15] Exec. Order 12,866 § 3(f), 58 Fed. Reg. 51,735 (1993).

[16] *Id. See also, e.g.*, SBA OFFICE OF ADVOCACY, REPORT ON THE REGULATORY FLEXIBILITY ACT, FY 2004 (Feb. 2005), *available at* http://www.sba.gov/advo/laws/flex/04regflx.html. *See also* Cindy Skrzycki, *Small Business Advocate Plays a Big Role in Rulemaking*, WASH. POST, Jan 11, 2005 at E-1 (describing the increasing clout of this office).

[17] 5 U.S.C. § 612 (b).

[18] Nw. Mining Ass'n v. Babbitt, 5 F. Supp. 2d 9 (D.D.C. 1998).

[19] 5 U.S.C. § 605(b).

116. Similarly, an agency must make a reasonable effort to facilitate participation by small entities, but the method and manner of accomplishing this was left to agency discretion, since the Act only offered suggestions. *Id.* at 117. *Southern Offshore* applied the reasonableness standard and concluded that the agency's certification of no "significant economic impact on a substantial number of small entities" was unsatisfactory because the evidence contradicted many of the assumptions upon which the certification was based. *Southern Offshore*, 995 F.Supp. at 1436.

Several cases have involved challenges to the adequacy of an agency certification of no "significant economic impact on a substantial number of small entities" in a FRFA by claiming that the agency failed to consider the effects of the proposed rule on a particular entity. The first case, *Mid-Tex Electric Cooperative, Inc. v. FERC*, 773 F.2d 327 (D.C. Cir. 1985), determined that the certification was valid because the agency need only consider the rule's direct impact on regulated entities and not the indirect impacts of the rule on entities not regulated by the agency. More recent cases have affirmed *Mid-Tex's* holding.[20]

The Certification Process

The IRFA or the certification must be sent to the Chief Counsel for Advocacy. When a rule proposed rule may have a "significant economic impact on a substantial number of small entities," the agency, in addition to publishing the proposed rule and IRFA, or summary, in the Federal Register, "shall assure that small entities have been given an opportunity to participate in the rulemaking for the rule through the reasonable use of techniques" such as advance notice of proposed rulemaking, publication of notice in specialized publications, direct notification of small entities, the holding of public conferences or hearings, or use of simplified or modified procedures that make it easier for small entities to participate.[21] After the comment period on the proposed rule is closed, the agency must either certify a lack of impact or prepare a FRFA, which, among other things, responds to issues raised by public comments on the IRFA.[22] The agency is not required to send the FRFA to the Chief Counsel for Advocacy, but it must make it available to the public on request and publish the analysis or a summary of it in the Federal Register.[23]

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[20] *See, e.g.*, Cement Kiln Recycling Coalition v. E.P.A., 255 F.3d 855 (D.C. Cir. 2001); Motor & Equipment Manufacturers Ass'n v. Nichols, 142 F.3d 449, 467 (D.C. Cir. 1998); United Distribution Cos. v. FERC, 88 F.3d 1105, 1170 (D.C. Cir. 1996); State of Colo. *ex rel.* Colorado State Banking Bd. v. Resolution Trust, 926 F.2d 931 (10th Cir. 1991), White Eagle Co-op Ass'n. v. Johanns, 508 F. Supp. 2d 664, 676 (N.D. Ind. 2007). *But see* Federal Aeronautical Repair Station Ass'n, Inc. v. FAA, 494 F.3d 161 (D.C. Cir. 2007) (distinguishing *Mid-Tex*), and American Federation of Labor v. Chertoff, --- F.Supp.2d ---, 2007 WL 2972952 (N.D. Cal. 2007) (enjoining a Department of Homeland Security rule in part because the rule was promulgated in violation of the Regulatory Flexibility Act).

[21] 5 U.S.C. § 609.

[22] *Id.* § 604(a). *See also* Grand Canyon Air Tour Coal. v. FAA, 154 F.3d 455, 470-71 (D.C. Cir. 1998) (accepting FAA's responses to comments on IRFA).

[23] *Id.* § 604(b).

Periodic Review and Agendas

The Regulatory Flexibility Act also requires agencies to publish and implement a plan for reviewing (within ten years) existing (and subsequently issued) rules that have a significant economic impact on a substantial number of small entities.[24] The agency is to review existing rules to minimize any "significant economic impact on a substantial number of small entities."[25] This review should consider the continued need for the rule; the nature of complaints or comments received concerning the rule; the complexity of the rule; the extent of duplication or conflict with other federal, state, or local regulation; and any relevant economic or technological changes that have occurred since the rule was issued.[26] There has been some strong criticism of the way this part of the Act has been implemented.[27]

Finally, the Act requires each agency to prepare a regulatory flexibility agenda of rules under development that may have a "significant economic impact on a substantial number of small entities."[28] The agenda must be published in the Federal Register semiannually, in October and April, and is to be transmitted to the Office of Advocacy for comment and brought to the attention of small entities or their representatives.[29] In practice, this agenda is incorporated into the Unified Agenda of Federal Regulatory and Deregulatory Actions, published semiannually by the Regulatory Information Service Center in the General Services Administration.[30] The SBA Office of Advocacy has also issued a lengthy guide for agencies on compliance with the RFA.[31]

Issues raised by the Reg-Flex Act.

1. The RFA's triggering language

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[24] *Id.* § 610(a). The period for review may be extended in one-year increments for up to five additional years. *Id.*

[25] 5 U.S.C. § 610(b). Throughout the Act, the goal of minimizing the impact on small entities is always understood to be considered in the context of achieving objectives of the relevant statute underlying the regulation in question. 5 U.S.C. §§ 603(c), 604(a)(3), 606.

[26] *Id.* § 610(b).

[27] *See* Michael R. See, *Willful Blindness: Federal Agencies' Failure to Comply with the Regulatory Flexibility Act's Periodic Review Requirement—and Current Proposals to Invigorate the Act*, 33 FORDHAM URB. L.J. 1199 (May 2006).

[28] *Id.* § 602(a).

[29] *Id.* § 602(b)-(c).

[30] *See, e.g.*, REGULATORY INFORMATION SERVICE CENTER, UNIFIED AGENDA OF FEDERAL REGULATORY AND DEREGULATORY ACTIONS, *Index to Entries That Agencies Have Designated for Section 610 Review* (Spring 2004), *available at* http://ciir.cs.umass.edu/ua/Spring2004/indexes/Section_610_Review_Index.html.

[31] *See* SBA OFFICE OF ADVOCACY, "A GUIDE FOR GOVERNMENT AGENCIES—HOW TO COMPLY WITH THE REGULATORY FLEXIBILITY ACT" (May 2003) *available at* http://www.sba.gov/advo/laws/rfaguide.pdf; *see also* DEPARTMENT OF COMMERCE, GUIDELINES FOR PROPER CONSIDERATION OF SMALL ENTITIES IN AGENCY RULEMAKING, *supra* note 10.

The RFA's central provision requires an agency issuing any notice of proposed rulemaking required by Section 553 of the APA to prepare and make available for public comment an initial regulatory flexibility analysis. But the RFA provides that this requirement "shall not apply to any proposed or final rule if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."

The meaning of the unwieldy phrase "significant economic impact on a substantial number of small entities" (which has been given the unfortunate acronym of SEISNOSE) thus becomes the pivotal threshold issue for agencies when they determine whether or not to undertake the drafting of an initial regulatory flexibility analysis. This will also determine of course whether the agency must subsequently do a final regulatory flexibility analysis, but it also determines whether various other requirements of the Act are triggered. This has been called a "domino effect" by the Government Accountability Office (GAO), which has also concluded that the lack of clarity in the phrase "significant economic impact on a substantial number of small entities" is hampering the success of the entire RFA:

> [T]he full promise of RFA may never be realized until Congress clarifies key terms and definitions in the Act, such as "a substantial number of small entities," or provides an agency or office with the clear authority and responsibility to do so. It is also important to keep in mind the domino effect that an agency's initial determination of whether RFA is applicable to a rulemaking has on other statutory requirements, such as preparing compliance guides for small entities and periodically reviewing existing regulations.[32]

The phrase encompasses a number of elements, each of which is in need of definition or at least elaboration: (1) "significant economic impact," (2) "substantial number," and "small entities." Executive Order 13,272 has directed federal agencies, after consulting with the Chief Counsel for Advocacy, to "issue written procedures and policies, consistent with the Act, to ensure [compliance with the Act],"[33] and the Chief Counsel has produced a useful compliance guide for federal agencies that describes the legislative history and court decisions on the meaning of "significant economic impact on a substantial number of small entities," yet there is still seems to be uncertainty as to this key issue.

The GAO has suggested that a reason for this was that the Chief Counsel for Advocacy was not delegated the responsibility to make such interpretations.[34] I would defer to the Chief Counsel's view as to whether additional authority to do so would be necessary, but I note that in the analogous area of environmental impact statements, the President

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[32] GOVERNMENT ACCOUNTABILITY OFFICE, REGULATORY FLEXIBILITY ACT: CONGRESS SHOULD REVISIT AND CLARIFY ELEMENTS OF THE ACT TO IMPROVE ITS EFFECTIVENESS 1, GAO-06-998T (July 20, 2006).

[33] *See* note 14 *supra*, at § 3.

[34] GAO Report, *supra* note 32.

authorized the Council on Environmental Quality to issue binding regulations concerning the implementation of NEPA by federal agencies.[35] This Committee may wish to compare the CEQ's authority with that of the Chief Counsel for Advocacy. In connection with this issue, an attorney in the Office of Advocacy has written that, while the Executive Order is working well in general, "many independent agencies assert they are not subject to the executive order and make no effort to comply with it."[36] He recommends that Congress codify the Order to remove such doubts, and that is certainly worth considering.

Another "triggering" issue concerns the important limitation that the Act does not apply to the vast amount of administrative activity that is not rulemaking, such as adjudication, consent decrees and other types of informal actions. Except for the limited set of IRS interpretive rules, the Act also does not reach rulemaking that is not subject to notice and comment, such as interpretive rules, policy statements, and other rules exempt from notice and comment by virtue of the subject-matter exemptions in section 553 of the APA.

I think it would be difficult to draft a provision that would apply the Act to the wide variety of non-binding guidance that agencies issue to the public (though I would be interested to know how it is working with respect to IRS interpretive rules). Furthermore, a new OMB bulletin has attempted to rein in agency use of "binding guidance" (which should be an oxymoron).[37] So I don't advocate expanding the Act's coverage in this regard at this time. I would, however, recommend that Congress amend the APA to eliminate the exemption from notice and comment for rules relating to "public property, loans, grants, benefits, or contracts."[38] It has been long-recognized that this exemption is outdated[39] and removing it would also extend the coverage of the RFA to such rules.

Finally, there seems to be much less oversight, guidance, and case law concerning the Act's coverage of small communities and small organizations. The Office of Advocacy (being part of the Small Business Administration), naturally would give more attention to

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[35] *See* Executive Order 11,991 Relating to Protection and Enhancement of Environmental Quality (May 24, 1977), *available at* http://www.hud.gov/offices/cpd/environment/lawsandregs/laws/lawsauthorities/eo/11991.cfm.

[36] Keith W. Holman, *The Regulatory Flexibility Act at 25: Is the Law Achieving Its Goals?*, 33 FORDHAM URB. L.J 1119, 1136-37 (2006).

[37] *See* Office of Management and Budget, "Bulletin on Good Guidance Practices," Issued January 18, 2007, 72 Fed. Reg. 3432 (Jan. 25, 2007). This was followed up by a Memorandum for Heads of Executive Departments and Agencies, and Independent Regulatory Agencies, (M-07-13), from Rob Portman, Director, OMB, "Implementation of Executive Order 13422 (amending Executive Order 12866) and the OMB Bulletin on Good Guidance Practices" April 25, 2007, *available at* http://www.whitehouse.gov/omb/memoranda/fy2007/m07-13.pdf.

[38] 5 U.S.C. § 553(a)(2).

[39] *See, e.g.*, ACUS Recommendation 69-8, Elimination of Certain Exemptions from the APA Rulemaking Requirements, 38 Fed. Reg. 19,782 (July 23, 1973) (recommending elimination of this exemption), *available at* http://www.law.fsu.edu/library/admin/acus/305698.html.

the small business aspects of the Act. The Congress might well consider whether the other two intended beneficiaries of the Act have been given inadequate attention.

2. The role of judicial review.

When Congress was considering the addition of judicial review to add teeth to the RFA in the early 1990's I was somewhat concerned that separate intensive court review of RFA compliance, apart from review of the rule itself, might lead to increased "ossification" of the rulemaking process.[40] I am happy to say that my fears have not been borne out. While the courts have by and large used a reasonableness test to review agency compliance with the statute, they have been willing to invalidate agency certifications in enough cases that agencies have to take their RFA responsibilities seriously. A case in point is the recent decision that received wide publicity, *American Federation of Labor v. Chertoff*,[41] which enjoined a Department of Homeland Security rule that would have added receipt of a no-match letter to a list of examples "that may lead to a finding that an employer had ... constructive knowledge" of an employee's unauthorized [immigration] status," in part because the agency improperly certified that the rule would not have a "significant economic impact on a substantial number of small entities."

One trend in the caselaw that might, however, require legislative attention is the tendency to find that agencies need only consider the rule's direct impact on regulated small entities and not the indirect impacts of the rule on entities not regulated by the agency.[42] While it would be burdensome for agencies to have to consider every ripple effect of a rule, I would think it would be reasonable for agencies to consider substantial indirect effects on small entities as well.

3. The role of the Chief Counsel for Advocacy of the Small Business Administration in superintending the Act.

Even a cursory look at the website of the Office of the Chief Counsel for Advocacy,[43] and its most recent Annual Report,[44] shows the breadth and depth of the Office's efforts to

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[40] *See* Testimony of Jeffrey S. Lubbers, Research Director, Administrative Conference of the United States, before the Subcomm. on Administrative Law and Government Relations, Comm. of the Judiciary, House of Representatives, on H.R. 830, Regulatory Flexibility Amendments Act of 1993 (Nov. 18, 1993).

[41] --- F.Supp.2d ----, 2007 WL 2972952 (N.D. Cal. 2007).

[42] *See* Mid-Tex Electric Cooperative, Inc. v. FERC, 773 F.2d 327 (D.C. Cir. 1985). See also Cement Kiln Recycling Coalition v. E.P.A., 255 F.3d 855 (D.C. Cir. 2001); Motor & Equipment Manufacturers Ass'n v. Nichols, 142 F.3d 449, 467 (D.C. Cir. 1998); United Distribution Cos. v. FERC, 88 F.3d 1105, 1170 (D.C. Cir. 1996); State of Colo. *ex rel.* Colorado State Banking Bd. v. Resolution Trust, 926 F.2d 931 (10th Cir. 1991), White Eagle Co-op Ass'n. v. Johanns, 508 F. Supp. 2d 664, 676 (N.D. Ind. 2007). *But see* Federal Aeronautical Repair Station Ass'n, Inc. v. FAA, 494 F.3d 161 (D.C. Cir. 2007) (distinguishing *Mid-Tex*),

[43] Http://www.sba.gov/advo/index.html.

[44] OFFICE OF ADVOCACY, U.S. SMALL BUSINESS ADMINISTRATION, FY 2006 ANNUAL REPORT OF THE CHIEF COUNSEL FOR ADVOCACY ON IMPLEMENTATION OF THE REGULATORY FLEXIBILITY ACT AND EXECUTIVE ORDER 13272 (Feb. 2007), *available at* http://www.sba.gov/advo/laws/flex/06regflx.html.

implement the RFA. My impression is that the Office is working well. The main issues are whether the Office should be given more authority as described above, and perhaps whether the Office should be established as an independent agency, with its own budget, more along the lines of the Office of Special Counsel.[45]

4. The ten-year reviews required by Section 610 of the Act.

Two recent commentaries, one a law review article by a former Assistant Chief Counsel for Advocacy (now an attorney with the American Petroleum Institute),[46] and an extensive GAO new report,[47] have suggested that the ten-year review process is not working well.

The article concluded:

> Unfortunately, over the past twenty-five years, federal regulators have often ignored section 610 and have not conducted periodic reviews of their rules. Even those agencies which review some of their existing rules under section 610 rarely act in response to their reviews. Most of these agencies comply with the letter of the law for only a small percentage of their rules, and they rarely take action beyond publishing a brief notice in the Federal Register. Ironically, when regulators conduct periodic reviews under section 610, they are far more likely to increase the burden of regulation on small entities than to reduce it.[48]

The article ascribed this to three reasons: "agencies (1) 'restarting the clock' by amending regulations, (2) determining that rules are not actually affecting small entities, and (3) in some cases, simply neglecting to fulfill their statutory duties."[49]

The problem also involves incentives related to the definitional "domino effect" mentioned above:

> The problem stems from the lack of definitions in the RFA for the terms "significant economic impact" and "substantial number." Some agencies routinely certify rules [as having no such impact] by adopting standards for these terms which result in every rule being certified. The rationale behind such action is twofold. First, the agency avoids being required to conduct regulatory flexibility analyses which consume agency resources

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[45] The Office of Special Counsel is an independent agency in the Executive Branch charged with protecting federal whistleblowers and enforcing the Hatch Act. The Special Counsel has a five year term and is only removable for cause. *See* http://www.osc.gov/intro.htm.

[46] Michael R. See, *supra* note 27.

[47] GOVERNMENT ACCOUNTABILITY OFFICE, REEXAMINING REGULATIONS: OPPORTUNITIES EXIST TO IMPROVE EFFECTIVENESS AND TRANSPARENCY OF RETROSPECTIVE REVIEWS, GAO-07-791 (July 2007).

[48] See, *supra* note 27, at 1200.

[49] *Id.* at 1219.

> and could support a regulatory alternative other than that which the agency favors. Second, agencies avoid any requirement to ever review their rules, and can conserve agency resources later on.[50]

The article suggests a number of legislative fixes for this problem, including sunsetting unreviewed rules, automatic rulemaking proceedings after ten years, and so on. My own view is that such cures might be worse than the disease. I would prefer to see the mandatory ten-year review requirement be scrapped in favor of a more targeted approach.

Mandates for agencies to consider the impact of existing rules (sometimes called "lookback") have been issued by every president since President Carter,[51] and agencies have been engaging in numerous discretionary reviews ever since. My conclusion that mandatory reviews are counter-productive is bolstered by the new GAO report, which identified a number of challenges that agencies generally face in undertaking reviews.

These include difficulties in collecting the data needed to demonstrate results, the diverse and complex factors that affect agencies' results (for example, the need to achieve results through the actions of third parties), the long time period required to see results in some areas of federal regulation, and the fact that it is often more difficult to estimate the benefits of regulations than it is to estimate the costs.[52] It is also hard to fit often-amended rules into a particular time frame for review.

The GAO report looked at all manner of retrospective review of rules engaged in by federal agencies. The report concluded:

> One of the most striking findings during our review was the disparity in the perceived usefulness of mandatory versus discretionary regulatory reviews. The agencies characterized the results of their discretionary reviews as more productive and more likely to generate further action. A primary reason for this appears to be that discretionary reviews that address changes in technology, advances in science, informal agency feedback, harmonization efforts, and petitions, among other things, may be more closely attuned to addressing issues as they emerge.[53]

This leads me to believe that a better approach is the technique used in the current Administration of seeking nominations from the regulated public on rules which should be reformed. This practice, which was begun by OMB in 1997,[54] led, for example, to a

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[50] *Id.* at 1223-24 (footnote omitted).

[51] *See* GAO Report, *supra* note 47, at 10.

[52] *See* GAO Report, *supra* note 47, at 11-12.

[53] *Id.* at 51. *See also* ACUS Recommendation 95-3, "Review of Existing Agency Regulations," 60 Fed. Reg. 43,108 (Aug. 18, 1995), *available at* http://www.law.fsu.edu/library/admin/acus/305953.html (noting the difficulty of such reviews and urging Congress to avoid standardization and additional judicial review of such reviews).

[54] *See* See, *supra* note 27 at 1210, citing Office of Mgmt. and Budget, Notice and Request for Comments, Draft Report to Congress on the Costs and Benefits of Federal Regulations, 63 Fed. Reg. 44,034 (Aug. 17,

response to a 2001 notice in which OMB received seventy-one nominations, and designated twenty-three of them as "high priority."[55] The next year, OMB received recommendations for the reform of 316 separate rules and guidance documents. Of these, OMB, the Chief Counsel for Advocacy, and the federal agencies mentioned identified thirty-four existing rules to be in need of reform.[56]

Thus, I think that rather than try to force agencies to review all rules in a set period, it would be better if the agencies were instructed to seek the public's input periodically as to which rules should be reviewed, and to issue a report responding to such suggestions—giving special attention to those which may disproportionately affect small entities.

5. The Small Business Advocacy Review Panel Requirements in Section 609 of the Act.

In the 1996 SBREFA amendments to the RFA, Congress added a new provision requiring a "covered agency," prior to issuance of the initial regulatory flexibility analysis, to convene a special review panel consisting of agency, Office of Management and Budget and Small Business Administration officials, and representatives of affected small entities.[57] The panel must file a public report on the impacts of the proposal within 60 days. Only two agencies (EPA and OSHA) are included in the definition of "covered agency" for the purposes of this provision.

According to the Chief Counsel's website, since 1996 there have been 31 EPA panels[58] and eight OSHA panels,[59] which seems like a rather low number. But a GAO report finding provides some clues to why:

> [A]fter SBREFA took effect EPA's four major program offices certified that almost all (96 percent) of their proposed rules would not have a significant impact on a substantial number of small entities. EPA officials told us this was because of a change in EPA's RFA guidance prompted by the SBREFA requirement to convene an advocacy review panel for any proposed rule that was not certified. Prior to SBREFA, EPA's policy was to prepare a regulatory flexibility analysis for any rule that the agency

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1998); and Office of Mgmt. and Budget, Notice and Request for Comments, Draft Report to Congress on the Costs and Benefits of Federal Regulations, 62 Fed. Reg. 39,352 (July 22, 1997).

[55] *See id.*, citing Office of Mgmt. and Budget, Stimulating Smarter Regulation: 2002 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities 104-06 (2002), *available at* http://www.whitehouse.gov/omb/inforeg/2002_report_to_congress.pdf (status of the twenty-three High-Priority Rules OIRA Suggested for Reform in 2001).

[56] *See id.*, citing OMB, Stimulating Smarter Regulation at 4, 25-28.

[57] 5 U.S.C. § 609(b)(5). For an early assessment of the implementation of this requirement, see U.S. GEN. ACCOUNTING OFFICE, REGULATORY REFORM: IMPLEMENTATION OF THE SMALL BUSINESS ADVOCACY REVIEW PANEL REQUIREMENTS (GAO-GGD-98-36) (MAR. 1998).

[58] *See* http://www.sba.gov/advo/laws/is_epapanels.html.

[59] *See* http://www.sba.gov/advo/laws/is_oshapanels.html.

> expected to have any impact on small entities. According to EPA officials, the SBREFA panel requirement made continuation of the agency's more inclusive RFA policy too costly and impractical.

I cannot say whether the RFA review panels have produces sufficient added value to the usual EPA and OSHA rulemaking process, or whether additional agencies should be "covered." This would perhaps be a good study for a revived Administrative Conference.[60]

6. The Act's analytical requirements in context with other analytical requirements applicable to rulemaking.

The RFA is one of many statutes and Executive Orders that require agencies to undertake separate analyses in rulemaking. For "significant regulatory actions" subject to Executive Order 12,866; rules containing information-collection requirements; rules likely to have significant economic impact on state, local, and tribal governments; and rules implicating certain other policy interests, an agency must undertake a special analysis. Where such analyses are required, an initial or preliminary report must generally be prepared in conjunction with the notice of proposed rulemaking, and a final report, responding to comments on the earlier report, must be prepared with the final rule.

Executive Order 12,866 requires a cost-benefit assessment of "economically significant rules" that evaluates the potential costs and benefits of the proposed rule. It also requires a description of alternative approaches that could substantially achieve the same regulatory goal at a lower cost and a brief explanation of the legal reasons why such alternatives could not be adopted.[61] The Paperwork Reduction Act[62] requires an agency to justify the burdens imposed by information collection requirements. The Unfunded Mandates Reform Act[63] essentially codified E.O. 12,866's analysis requirements and extended them to rules having a special impact on state, local, or tribal governments, as well as on the private sector. In addition, executive orders on federalism, tribal governments, takings of private property, energy effects, and the protection of children from environmental health risks require analysis of a rulemaking's impacts in particular areas.[64] Obviously one could think of many other analyses that might be required: analyses of "urban areas," rural areas," farmers, national security, just to name a few. Each one is defensible and each one might have its own constituency, but at some point

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[60] On October 22, 2007, the House of Representatives passed H.R. 3564, the Regulatory Improvement Act of 2007 which would reauthorize the Administrative Conference of the United States. On October 25, it was placed on the Senate Calendar.

[61] Exec. Order 12,866 § 3(f). For a critical review of agency performance in this area covering all economically significant rules issued from July 1996-March 1997, see U.S GEN. ACCOUNTING OFFICE, REGULATORY REFORM: AGENCIES COULD IMPROVE DEVELOPMENT, DOCUMENTATION, AND CLARITY OF REGULATORY ECONOMIC IMPACT ANALYSES (GAO-GGD-99-59) (May 1998).

[62] 44 U.S.C. §§ 3501-3520.

[63] Pub L. No. 104-4, 109 Stat. 48 (1995) (codified at 2 U.S.C. chs. 17A, 25).

[64] *See* Lubbers, *supra* note 1, at 241-74.

the agency's task in issuing rules will be hampered if the task of performing analyses is not made more straightforward and coordinated.

The Administrative Conference observed that the profusion of these analytical requirements has become a problem: "While these analytical emphases can be rationalized individually, in the aggregate, they can result in redundant requirements, boilerplate-laden documents, circumvention, delays, and clutter in the Federal Register."[65] The ABA has also urged that Congress and the President show restraint in establishing analytical requirements.[66]

This is not to minimize the importance of doing regulatory flexibility analysis at all. But as a matter of good government, we should be wary of making it too difficult for the government to issue needed health, safety, and environmental rules.

Despite the many examples of problematic rules that have been documented, we must keep in mind that rules can have great benefits too. As the GAO pointed out in its 2006 report: "The Office of Management and Budget reported that the estimated quantified and monetized annual benefits of the major federal regulations it reviewed from October 1995 through September 2005 range from $94 billion to $449 billion, while estimated annual costs range from $37 billion to $44 billion."[67]

It may be surprising to this Committee to learn that the amount of rulemaking by federal agencies has dropped significantly. The high water mark in both proposed and final rules was in 1979, in the Carter Administration—7611 final rules and 5824 proposed rules. Even in 1983 in the middle of the Reagan Administration, 6049 final rules and 3907 proposed rules were issued. The latest published figures are for 2005, in which the lowest point was reached: 2,257 proposed rules and 3980 final rules This means that the government is now publishing 48% fewer final rules and 61% fewer proposed rules as compared to 1979. And even 34% fewer final rules and 42% fewer proposed rules than the Reagan Administration did in 1983.[68]

Of course I would not ascribe this fall-off entirely to the need for agencies to produce so many special analyses, but there is a lot of needless redundancy. Both the RFA and the Unfunded Mandates Reform Act specifically provide that agencies may perform

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[65] ACUS Recommendation 93-4, "Improving the Environment for Agency Rulemaking," 59 Fed. Reg. 4670 (Feb. 1, 1994) (part I of preamble), *available at* http://www.law.fsu.edu/library/admin/acus/305934.html.

[66] ABA House of Delegates, Recommendation on Rulemaking Impact Analyses (Feb. 1992); *see also* U.S. GEN. ACCOUNTING OFFICE, FEDERAL RULEMAKING: PROCEDURAL AND ANALYTICAL REQUIREMENTS AT OSHA AND OTHER AGENCIES (GAO-01-852T) (June 14, 2001) (testimony of Victor Rezendes, Managing Director, Strategic Issues Team, before the House Comm. on Education and the Workforce) (describing the many requirements and their impact on OSHA rulemaking).

[67] GAO Report, *supra* note 32, at 2, n.2, citing Office of Management and Budget, *Draft 2006 Report to Congress on the Costs and Benefits of Federal Regulations* (Washington, D.C.: April 2006).

[68] *See* COMPETITIVE ENTERPRISE INSTITUTE, "TEN THOUSAND COMMANDMENTS" 28 (2006), *available at* http://www.cei.org/pdf/5407.pdf.

regulatory analyses in conjunction with or as a part of any other analysis required by law, so long as the analysis satisfies each Act's requirements.[69] I would like to see Congress work on a way to consolidate all of these analyses into one comprehensive "regulatory analysis."

7. Overarching budget constraints.

In closing, I would also like to mention that agencies are a bit beleaguered at this point. Budgets and staffing have been flatlined or reduced for many regulatory agencies while their substantive and procedural responsibilities have continued to increase. Just to provide two published examples, (1) in 2000, OSHA had fewer employees than it did in 1971, and nearly eight hundred fewer employees than it had in 1980;[70] and (2) the Commodity Futures Trading Commission's staffing this year has dropped to its lowest level in the agency's 33-year history, and CFTC's Acting Chairman Walter Lukken was quoted as saying: "We are facing flat budgets and exponential growth in the industry. . . . Over the long term this type of budgetary situation is not sustainable."[71]

I have already mentioned some of the incentives that have led agencies to avoid doing reg-flex analyses, convening advocacy review panels, and conducting ten-year reviews. Instead of adding a lot more requirements in the RFA, perhaps this Committee could pursue ways to provide additional funding for agencies based on the number of analyses, panels, and lookback reviews that they do.

I'd be happy to try to answer any questions you may have.

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[69] *See* 2 U.S.C. § 1532(c) (UMRA); 5 U.S.C § 605 (RFA).

[70] *See e.g.*, Sidney A. Shapiro & Randy Rabinowitz, *Voluntary Regulatory Compliance in Theory and Practice: The Case of OSHA*, 52 ADMIN. L. REV. 97, 98 (2000).

[71] David Cho, Energy Traders Avoid Scrutiny As Commodities Market Grows, Oversight Is Slight, WASH. POST, October 21, 2007 at A1.

# STATEMENT OF MAUREEN MORRISSEY

# TUPPERWARE BRANDS CORPORATION

# BEFORE THE COMMITTEE ON SMALL BUSINESS

# U.S. HOUSE OF REPRESENTATIVES

# NOVEMBER 15, 2007

Good morning. My name is Maureen Morrissey. I am Assistant General Counsel for the Americas with Tupperware Brands Corporation. My testimony today focuses on the Federal Trade Commission's "Business Opportunity Rule," a proposed regulation published in April 2006. Specifically, I would like to address how the FTC has analyzed the impact of this regulation on small businesses pursuant to the Regulatory Flexibility Act. We and many others have significant concerns with the FTC's analysis.

Tupperware Brands Corporation is a publicly traded direct seller of premium innovative products headquartered in Orlando, FL and our

products are now sold in over 100 countries[1]. In 2006, $1.7 billion of Tupperware Brands products were sold by our sales force of over 1,9 million individuals around the world. For over 60 years, Tupperware has been one of the most well known brands in America and a leader in the direct selling industry. The term "Tupperware parties" has now entered the American lexicon due to their widespread popularity.

I want to make sure that the Committee fully understands why a company such as Tupperware Brands has a direct interest in the proper implementation of the Regulatory Flexibility Act. In the United States, our products include design-centric preparation, storage, and serving solutions for the kitchen and home through the Tupperware brand and beauty and personal care products through the BeautiControl brand. Our products are sold primarily through the "party plan" via a business model based upon direct sales to customers by our individual sales consultants, each of whom is a self-employed business owner. It is the direct impact of the FTC's Business Opportunity Rule upon these small business owners that concerns Tupperware Brands because the requirements of the

[1] In addition to the Tupperware product line, Tupperware Brands includes Avroy Shlain, BeautiControl, Fuller, NaturCare, Nutrimetics, Nuvo, and SwissGarde.

Regulatory Flexibility Act should have led the FTC to conclude that these individual Tupperware and BeautiControl business owners would be impacted by the proposed Business Opportunity Rule.

Today, Tupperware Brands has more than 180,000 independent contractor sales consultants working in the United States. Through Tupperware Brands, these individuals are able to operate their own small businesses and earn significant incomes. For many, selling Tupperware or BeautiControl is a full-time job.

The FTC's Business Opportunity Rule proposes burdensome new requirements that must be met before individuals can enter into a new "business opportunity" that requires any level of up-front investment. The preamble to the regulation states that the objective is to target fraudulent schemes, including work-at-home arrangements that involve misrepresentations by the seller of the income-earning opportunity and other scams that result in financial harm to the individual buying into the opportunity. However, the true scope of the regulation is far broader. The new requirements also would apply to legitimate direct-selling opportunities, such as those

offered by Tupperware. By the way, the up-front investment for Tupperware consultants is currently either a $69 or $99 starter kit of Tupperware products whose retail value is $300 and $450, respectively. For BeautiControl consultants, the current cost of the full starter kit is $179, which includes BeautiControl products with a retail value of nearly $400. Both Tupperware and BeautiControl extend a generous return policy with regard to these starter kits, thereby providing further safeguards for these entrepreneurs.

The proposed requirements of the Business Opportunity Rule are indeed onerous. Of greatest concern, the regulation would require business opportunity sellers to furnish a prospective buyer with detailed written disclosures at least seven days before a buyer can enter into a new business opportunity. Today, the direct selling business is marked by ease of entry and speed to market. Obstacles to entry or delays in earning income would adversely impact these small entrepreneurs. If the Business Opportunity Rule were finalized in its current form, it would fundamentally alter the way direct selling operates. In practice, fewer recruits would become sales consultants and thus successful small business owners And,

those who do endure the waiting-period process may earn less income.

Tupperware Brands recognizes that unscrupulous companies and individuals have taken advantage of the public by offering get-rich-quick schemes that operate under a "work from home" framework masked as a legitimate direct selling opportunity. Under these types of fraudulent schemes, consumers are typically encouraged to invest their money upfront to stuff envelopes, assemble products, purchase worthless goods for resale, etc. The reality is that the only business occurring is that the fraudster is making money through outright fraud. Tupperware Brands condemns those individuals and companies who market fraudulent business opportunities, and we encourage local, state, and federal law enforcement to crack down on them to the greatest extent permitted by law.

Now I would like to turn to the Regulatory Flexibility Act. Congress enacted the RFA in 1980 to ensure that when planning new regulations, federal agencies consider the needs of small businesses and other small entities like small nonprofits. This law was a

response to the creation of numerous new federal agencies in the 1970s such as the Environmental Protection Agency, Occupational Safety and Health Administration, and the National Highway Traffic Safety Administration and the enactment of new laws that imposed a wide variety of new regulatory requirements on small businesses, such as the Clean Air Act, Clean Water Act, Occupational Safety and Health Act, and the Employee Retirement Income Security Act.

In the RFA, Congress declared that its purpose was "to establish as a principle of regulatory issuance that agencies shall endeavor…to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation." For the RFA to work as intended, agencies must make sure that they analyze properly the potential impact on small entities and that they do not minimize the universe of affected parties in such a way that it appears that there is no significant economic impact on a substantial number of small entities.

As you know, the RFA requires agencies to prepare an Initial Regulatory Flexibility Analysis when proposing a new rule with a

potentially significant impact on small entities. The FTC also stated in the preamble to the regulation that it did not expect that the Business Opportunity Rule would have a significant economic impact on a substantial number of small entities. However, the FTC nevertheless prepared an IRFA for the regulation, and in doing so concluded that the regulation would affect only 3,200 small businesses, including 2,500 vending machine, rack display, and related opportunity sellers; 550 work-at-home opportunity sellers; and 150 multilevel marketing companies.

Nowhere is there any mention or consideration of the impact of the proposed regulation on individual sales consultants whose income-earning opportunities would be restricted by the rule. Yet the impact of the regulation on these independent small businesses should have been readily apparent. As I discussed, the proposed waiting period requirement under the regulation would mean fewer recruits will become consultants. And for those recruits that do eventually become consultants, the waiting period would significantly dampen their enthusiasm at the time of first recruiting contact, which would mean these individuals would end up being less successful. This

would mean not only less income for the recruits but also for the individual sales consultants who recruit them and earn commissions on "downstream" sales. Not only should these independent sales consultants have been treated by the FTC as small businesses for purposes of the Regulatory Flexibility Act, the FTC should have concluded that the economic impact on these entities was substantial.

It is telling that the FTC received approximately 17,000 comments on the proposed Business Opportunity rule. Most were submitted by individual sales consultants harshly critical of the impact of the regulation on their ability to earn income. Tupperware sales consultants were among those voicing their strong concerns. These are the small business owners whom the RFA is supposed to protect and whose livelihoods are the subject of this Committee's jurisdiction.

Business opportunity sellers also voiced strong concerns about the impact of the Business Opportunity Rule. We flatly contest the FTC's Reg Flex analysis that the economic impact of the proposed regulation would be minimal. Business opportunity sellers may lose

revenues as individual sales consultants make fewer sales. We also would have to make substantial expenditures to build the recordkeeping and computer systems necessary to produce disclosure documents that would be required by the Business Opportunity Rule.

I am not here to provide a detailed legal analysis of the FTC's compliance with the Regulatory Flexibility Act. However, I strongly believe that in the case of the Business Opportunity Rule, the agency has not met the underlying objectives of the Act. An agency is not meeting the Act's objectives when it disregards the impact of a rule on the types of small businesses that have been established by Tupperware sales consultants and the hundreds of thousands of other selling products offered by the Pampered Chef, Avon, Longaberger, and other direct sellers. The impact is real. My phone is still ringing with complaints from our sales consultants who are worried about their futures.

The Regulatory Flexibility Act needs to protect their interests. Either the FTC did not comply with the Act in issuing the Business

Opportunity Rule or the Act itself needs to be strengthened to ensure these types of small businesses are not overlooked.

I understand that the FTC is currently evaluating how to proceed on Business Opportunity Rule. I am hopeful the FTC will recognize the true impact of the proposed regulation on direct selling consultants and consider alternatives that would not restrict the valuable income-earning opportunities offered by companies like Tupperware. We would greatly appreciate any assistance that the Committee may be able to offer in this regard and also in ensuring that the requirements of the Regulatory Flexibility Act are observed both in letter and in spirit.

Thank you for your allowing me to testify today. I'd be happy to answer any questions you may have.



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