



Statement of the U.S. Chamber of Commerce

ON: SMALL BUSINESS REGULATORY IMPROVEMENT ACT OF 2008

TO: THE HOUSE COMMITTEE ON SMALL BUSINESS

**BY: MARC FREEDMAN
THE UNITED STATES CHAMBER OF COMMERCE**

DATE: DECEMBER 6, 2007

The Chamber's mission is to advance human progress through an economic, political and social system based on individual freedom, incentive, initiative, opportunity and responsibility.

The U.S. Chamber of Commerce is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region.

More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees, 70 percent of which have 10 or fewer employees. Yet, virtually all of the nation's largest companies are also active members. We are particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large.

Besides representing a cross-section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business— manufacturing, retailing, services, construction, wholesaling, and finance—is represented. Also, the Chamber has substantial membership in all 50 states.

The Chamber's international reach is substantial as well. It believes that global interdependence provides an opportunity, not a threat. In addition to the U.S. Chamber of Commerce's 96 American Chambers of Commerce abroad, an increasing number of members are engaged in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on national issues are developed by a cross-section of Chamber members serving on committees, subcommittees, and task forces. More than 1,000 business people participate in this process.

**TESTIMONY TO
HOUSE SMALL BUSINESS COMMITTEE
Marc Freedman, Director of Labor Law Policy
U.S. Chamber of Commerce
Small Business Regulatory Improvement Act of 2008
December 6, 2007**

Madam Chairwoman, Ranking Member Chabot, good morning. I am Marc Freedman, Director of Labor Law Policy for the U.S. Chamber of Commerce. Before I came to the Chamber in 2004, I was the Regulatory Counsel for the Senate Small Business Committee for more than five years under the chairmanships of Senators Bond and Snowe. During that time, my role was to oversee agency compliance with the Regulatory Flexibility Act and to suggest ways that it could be improved.

The Chamber unequivocally supports improvements to the Regulatory Flexibility Act (RFA) to close loopholes and clarify various terms that have led to agencies avoiding the requirements of the Act. We therefore are pleased to support your bill, the Small Business Regulatory Improvement Act of 2008 and commend you for pursuing this issue.

If we needed any reminder of what agencies will do to avoid assessing the impact of their regulations on small businesses, the recent regulation issued by the Department of Homeland Security holding employers accountable for the work authorization status of their employees based on the receipt of a Social Security Administration “no-match” letter should be more than sufficient. In that regulation, DHS did not address any of the complications and subtleties of trying to determine whether their regulation would have a “significant economic impact” on a “substantial number of small entities” in making their certification that the regulation did not trigger the full requirements of the RFA. They merely asserted that the regulation did not change

the underlying obligation of an employer to determine the work authorization status of its employees, and therefore this regulation represented no new burden.

The Chamber intervened in a case brought by an array of unions specifically to raise the Regulatory Flexibility Act compliance issue. Fortunately, Judge Charles Breyer of U.S. District Court for the Northern District of California saw through DHS's neglect of its rulemaking obligations and found that the agency had not supported its certification of no "significant economic impact on a substantial number of small entities" with an adequate factual basis as required by the Act. Currently, we are waiting to see how DHS addresses this shortcoming in an anticipated re-proposed regulation.

DHS's reasoning, if left unchallenged, would have set a dangerous precedent. Consider how that same logic—that the underlying obligation on the employer was not changed by a regulation—could be applied by other agencies such as OSHA. The Occupational Safety and Health Act mandates that employers provide a workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm"—all of OSHA's regulations are merely detailed examples of these hazards and how employers must protect their employees from them. If OSHA was to adopt DHS's logic—that any regulation did not change the underlying obligation of the employer—the agency would never have to determine the impact of a proposed regulation on small businesses and therefore would never conduct a Small Business Regulatory Enforcement Fairness Act (SBREFA) panel review taking input from actual small businesses; and never have to produce a small entity compliance guide—requirements for which were recently enhanced in the minimum wage package passed earlier in this session.

Against this backdrop, the Chamber believes making the RFA as effective as possible is imperative. While we are often associated with our large members, the truth is that 96 percent of U.S. Chamber members are actually small businesses with 100 employees or less. Everyone acknowledges that regulations impact small businesses more harshly than large businesses. If we are serious about keeping our small businesses competitive with global competition, we must make sure this act has the impact Congress intended when it passed the Regulatory Flexibility

Act more than 25 years ago, and amended it with the Small Business Regulatory Enforcement Fairness Act in 1996.

Your bill would make several important improvements to the Regulatory Flexibility Act. Perhaps the most significant is requiring agencies to consider the indirect impact of regulations when calculating the impact of regulations on small businesses. This is particularly helpful with respect to Environmental Protection Agency (EPA) regulations where the agency has claimed that, because some of their regulations are enforced by the states, these regulations only have an indirect impact and therefore do not trigger the range of requirements under the RFA and SBREFA. One example is with the National Ambient Air Quality Standards (NAAQS) under the Clean Air Act which delegates to the states the authority to develop the implementation plans on how comply with the NAAQS. Although ambient air quality standards can impose significant economic costs on businesses that may have to reduce their activities in order to comply with the state implementation plan and meet the ambient air quality standards, EPA does not comply with the RFA when it develops the standards or during the approval of the state implementation plans. The EPA argues that the RFA does not apply because the ambient air quality standards and state implementation plans only regulate states which are not small entities under the RFA.

Another important problem your bill addresses is improving agency compliance with Section 610—the provision that requires agencies to review their regulations after 10 years to determine if they should remain as is, or be modified to better fit the realities of the small businesses who must comply with them. Your bill makes clear that the agency is to determine whether the regulation has a significant economic impact on a substantial number of small entities at the time of the review. The Government Accountability Office concluded that the original text of the legislation was not clear whether this impact applied to the time the regulation was issued, or when it was being reviewed. This confusion allowed agencies to legitimately claim that they were unsure how to proceed.¹

¹ GAO Report, “Regulatory Flexibility Act: Agencies’ Interpretations of Review Requirements Vary,” GGD-99-55, April 2, 1999.

Indeed, the Government Accountability Office has done quite a few studies on the Regulatory Flexibility Act showing how agencies have failed to comply with it and repeatedly citing lack of clarity in the law's terms as a key reason. I think this statement from a 2006 testimony makes the point very well about what is needed to make the RFA as effective as we all want it to be:

GAO's past work suggests that Congress might wish to review the procedures, definitions, exemptions, and other provisions of RFA to determine whether changes are needed to better achieve the purposes Congress intended. In particular, *GAO's reports indicate that the full promise of RFA may never be realized until Congress revisits and clarifies elements of the Act, especially its key terms, or provides an agency or office with the clear authority and responsibility to do so.* Attention should also be paid to 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.²

Madam Chair, I agree with the GAO that if we are serious about improving the Regulatory Flexibility Act the most important thing would be for Congress to make clear what it means by the terms "significant economic impact" and "substantial number of small entities." These two phrases drive the overall question of whether an agency must apply the RFA to any given regulation. Agencies have taken maximum advantage of the "flexibility" in the Regulatory Flexibility Act to define these terms differently as they choose for any given regulation with the goal being to credibly define these terms so that the regulation is regarded as not having this level of impact, and thus avoid having to complete the requirements of the RFA.³

² Testimony of J. Christopher Mihm, Managing Director Strategic Issues Before the Subcommittee on Commercial and Administrative Law, Committee on the Judiciary, House of Representatives, July 20, 2006, "Congress Should Revisit and Clarify Elements of the Act to Improve Its Effectiveness," (GAO-06-998T).

³ See, Testimony of Victor Rezendes, Managing Director Strategic Issues Team, Before the Committee on Small Business, U.S. Senate, April 24, 2001, "Regulatory Flexibility Act: Key Terms Still Need to Be Clarified," (GAO-01-669T): "In particular, Congress may need to clearly delineate—or have some other organization delineate—what is meant by the terms "significant economic impact" and "substantial number of small entities." The RFA does not define what Congress meant by these terms and does not give any entity the authority or responsibility to define them governmentwide. As a result, agencies have had to construct their own definitions, and those definitions vary. Over the past decade, we have recommended several times that Congress provide greater clarity with regard to these terms, but to date Congress has not acted on our recommendations." And Rezendes Testimony before the Committee on Small Business, U.S. House of Representatives, March 6, 2002, "Regulatory Flexibility Act: Clarification of Key Terms Still Needed," (GAO-02-491T). See also, GAO Report to

To bring clarity to these terms, there are various approaches Congress could take. While these two terms cannot be defined the same for all regulations, or even for all regulations from a specific agency, it is possible to establish the parameters and the elements that must be considered. Doing so would not only keep agencies honest about how they apply the RFA, it would also set benchmarks so that those of us who monitor agencies' compliance with the RFA would have some way to tell if they had done what they are supposed to do.

One way to accomplish the goal of clarifying these terms would be to authorize the Chief Counsel of Advocacy to promulgate a rulemaking defining these terms, and other requirements of agency compliance with the RFA. Giving the Chief Counsel authority to issue regulations has been proposed before, most recently in the last Congress by Congressman Manzullo in H.R. 682, the Regulatory Flexibility Improvements Act, and also by Senator Bond back in the 107th Congress in his bill, S. 849, the Agency Accountability Act. In the alternative, Congress could specify what it meant by these key terms and instruct agencies that they are to incorporate these elements as they apply these terms to their regulations.

For those regulations when an agency's certification is still not adequately supported, another change I think would be most helpful would be to permit the judicial review of an agency's certification decision at a time closer to when that decision is made, rather than having to wait until the final regulation is issued as under the current system. This would preserve the ability of small businesses to get their input into the rulemaking at a time when it can still have an impact.

An excellent example of where this would have been particularly helpful is the recent case brought by the Aeronautical Repair Station Association (ARSA), against the Federal Aviation Administration (FAA)⁴ regarding its regulation requiring contractors and subcontractors at any tier to establish mandatory drug and alcohol testing programs for

the Chairman of the Committee on Small Business, U.S. Senate, "Regulatory Flexibility Act: Agencies' Interpretations of Review Requirements Vary," April, 1999, (GAO/GGD-99-55).

⁴ *Aeronautical Repair Station Association, Inc. v. FAA*, No. 06-1091, 2007 U.S. App. LEXIS 16920 (D.C. Cir. July 17, 2007).

employees performing maintenance functions for the aviation industry. On July 17, the U.S. Court of Appeals for the District of Columbia Circuit found that the FAA had not fulfilled its obligations under the RFA. In certifying that the regulation would not trigger the RFA, and therefore not require an Initial Regulatory Flexibility Analysis (IRFA), FAA had not included various small businesses in its assessment of the impact of the regulation because it described the various levels of contractors that would have to comply with this regulation as “indirectly” affected and therefore not covered. An industry survey, however, showed that between 12,000 and 22,000 subcontractors would be affected, compared to the 297 subcontractors cited by the FAA.

As part of the IRFA that was not conducted, the FAA did not evaluate less burdensome alternatives that were offered by ARSA and would likely have been considered had the FAA fulfilled their obligations under the RFA. Although the Court found in favor of ARSA, it still upheld the substance of the final rule letting it go into effect, but remanding it for the limited purpose of requiring FAA to comply with RFA. Had the right of judicial review been allowed earlier in the process, the certification would have been successfully challenged, and the input from ARSA about less burdensome, but still effective, alternatives would have been provided when it could have made a difference in fashioning the regulation. Under the current court ruling, the agency is obligated only to go back and comply with the Reg Flex Act requirements—it has no obligation to modify the final rule and will likely find it difficult to retroactively modify a final rule that is currently in effect, even if more small business friendly alternatives have merit.

Waiting until a final regulation has been issued means that the certification decision might have been made years before, and the agency will have expended considerable effort and resources on finalizing the regulation, thereby creating an argument for keeping it as is, even if it has badly mischaracterized its impact. By that time the regulation is written, and in some cases—such as the ARSA challenge—may still go into effect, as the question of whether to stay the regulation is up to the judge. Allowing this review to occur on an expedited basis, when the certification decision is made public, presumably as part of the Notice of Proposed Rulemaking,

would preserve the impact of the small business input and then allow the rulemaking to go forward as it should have.

The ARSA case also demonstrates the importance of the provision in the bill specifying that “foreseeable indirect impacts” being included in an agency’s threshold analysis to determine the impact of a regulation. Had this provision been in place, the agency would not have been able to dismiss the impacts on contractors and subcontractors as “indirect” and would most likely have recognized that the Regulatory Flexibility Act applied to this regulation.

Madam Chair, the Chamber recognizes your long history of support for the Regulatory Flexibility Act and applauds your leadership in introducing the Small Business Regulatory Improvement Act of 2008. We look forward to working with you to move this important bill.