

# REDUCING FEDERAL AGENCY OVERREACH: MOD- ERNIZING THE REGULATORY FLEXIBILITY ACT

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## HEARING BEFORE THE COMMITTEE ON SMALL BUSINESS UNITED STATES HOUSE OF REPRESENTATIVES ONE HUNDRED TWELFTH CONGRESS FIRST SESSION

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## HEARING ON REDUCING FEDERAL AGENCY OVERREACH: MODERNIZING THE REGU- LATORY FLEXIBILITY ACT

WEDNESDAY, MARCH 30, 2011

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

The Committee met, pursuant to call, at 1 p.m., in Room 2360, Rayburn House Office Building. Mr. Coffman presiding.

Present: Representatives Graves, Bartlett, Coffman, Chabot, King, Tipton, Fleischmann, West, Ellmers, Velázquez, Altmire, Cicilline, Mulvaney, and Herrera Beutler.

Mr. COFFMAN. The committee on Small Business is called to order.

Good afternoon. Studies have shown that small business must spend more per employee to comply with regulations than their large competitors. If we are relying on small business to create jobs that will create economic growth, America's entrepreneurs cannot be saddled with unnecessary costs. It is just plain common sense that federal agencies should see how the rules will affect business, business that need scarce capital to hire workers rather than comply with costly and unwieldy dictates of federal bureaucrats. In fact, such a statute exists, the Regulatory Flexibility Act [RFA]. The act charges all federal agencies with examining the impact of their proposed and final rules on small business. If these impacts are significant, the agency is required to consider less burdensome alternatives.

Let me give an example. TSA decided that it would be a good idea to impose on general aviation security plans and screenings similar to that used by commercial airlines. Significant costs would have been imposed on the general aviation community without any showing that safety to the public would have increased. It is this type of nonsensical federal overreaching that hinders job creation without providing any benefit to the public that the RFA was designed to stop. Had TSA done what was required under the act that agency would not have put forward such a proposal.

Despite the importance of the RFA to the small business community, federal agencies, as we will hear from today's witnesses, regularly ignore the requirements of that act. The result reduced competitive capability of small business which in turn prevents them from expanding and creating needed jobs. Given the state of the American economy, that is not a result we in Congress or the American public can afford.

I want to thank witnesses for taking the time to provide their insights into the RFA, its benefits to small businesses, and the loopholes that agencies may use to avoid a necessary and sensible examination of the consequences of their actions.

With that I now recognize the ranking member for her opening statement.

Ms. VELÁZQUEZ. Thank you, Mr. Chairman. Good afternoon.

Small businesses play a key role in creating new jobs. Today we are going to examine how the rising regulatory burden may prevent them from generating these employment gains. As the latest studies show, the annual cost of regulation grew over the last decade to \$1.75 trillion. This means that if every U.S. household paid an equal share of the regulatory burden, each will owe more than \$15,000. For many small businesses the cost of regulatory compliance has become considerable. Firms with fewer than 20 employees pay more than \$10,500 per employee in compliance costs, a number 36 percent higher than their larger counterparts. The result is that many entrepreneurs are spending more on regulatory requirements than they are on building their businesses.

To address this issue Congress passed the Regulatory Flexibility Act in 1980 giving small businesses greater influence in the regulatory process. The act was designed to ensure that federal agencies consider the impact of its regulations on small entities. Clearly RFA is working as regulatory costs were reduced by \$15 billion in 2010 alone according to the SBA's Office of Advocacy. In the last three years the EPA and OSHA convened seven Small Business Advocacy review panels providing small firms with greater input regarding key environmental and occupational safety regulations.

Despite this success, it is clear that RFA could be working better. One area that needs improvement is the process in which agencies can certify that a rule has no significant impact on small businesses. While agencies are required to provide a factual basis for such certifications, they often provide only a simple statement which dismisses the concerns of small firms. By doing so, small firms are often left out of the process with little hope of their voice being heard. Agencies also have been slow to review outdated regulations that remain on the books, yet which continue costing small businesses money.

While the RFA requires agencies to periodically review existing rules, these requirements are vague and agencies often do not apply them consistently. As a result, these reviews have been much less effective than they could have been. Given the well documented concerns and the evidence that lies before us, I think the question is not if we make improvements to the RFA, but rather how do we go about it.

As we move down this path, the Committee should be cautious in two areas. While the SBA's Office of Advocacy plays an important role, simply giving them additional power is not the answer to all that ails the RFA. With only 46 employees, we have to be careful about creating a situation where we vest too much new authority on an entity that lacks the budget and manpower to execute such an expanded role. In these times of fiscal restraint, I am wary of heaping more responsibilities on an agency that is struggling to keep up with its existing workloads. Let us first see if Advocacy

can handle the new tasks required under Dodd-Frank, which increases by 50 percent the number of agencies covered by the panel process.

In addition, any expansion of the RFA, and in particular the panel process, must be scrutinized. I wholeheartedly support efforts to reign in agencies that are insensitive to small businesses but we cannot do so by simply grinding the regulatory process to a halt.

With this in mind I look forward to today's discussion on how RFA can be best modernized to meet small businesses' needs. And let me take this opportunity to also thank all the witnesses for being here today.

Since its enactment over 30 years ago, the Regulatory Flexibility Act has played a critical role in reducing regulatory burden. We need to ensure our system functions properly and correctly as minimizing regulation will enable small businesses to do what they do best—innovate, grow, and create the jobs our economy needs to move ahead.

With that I yield back the balance of my time.

Mr. COFFMAN. I thank the ranking member, Congresswoman Velázquez.

All the witnesses' written statements will be placed in their entirety into the record of the hearing.

**STATEMENTS OF BILL SQUIRES, SENIOR VP AND GENERAL COUNSEL, BLACKFOOT TELECOMMUNICATIONS GROUP, ON BEHALF OF THE NATIONAL TELEPHONE COOPERATIVE ASSOCIATION; DAVID FRULLA, KELLEYDRYE; CRAIG FABIAN, VP OF REGULATORY AFFAIRS AND ASSISTANT GENERAL COUNSEL, AERONAUTICAL REPAIR STATION ASSOCIATION; RICH D. DRAPER, CEO OF THE ICE CREAM CLUB, INC., ON BEHALF OF THE INTERNATIONAL DAIRY FOODS ASSOCIATION**

The first witness will be Mr. Squires.

Mr. Squires, Mr. Bill Squires, is the senior vice president and general counsel of Blackfoot Telecommunications Group in Missoula, Montana and is testifying on behalf of the National Telephone Cooperative Association. Mr. Squires, you will have five minutes to present your oral testimony.

**STATEMENT OF BILL SQUIRES**

Mr. SQUIRES. Thank you. And thank you for the invitation to participate in today's discussion on controlling the reaches of federal agencies and considering modifications to the RFA.

For the past 10 years I have served as senior vice president and general counsel of Blackfoot Telecommunications Group in Missoula, Montana. Blackfoot is organized as a cooperative, and as such our priority is to provide to our customers who are also our owners the very best communications and customer service available. We serve only 21,000 customers in western Montana over an expanse of about 6,500 square miles, so only a little over three customers per square mile. We have approximately 140 employees, and in 2010 had operating revenues of \$34 million. So we are a small, highly regulated company.

The entrepreneurial spirit of Blackfoot is represented by approximately 1,100 small rural counterparts in the telecom industry, who together serve 50 percent of this nation's land mass but only 10 percent of the population. Rural providers are early adopters of new technologies and services. Blackfoot currently offers 15 megabit broadband service to 98 percent of that 6,500 square mile service territory. Thanks to rural telecom providers, rural Americans are enjoying universal voice services, access to broadband internet, and enhanced emergency preparedness.

To counteract the natural inclination to develop a "one size fits all" approach to regulation, the RFA was adopted in 1980. It directs the agencies to balance the societal needs tied to federal regulations with the needs of small businesses. Though the RFA has been good for small business, many industry stakeholders believe that some agencies in our industry, particularly the FCC, gives little regard to the law and its mandate to thoroughly review the impact of proposed regulatory orders on America's small business community.

The RFA is supposed to force agencies to be creative with regulatory alternatives. Instead of conducting this analysis, agencies often summarily state that alternative regulation was considered and rejected. Among the FCC's rules, for example that have a significant and unnecessarily damaging financial impact on small carriers are things such as truth in billing, bill shocks, slamming, and customer proprietary network information rules. These are all laudable goals and I do not question those today. However, in the instances where final rules have been adopted, the Commission did not fully analyze the impact of its rules on small businesses and did not fully explain why alternatives were rejected.

In response to the FCC's continued disregard of the RFA, the National Telecommunications Cooperative Association actually sued that agency in 2004 over its new number portability rules which were heavily skewed in favor of very large companies. The court forced the FCC to perform the required RFA analysis and NTCA members offered suggestions on lessening the burdens that the rules would have on small businesses. The FCC rejected and ignored the suggestions of NTCA and NTCA sued again, arguing that the analysis was deficient. Amazingly, the court stated that the RFA's requirements are purely procedural. It requires the agency to do no more than state and summarize issues. I simply cannot believe that it was Congress's intent in passing the RFA.

Because the FCC is an independent agency, it is largely not subjected to direct oversight by the OMB's Office of Information and Regulatory Affairs. The OIRA was created by Congress to review federal regulations and reduce burdens. Further, the FCC is not required to comply with Executive Order 13272, which specifically deals with cooperation with the Small Business Administration's Office of Advocacy, nor is it subject to Executive Order 12866, which requires a cost benefit analysis for all significant rules.

We believe the following legislative actions could go a long way toward enhancing small business participation in the dynamic communication sector.



Codify the appropriate provisions of the executive orders in a manner to make them applicable to independent agencies such as the FCC;

Require all agencies to explain whether and how each rule-making decision promotes and protects small businesses;

Amend the RFA to clarify that all agencies must suggest and analyze creative alternatives that account for the nature and competitive position of small businesses when conducting rulemakings;

Certainly consult with the Small Business Administration's Office of Advocacy well in advance of rules being adopted and specifically address any suggested authority;

Provide the FCC with the responsibility to require agency bureaus to coordinate regulatory activities.

Members of the Committee, we are excited to have your attention today and I appreciate the opportunity to be here. We are excited to have your leadership to develop policies that will give America's small businesses the confidence to invest and flourish. Thank you for the opportunity to be here today and I look forward to answering any questions you may have.

Mr. COFFMAN. Mr. Squires, thank you so much for your testimony. Mr. David Frulla. Did I pronounce that properly?

Mr. FRULLA. Yes, you are. Thank you.

Mr. COFFMAN. Okay. Is a partner in the Washington, D.C. office of Kelley Drye. Mr. Frulla, you have five minutes to present your testimony.

#### **STATEMENT OF DAVID FRULLA**

Mr. FRULLA. Thank you very much, Mr. Coffman, Ranking Member Velázquez, and members of the Committee.

I am David Frulla from Kelley Drye in Washington, D.C. I appear today personally, though I have long helped small businesses try to cope with federal rulemaking, including in over about a dozen RFA-related court cases, several times successfully.

It is important testimony here today regarding the Regulatory Flexibility Act as Congress seeks to ensure federal regulations do not impede economic recovery and job creation. In summary, the RFA, along with its watchdog, the SBA's Office of Advocacy, have proven valuable in leveling the regulatory playing field for small businesses, nonprofit organizations, and governmental entities over the last 30 years. In short, the office does a great job in its role as a liaison for small entities to the federal government, and it deserves the resources it needs to fulfill its mission, especially if that mission is going to be enhanced. More does need to be done though, to ensure federal regulations match the scope and scale of these small entities.

As I will explain, certain RFA weaknesses have emerged since the Small Business Regulatory Enforcement Fairness Act [SBREFA] provided for judicial review of agency RFA analyses in 1996. The heart of RFA analyses are agencies' preparation and publication for notice and comment of an initial regulatory flexibility analysis [IRFA] and then the preparation of a final regulatory flexibility analysis [FRFA] at the time a final rule is published. Most importantly, these analyses should explore significant

alternatives that reduce adverse impacts on small businesses and the FRFA should explain why it rejects less flexible alternatives.

In general, an agency can only avoid the RFA if it certifies the rule is not likely to have a significant impact on a substantial number of small entities. These § 605[b] certifications have proved to be controversial.

Importantly, courts have interpreted the RFA to be strictly procedural and that limits its utility. A very deferential Administrative Procedure Act standard of review applies. It is an open question how much deference the expert SBA Office of Advocacy is entitled to when it disagrees, as it sometimes does, with agencies' analyses. And agencies have often been able to create their own ad hoc RFA standards that are contrary to SBA guidance and informed public input.

Perhaps most significantly, an agency is not required to adopt any more flexible regulatory alternative, and courts generally defer. Whatever the cause, that outcome is not acceptable. Further, there is an ever growing line of cases that find an agency need not comply with the RFA if the rule does not directly impact a universe of small entities. The origins of this construction are both sketchy and nonstatutory. Also, there have been difficulties with § 610 regulatory review. An extensive empirical analysis has shown that these large scale regulatory reviews have not succeeded and may even have been counterproductive. This is particularly discouraging given the current legislative focus on retrospective reg review.

The RFA also included the panel requirement that the ranking member discussed. These panels have helped avoid "ready, fire, aim" regulatory outcomes.

Fortunately, there are good ideas in play to amend the RFA, and I actually have one or two more of my own that I am going to bring forward. It is important to give the Chief Counsel of the Office of Advocacy the authority to draft uniform implementing regulations for agencies to follow. For instance, EPA should not be able to, as it illogically does, assess the impact of a rule based on its impact on small business revenue without considering the profits needed to fund the change. H.R. 527 would provide for this more formal SBA rule.

Small entity outreach should be expanded during the proposed rule stage, along with increased use of SBREFA-type panels. President Obama himself has emphasized such proactive outreach. Include indirect effects, when for instance, states merely act as regulatory intermediaries. There is no reason an agency cannot assess the rule's impact on the small businesses that will ultimately have to comply. H.R. 527's foreseeable concept is on target.

Regulatory review. Your proposed bill also enhances the 610 reg review process. And that should be strengthened, consistent with other legislative efforts to enhance retrospective reg review being considered in this Congress. The bill also understands the need for better understanding and minimization of cumulative regulatory impacts.

You need to add teeth to the regulatory alternatives development process. Courts and agencies have both lost sight of the admonition in the RFA's legislative history that the law should be liberally construed to fulfill its purposes. It is not an easy legislative issue.

And if you would permit just one more minute so I can finish up. Thank you.

Here is what Congress can do. It can mandate the use of the best scientific, economic, and social information available in these analyses, and let the SBA define what those terms mean. And it can provide for peer review in appropriate instances. Congress should consider development a process where small entities could petition the Office of Advocacy to convene a peer review of an agency's RFA analyses, especially as they relate to alternatives. They should not be automatic, but let the SBA take a look at that and decide where it is appropriate. And then these peer review results could be accorded judicial deference equal to the agency's own RFA analysis. Then you get a better playing field at the courts.

And finally, opportunities for judicial review should be enhanced so they are effective. On the substantive matter, we just talked about the issue of deference. But also, small business should not have to wait, as one of our clients did, four years for a court to conclude that the agency should have conducted an RFA analysis in the first place. Congress also needs to consider the heavy cost of federal litigation on small business.

Thank you very much. I look forward to answering any questions you may have.

Mr. COFFMAN. Thank you, Mr. Frulla. The chair recognizes ranking member Congresswoman Velázquez.

Ms. VELÁZQUEZ. Thank you, Mr. Chairman. It is my pleasure to introduce Craig Fabian. He is the vice president of regulatory affairs and assistant general counsel to the Aeronautical Repair Station Association [ARSA]. He is also a practicing aviation attorney and has over 20 years of experience in the aviation industry. He began his career as an aircraft mechanic technician with Northwest Airlines, worked as a maintenance controller for U.S. Airways and is the former director of technical operation for the Air Transfer Association. Welcome.

#### **STATEMENT OF CRAIG FABIAN**

Mr. FABIAN. Thank you, Ranking Member Velázquez and members of the Committee. Thank you for the invitation to testify this afternoon.

For those of you not familiar with the Aeronautical Repair Association, known as ARSA, it is the premier association for the international aviation maintenance industry. ARSA's certificate repair station members facilitate the safe operation of aircraft worldwide. From an economic perspective, the aviation maintenance industry generates over \$39.1 billion of economic activity in the United States and employs more than 274,000 workers in all 50 states. A snapshot of our economic and employment footprint is attached to my written testimony.

On a global scale, North America is a net exporter of aviation maintenance services, enjoying a \$2.4 billion positive balance of trade. Although ARSA members represent a wide cross section of the aviation industry, the vast majority of these companies are small businesses. As a result, the protections afforded by the Regulatory Flexibility Act, which I will refer to as the RFA, are particularly meaningful to our members.

Today I will discuss ARSA's experience in challenging an agency rule under the RFA. That experience began with the decision by the Federal Aviation Administration [FAA] to dramatically expand the scope of its drug and alcohol testing requirements. The changed rule impacted many traditional small businesses that certificated repair stations rely on for ancillary services, such as welding shops, metal finishers, and machine shops. Those small businesses were faced with a difficult choice, either implement a full blown FAA drug and alcohol testing program or simply stop serving repair station customers.

ARSA challenged the rule in court, and in 2007, the U.S. Court of Appeals for the D.C. Circuit found that the FAA had violated the RFA when it decided that a full analysis was unnecessary. The FAA was then instructed to perform an analysis to comply with the RFA. Despite the court's mandate, over three years passed and the FAA made no effort to perform the required analysis. As a result, on February 17th of this year, ARSA filed a petition for writ of mandamus with the same court to compel the FAA's compliance. Several weeks later, the FAA was ordered to show cause and explain why ARSA's petition should not be granted. As a basis for its response to the court, the FAA posted what it characterized as a supplemental regulatory flexibility determination, restating its conclusion that a full and complete RFA analysis is not required.

To put it briefly, despite the passage of time, over five years since the final rule became effective and over three years since the court's mandate the issue is far from over. 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 difficult task of compiling the economic data and considering alternatives to a proposed rule. Indeed, even when specifically commanded by a court of law to carry out an analysis, federal agencies are prone to engage in foot dragging with the apparent hope that the requirement will just go away.

We believe the following suggestions will help. Congress should allow small businesses and nonprofit associations that successfully mount RFA challenges to recover court costs and legal fees. The RFA could be amended to require that agencies assess direct and indirect costs for small businesses. 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. Congress could ensure that any legislation it passes contains language, either in the bill itself or in legislative history, clearly stating that it does not intend the law to have adverse effects on small businesses.

Congress could empower the Small Business Administration's Office of Advocacy to make small business determinations for agencies. Congress could also refrain from setting strict timelines that agencies must meet to complete the rulemaking process.

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.

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

Mr. COFFMAN. Thank you for your testimony.

And now for the most important part, the dessert portion of the hearing, I would like to welcome Mr. Rich Draper, CEO of the Ice Cream Club, Boynton Beach, Florida, testifying on behalf of the International Dairy Food Association. Mr. Draper, you will have five minutes to present your oral testimony. Thank you.

#### **STATEMENT OF RICH DRAPER**

Mr. DRAPER. Thank you, Member Velázquez, members of the Committee, and specially my congressman, Alan West, from Florida's 22nd District, who is so committed to small business. Sorry I did not bring any samples today. If I am invited back, I will.

I also want to recognize International Dairy Foods Association, the leading voice of the dairy industry, for their help with today's hearing. And I would be remiss if I did not mention my wife and business partner, Heather, who is with me today. Just briefly, Heather and I have been married recently, two and a half years ago, first marriage for both of us. She is a former executive in the banking industry. So I feel I have done my part to move the economy forward by adding her tremendous talents to the manufacturing industry and also removing one from the banking industry.

A brief description of my company, the Ice Cream Club. In 1982, a buddy of mine, Tom Jackson and myself opened up an ice cream shop in a little town called Manalapan in South Florida near Palm Beach. Those were the good old days when you could just come across an opportunity and pack up and go.

We started making ice cream in the back of the store and shortly thereafter began wholesaling. Today we produce over 120 award winning flavors and are known for our crazy mouthwatering varieties. But we only produce in three-gallon tubs so we are not available in grocery stores.

We supply 500 food service accounts throughout the southeast and Caribbean. About seven percent of our business is export and that percentage is growing.

We now employ over 50 people and operate from an 18,000 square foot factory and we continue to grow. In fact, this year we have hired seven new staff members. We still have our original store, and my partner, Tom, is still with the company. We deal with regulations with local, state, and federal levels by multiple agencies, so we are very interested in today's hearing topic. We fully support the efforts of this Committee to ensure that federal agencies make regulations as efficient and as least burdensome as possible for small business.

Let me touch briefly on some items of concern for the Ice Cream Club. There is nothing more important to the success of our business than the confidence our customers have in the safety and quality of our products. We welcome government regulation and inspection when it is utilized as a partnership between industry and government to further enhance the safety of food production. How-

ever, we are worried about duplicative regulatory agencies at various levels of government. For example, we are inspected regularly by the Florida Department of Agriculture, part of the USDA. Also, we are inspected by the FDA. We have four major inspections by the Florida Department of Agriculture each year, as well as numerous other visits to collect samples and calibrate equipment.

The new food safety law passed by Congress last year calls for even more inspections for food manufacturers, so it will be particularly important that the FDA utilize existing inspections in the dairy industry as much as possible. We are concerned that instead of targeting increased inspection in high risk areas, FDA will take a "one size fits all" approach over the entire food sector. We hope that there is not an adversarial gotcha approach coming down the pike. Our view is that the vast majority of food producers adhere to strict food safety procedures and are working very hard to provide safe, quality, consistent products to the public.

Recently, the FDA began targeting certain segments of the dairy industry for extra environmental testing. The FDA's process can take anywhere from a few days to more than a month to get test results back. During that time, businesses have to hold product in inventory and production lines may have to be slowed down until FDA results confirm the products are safe to be shipped. These additional inspections are slow in response and FDA makes the cost of doing business higher for small business and the FDA should be required to determine if these extra costs can be avoided.

Another example of "one size does not fit all" is when we try to sell to the government. For example, if we wanted to sell to a VA Hospital we have several roadblocks potentially in our way. One is the size of the bid. They may require all fluid, including ice cream and milk; we only do ice cream. It could be a geographical boundary, say the entire eastern United States; we only supply the southeast. That also goes against the buy local movement, which has benefits. Plus, we would be subjected to additional USDA inspections. We make over 20 flavors of no-sugar-added ice cream. I am not aware of any other company that does. I think that would be a great addition to a VA Hospital. We would just like the opportunity to be able to go in and say we are meeting all other regulations. Let us have a shot.

Since milk is the primary—I will go ahead in just a second.

Finally, I would like to suggest more involvement by small business at the inception of regulations. This could be accomplished by a small committee of business people, such as myself, that could offer input not as a way to get a competitive advantage or take shortcuts, just smart input from people on the frontline.

In conclusion, I want to say that I feel very fortunate that we are operating in a country that allows us to grow our business. Much of the world's population is under an oppressive regime of some sort so we cannot complain too much, so we will take reasonable regulations over the alternative.

Thank you very much.

Mr. COFFMAN. Thank you, Mr. Draper. I think we are going to go ahead and vote right now. I appreciate your testimony and then we will return for questioning.

[Recess.]

Chairman GRAVES. We will go ahead and call the hearing back to order. I apologize to everyone for missing the first part of it. I had a speaking engagement I had to be at and then, of course, we had votes. But with that we are ready to start questions. And I appreciate again all of you being here. Some of you traveled a ways and we always appreciate that here at the Committee.

But my specific question to you all when it pertains to the Regulatory Flexibility Act, on January 19th, the President reaffirmed the need for federal agencies to comply with the act. And my question to you is have you seen any improvement in agency assessment when it comes to small businesses and as it pertains to the Regulatory Flexibility Act? And I would also be interested in any specific things that have happened in the last year that frustrate you for the administration when it comes to the Regulatory Flexibility Act, specific items that have happened to you.

We will start with Mr. Squires.

Mr. SQUIRES. Thank you, Mr. Chairman.

To answer the first question, the agency, of course, that we deal primarily with is the Federal Communications Commission [FCC]. And as an independent agency they are exempt from some of the executive orders that control federal agency responses. And so we have not seen, since January, great improvement in at least the FCC's compliance with the RFA. As an example, and this addresses, I believe, your second question for frustration at least on my part is a recent Notice of Proposed Rulemaking currently pending in the FCC, which is sweeping regulatory change to our industry, pays very scant attention to the initial regulatory flexibility analysis that is required under the RFA. There is just a few paragraphs in, I believe, appendix H of that Notice of Proposed Rulemaking, that essentially asks all of us, the small businesses, well, you tell us what maybe are some ideas to reduce the burden of regulation on you. And it is my belief that the RFA really places the burden, and rightfully places the burden on the agency itself to come up with those creative alternatives, not simply punt in a few paragraphs of a 300 page order the burden to small businesses such as ours to come up with those alternatives.

Chairman GRAVES. Mr. Frulla.

Mr. FRULLA. Thank you, Mr. Chairman. I have seen some slow-down of, agency rules, maybe for a little bit more deliberation. The EPA has done some of that. It has not seemed to me to be small business focused. It has been more on the general policy, rather than on the presidential memorandum relating to reg flex and small business.

In terms of what has been maddening for everybody on the panel, is the easy way now for an agency to handle the Regulatory Flexibility Act. It is to say, okay. And we run into this fairly constantly. Yeah, we got it. You are going to get creamed. But we have to. We do not have any alternative. And that is the sophisticated approach. It has sort of evolved from there is no impact on you, to you are going to get creamed. We cannot do anything about it. And, they go to court and the court defers to the agency's rather superficial analysis.

Chairman GRAVES. Mr. Fabian.

Mr. FABIAN. Thank you, Mr. Chairman.

I would point out a very recent example, this month as a matter of fact, and I mentioned in my written and oral testimony the FAA's recent posting of a regulatory flexibility analysis as a result of a petition for writ of mandamus that ARSA filed back in 2007 regarding their drug and alcohol rules and their noncompliance with the RFA. Just recently in response to the court's order to show cause why the writ should not issue, the FAA basically once again just stated that the rule will not have a significant impact on a significant number of small businesses and therefore, we certify that an analysis will not be required. So I think that is no change in the behavior of agencies in our opinion.

Chairman GRAVES. Mr. Draper.

Mr. DRAPER. From the food manufacturing standpoint, we are gearing up for the new FDA regulations that affect businesses like ours. So no real surprise that it is coming. We just want to make sure that we have everything ready, so that is anticipated additional regulation. Not that it is bad regulation but we are just making sure we are prepared.

Chairman GRAVES. We have got a little bit of a time crunch so I am going to turn to Ranking Member Velázquez for her questions.

Ms. VELÁZQUEZ. Thank you.

Mr. Fabian, you suggest that agencies should account for the indirect costs of regulations. And I believe that your experience with the FAA makes a clear case for this. However, implementing this change is a different matter. How should indirect costs or indirect be defined, and how far should agencies be required to go in determining the indirect cost of the regulation?

Mr. FABIAN. Thank you, Ranking Member Velázquez.

In my opinion, it should be the population of small businesses that will be affected by the rule. In our case it was the FAA stated that while the drug and alcohol rules apply to air carriers, so therefore we only have to consider the direct cost of that group of businesses, not at any tier down the line that is more indirect and I think there is no bright line for determining where the line would be drawn for the indirect costs. However, anyone that would have to be compliant with the rule I think should be considered.

Ms. VELÁZQUEZ. Sure.

Mr. Frulla, in discussion concerning RFA, some observers have suggested that the SBA's Office of Advocacy be given an expanded role. For instance, you recommend that Advocacy be given the authority to write rules implementing RFA. What would be the result if Advocacy is given new rulemaking authority for RFA?

Mr. FRULLA. What I think could happen that would be constructive, because the SBA produces guidance anyway on RFA compliance, is the creation of a standardized set of guidelines about how reg flex analyses should be conducted because if there is an expert on how to do an RFA analysis, it is that agency, and that is where the deference would come from.

I gave one example in my testimony where we had a case for the National Federation of Independent Business where EPA had based economic impacts analysis on changes to revenues without looking at profit. And it is pretty clear you pay for changes out of your profit, not out of your revenue. And the Federal District Court



here in D.C. deferred to that decision by EPA, even over SBA's objection. I mean, that is a clear situation, I think, where centralized—

Ms. VELÁZQUEZ. And if you were to prioritize, what do you think is more important—giving Advocacy the right—the authority to write rules or giving them Chevron deference?

Mr. FRULLA. I think they go together because by writing the rules and being tasked as the expert to write the rules, the deference should follow.

Ms. VELÁZQUEZ. But if I asked you which one, prioritize one or the other, which one would come first?

Mr. FRULLA. I think they are of a piece. I think the reg writing authority would get you to the deference, and the deference would be the place to look, at least in terms of the reg writing. I mean, there are other issues relating to alternatives which I raised. It is trickier.

Ms. VELÁZQUEZ. Among the witnesses today there have been many proposals about reforming the RFA, and this includes expanding the panel process to all federal agencies giving SBA's Office of Advocacy rulemaking authority, strengthening outreach to small businesses, and making the analysis required by RFA more specific. So if we count the different proposals close to 10 outlined in your testimony, would Advocacy's proposed fiscal year 2012, budget with a staff level of 46, and nine million dollars be enough to implement all these proposals?

Mr. FRULLA. What I have said in my testimony is, I mean, there may be reason to be judicious about expanding the panel process. You are looking at major rules, not every rule. And I think the SBA, they need more budget to do this. If Congress is going to say small business is the engine of job creation and growth and we have this agency—

Ms. VELÁZQUEZ. You know we are in the midst of CR negotiations and so people are asking to cut the budget, not to increase the budget for any agencies.

Mr. FRULLA. I understand.

Ms. VELÁZQUEZ. If you have to guess how many more employees and how much more funding Advocacy would need, do you have an estimate?

Mr. FRULLA. I think I would have to defer to them on that. It would probably depend upon the—you could write the regs with probably whatever force you have. A lot of that information is already contained in their guides in terms of—

Ms. VELÁZQUEZ. Remember that Dodd-Frank, regulatory reform, will cover all the agencies and SBA's Office of Advocacy will have to be part of that.

Mr. Draper, you mentioned that you are worried about duplicative regulation, particularly regarding food safety inspection of which you are already subject to by the state of Florida. Can you discuss how these inspections impact your business and your annual costs?

Mr. DRAPER. Our regular inspector, as I mentioned, is the Florida Department of Agriculture through the USDA. Additional inspections require significant time, mainly my time. We are not of a size—I do have a full-time quality control director but when we

have inspectors come in there are times when they are not really familiar with dairy but they will command our time and rightfully so, but we feel that their existing inspectors are doing almost everything the FDA does. The FDA tends to focus more on labeling, paperwork, things like that, recordkeeping, whereas the FDA is more—the Florida Department of Agriculture is more involved with our actual processes, pasteurization, things like that. So it struck us that that may be something that could be more efficient. The FDA certainly has a role but our experience has been the dairy part of their inspection is not at the level that the Florida Department of Agriculture is.

Ms. VELÁZQUEZ. Mr. Squires, do you have a recommendation as to how can we close the loophole that would allow for agencies to certify that they have conducted the required impact analysis?

Mr. SQUIRES. Yes, I believe my recommendation, Ranking Member Velázquez, would be to just clarify the RFA to make sure that the agencies have the directive from Congress to properly offer alternatives for small business. Again, I fall back on our recent experience with the FCC. One of the things that small companies, small rural telecom providers such as mine is criticized by the FCC for is our corporate operations expense, the size of those expenses in comparison to our overall operating expenses. But we only have those expenses because of the degree of regulation that is imposed on us by the FCC. So it is a real tough situation for us. So I believe that this body can clarify for federal agencies that they need to come up with alternatives.

Ms. VELÁZQUEZ. Thank you. Thank you, Mr. Chairman.

Chairman GRAVES. Mr. West.

Mr. WEST. Thank you, Mr. Chairman. Madam ranking member.

In a previous career, you know, I had a pretty simple life. When you sit on an airplane and you have a parachute on, the light is red, you do not jump. When the light is green you do jump. So what I am sitting here and listening to is that we saw that there was a problem with burdensome regulation back in the '70s. We created an agency or this act, the Regulatory Flexibility Act. Now we come along and we have federal agencies that are not adhering to the analysis that defines what have you of this RFA. So my question is in the simple world, what do you think is driving the federal agencies not to adhere to the RFA? I mean, is it belligerence? Is it the fact that they think they are untouchable? I mean, what are the things you believe is causing this rub, this recalcitrance?

Mr. DRAPER. I can start out. I will just mention from our world again, the food processing world, kind of what I mentioned to Ranking Member Velázquez that certain agencies have a focus on what they have done well, and then they might also pick up other industries as part of it. Dairy, our world is specific and we have specific inspectors now that are in a lot of cases former dairy people with good knowledge. They come in and they share the knowledge, which is appreciated. Sometimes we have other agencies that come in, not just the FDA but anyone else that might come in to inspect, maybe they have to, they have us wrapped up because we are food. Maybe it should be more industry specific. And the people

that do inspect those businesses would have the industry experience.

Chairman GRAVES. Open to the full panel.

Mr. FABIAN. Congressman, I think that the, as I stated in my oral and also in my written testimony, is the fact that it is easy for the agencies to circumvent the RFA and just certify that it is inapplicable and really without repercussion. I think it is, at least our case proves the RFA does not today have real teeth and if the RFA is viewed as a burden and something to avoid it can be accomplished rather easily.

Mr. FRULLA. I would agree with that. We had some early cases, for instance, where a federal court in Florida had designated a special master to look at the agency's good faith—an agency's good faith in complying with the RFA. That kind of thing, if you can get to that point, can get you some attention. But that is not an everyday occurrence in litigation.

I think there are two ways this happens. One is agencies just do not get it. They really do not get and understand the impacts that their regulations have on small businesses. And so they just proceed. Others have their mission and they do not care; they want to proceed. So you have those two as the animating factors I think we most often see.

Mr. SQUIRES. I do not believe that it is belligerence. At least I hope that it is not in the cases that we have had but I do believe that it is complete indifference because the courts have said that the act itself is procedural only. And so why would an agency devote a lot of resources and time to an RFA analysis? I believe congressional mandate to put some teeth into the act would go a long way.

Mr. WEST. And one final question if I can. If you look at the time period when you first started your business, and if you were to try to go into that endeavor today, do you think that it has become easier or do you think there are more obstacles out there for you to try to create the exact same business that you did 20 or however many years ago?

Mr. SQUIRES. Clearly for us, Mr. West, it would be almost impossible to start our business today. We began in 1954 as a rural telephone cooperative with a handful of farmers and ranchers throwing 50 bucks into the kitty to string wires on the poles, largely unregulated. And today we have a full finance department and kind of a mini accounting firm in our own small company. We have lawyers and economists, a much more complicated industry now, probably impossible to start.

Mr. FRULLA. I think I will demur. But I will note there are a lot more lawyers now than there were in 1987 when I started.

Mr. DRAPER. I will mention we would probably look at opening up a store but taking the leap into the manufacturing, now there are so many new things over the past 30 years and when we started allergens weren't really on the radar screen. Now it is a huge part of our industry and our whole production process. And the regulations that we are following now, it would be a daunting task but in our case starting small we took one step at a time and we will keep doing that. But there are more challenges now but we hope to, as evidenced by our membership in International National

Dairy Foods and just trying to be fully educated, having a quality control director so we can meet all of the current regulations, but it is a task.

Mr. WEST. Thank you, Mr. Chairman. I yield back.

Chairman GRAVES. No more questions?

I want to thank the witnesses for being here. I apologize. We are going to have to end just a little early. We have a briefing on Libya that we definitely want to be at, but again, I appreciate your testimony and for coming in. I apologize for the votes but the Committee is going to be examining legislation when it comes to the RFA so that businesses, you know, obviously can create jobs and do not have to continue to comply with some of the ridiculous regs that are coming out that have not taken into account how much it is going to harm business and how much affect it is going to have on job creation. But with that, again, I appreciate you being here and we will say the hearing is closed. Thanks.

[Whereupon, at 2:31 p.m., the Committee was adjourned.]



Statement by

**Bill Squires**  
**Sr. Vice President and General Counsel**  
**Blackfoot Telecommunications Group**  
**Missoula, Montana**

On behalf of the

National Telecommunications Cooperative Association

Before the

United States House of Representatives  
Committee on Small Business

In the Matter of

*"Reducing Federal Agency Overreach:  
Modernizing the Regulatory Flexibility Act"*

March 30, 2011

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## **INTRODUCTION**

Thank you for the invitation to participate in today's discussion on controlling the reach of federal agencies, and considering modifications to the Regulatory Flexibility Act (RFA) that may help effectuate that objective. Clearly, there will be little, if any, argument from America's small business community anytime attempts are made to appropriately limit unnecessary burdens and costs that often emerge in the wake of regulatory initiatives no matter how well intentioned.

For the past ten years I have served as the Senior Vice President and General Counsel of Blackfoot Telecommunications Group, which is headquartered in Missoula, Montana. For almost ten years prior to that I served as outside counsel to Blackfoot and similar small communications companies as well as the Montana Telecommunications Association. I also serve on the National Telecommunications Cooperative Association's (NTCA) Industry Committee, which is the entity that considers federal regulatory policy. My remarks today are on behalf of Blackfoot, as well as NTCA and its more than 570 small, rural, community-based members that provide a variety of communications services throughout the rural far reaches of the nation.

We believe our industry is uniquely qualified to participate in today's discussion because we are consumer-centric small businesses operating in a highly regulated environment. Blackfoot, similar to nearly half NTCA's other members, operates and functions as a cooperative. In a cooperative structure, the consumers are also the owners, so every idea and every action is made from both an owner and a consumer perspective – the two are truly one in the same. Likewise, with regard to the other half of NTCA's members, those that are family or commercially owned and operated, again their focus is consumer-centric because they are locally owned and operated. And, very importantly, in both cases these companies exist to provide service rather than to generate owner value.

So, again Blackfoot is organized as a cooperative, and our top priority has always been to provide every one of our consumers, who are also our owners, with the very best communications and customer service possible. Blackfoot has several lines of business, including ILEC, CLEC and ISP. Make no mistake – while our headquarters are in Missoula, we

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in fact serve over 21,000 customer lines across our 6,500 square mile rural service area that is spread across the western-central portion of the state of Montana. This constitutes about 3.2 customers per square mile. We employ a total of 140 people and in 2010 our annual operating revenue was about \$34 million dollars. Our beautiful part of the country is accented by tall mountains, and steep, deep canyons, requiring cutting through solid granite to get advanced services to our customers. In our industry's parlance, as a small rural provider of this size, Blackfoot is a Tier 3 carrier, yet even so, our system is considered to be one of the larger carriers among the Tier 3 small carrier set.

Let me give you a quick snapshot of how Blackfoot compares with several other industry entities. CenturyLink, as a midsized, or Tier 2 carrier, operates in 33 states, has a work force of approximately 20,000 and annual revenues of \$7 billion. Verizon, AT&T, and Qwest are classified as large, or Tier 1 carriers, and also operate in multiple states. Verizon has a workforce of nearly 194,000 and annual revenues of \$106.6 billion. AT&T has a workforce of 266,590 and annual revenues of more than \$123 billion. Qwest has a workforce of 29,000 and annual revenues of more than \$11 billion. Of course, after the pending close of the CenturyLink/Qwest merger, this combined entity will rank among the industry giants in Tier 1. Clearly with operations of this size, the priorities, objectives, and ability to comply with regulatory directives are generally far different from Blackfoot's community-based limited-scale approach to doing business.

The entrepreneurial spirit of Blackfoot is representative of our approximately 1,100 small rural counterparts in the industry, who together serve 50% of the nation's land mass, yet less than 10% percent of the population. Like the vast majority of our rural colleagues, Blackfoot has always been an early adopter of new technologies and services. Blackfoot currently has 15 Megabit broadband service available to 98% of our service area and we are currently working on a strategic network plan to deliver even higher speed services that our members are demanding. Rural Americans throughout Blackfoot's service area, and indeed throughout the markets of NTCA members, are enjoying universal voice service, access to broadband Internet services, and

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enhanced emergency preparedness. Many NTCA members are also introducing advanced video services and in many cases the first true local video competition to their areas.

#### **THE SMALL BUSINESS CIRCUMSTANCE**

Now, more than ever, our domestic, economic, and personal security needs are intricately linked to our national universal service policy that envisions the ubiquitous availability of advanced communications infrastructure and services for all Americans. Likewise, this national statutory policy envisions such services being of a reasonably comparable nature in terms of price and scope.

Obviously, when considering such policies, it is apparent that a multitude of entities with very diverse abilities and resources will be involved in their ultimate achievement. This is particularly the case with regard to the communications industry where technological evolution is rapid and research, development, and deployment costs can be multiples of what are experienced in an urban environment. To respond to such realities, through the years policymakers have attempted to develop a unique mix of legislative and regulatory initiatives to ensure that competition is able to flourish, varying technologies are neither advantaged nor disadvantaged over one another, operational options are available to ensure carriers of all sizes have a practical environment in which to function, and above all, consumers needs are effectively met.

Yet, policymakers have also recognized a truism that applies virtually across the spectrum of legislative and regulatory development – that a natural inclination to develop “one size fits all” approaches to policy will always emerge and generally prevail. To counteract this natural inclination, in 1980 Congress and the President enacted the Regulatory Flexibility Act (RFA). The RFA had the specific mission of attempting to balance the societal goals tied to federal regulations with the specific needs of small businesses such as Blackfoot and its rural communications brethren.



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The RFA, which has historically enjoyed bipartisan support, has been strengthened through the years of its existence. Since the federal government began calculating the RFA's economic impact 13 years ago, it is said to have saved small businesses more than \$200 billion, all the while without undermining the regulations it was simultaneously impacting.

So, everything is working fabulously and our work here today is done, right? Unfortunately, the answer is no from the perspective of the small businesses comprising the rural communications sector. It is the view of our sector that the RFA is not doing what it was designed to do in terms of its application and interaction with regulations that emerge from within the Federal Communications Commission (FCC). And this view is backed up by a litany of regulatory proceedings. Far too often, rulemakings are issued by the FCC that appear to have given little real regard to the RFA and its requirements to thoroughly review the impact of proposed regulatory orders on America's small community-based communications providers.

As I noted, the RFA exists to protect small businesses. The largest U.S. companies employ roughly half of this country's private sector employees. The other half work for small businesses like Blackfoot. The RFA exists to ensure that policymakers don't impose costly rules designed for the large half – those companies with the scope and scale to absorb the cost of new requirements and that need more customer safeguards – on the small half.

Under the RFA, as part of every rulemaking proceeding, agencies must publish an initial and final regulatory flexibility analysis. The public is afforded the opportunity to comment on the burden to small businesses and offer alternatives that accomplish the regulatory goal, while protecting the small businesses. It is intended that agencies specifically consider rules that are less burdensome to small businesses and explain why alternative regulation is rejected.

Regrettably, the law doesn't always work as intended. In the recent FCC Notice of Proposed Rulemaking (FCC 11-13) the FCC devoted a scant few paragraphs to its initial regulatory flexibility analysis of this sweeping regulatory reform. Ironically, this same NPRM asserted that the corporate operations expenses of small companies may be too high. In doing so it never

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hinted at reality – that FCC imposed regulations significantly drive up the corporate overhead costs of small telecommunications firms.

When the FCC performs an RFA analysis, rather than offering creative alternatives, the agency simply punts the issue to us small companies – placing the burden on us to suggest alternatives. The RFA is supposed to force agencies such as the FCC to be creative. There are ways to accomplish goals while minimizing the financial impact on small businesses. Sometimes, an extended compliance period is all that is necessary, other times – it's lesser reporting requirements. On occasion, small companies require completely different regulation than large companies. This analysis, and proposed solutions and alternatives, should be part of the rulemaking process each and every time a federal regulation is proposed, but as is no secret to any of us, it is generally not. Routinely all we are afforded is a couple of paragraphs tacked onto the end of a rulemaking that states that alternative regulation was considered, but rejected. This is all the effort we see given to this requirement. The law simply does not seem to compel anything more than a nod to the fact that it exists.

#### **THE NTCA EXPERIENCE**

For years this has been the experience of NTCA and its members with regard to FCC regulatory proceedings. I should note that the association does not routinely cite the need to go overboard on RFA review with regard to each and every FCC rulemaking. Because we know how it is viewed and applied by the agency, we approach it judiciously with the hope that now and then perhaps our comments will be taken seriously and ultimately bear the much-needed fruit that is so necessary and could be so helpful to our small business members. Unfortunately, I believe that the requests of small businesses for lesser regulation are often lost in all the comments from the largest players in the industry that the regulations are not needed at all. Following is a list of several of the FCC's rules or proposed rules that have or would have a significant and unnecessarily damaging financial impact on small carriers: truth in billing, bill shock, slamming/carrier change verification, Customer Proprietary Network Information (CPNI), Communications Assistance for Law Enforcement Act (CALEA), marking and lighting of antenna structures, E911, and voice and data roaming. In the instances where final rules have

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been adopted, the Commission did not fully analyze the impact of its rules on small businesses and did not fully explain why alternatives were rejected.

Frustrated with the FCC's ongoing flagrant disregard of the RFA and the disparate impact its rules were having on small rural community-based communications providers, in 2004 NTCA sued the FCC. The agency had imposed new number portability obligations on telephone companies. The rules created costly new obligations, compliance required expensive equipment upgrades and, in NTCA's opinion, the rules were heavily skewed in favor of large competitive providers that the agency had again and again bent over backward to accommodate.

At any rate, no analysis of the impacts of the number portability rules on small business had been performed by the FCC. The court sided with NTCA's small business perspective and remanded the order back to the FCC for a proper regulatory flexibility analysis. It was a victory, but it was a victory short lived.

The FCC subsequently performed its initial regulatory flexibility analysis and small businesses, including NTCA and its members, offered suggestions about how the FCC could lessen the impact and burden of its rules while still accomplishing its number portability goals. The suggestions were rejected or otherwise ignored in the FCC's final regulatory flexibility analysis as had so often happened in the past and continues to happen today.

NTCA sued again, arguing that the analysis was deficient. However, ultimately we learned just how weak the Regulatory Flexibility Act truly is because it has no teeth. The court stated that the RFA's requirements are "purely procedural." It requires the agency to do no more than state, summarize and describe issues and situations.

#### **GOING FORWARD**

In addition to the legal blow described above, it is interesting that there may be other issues at play with regard to the FCC's attitude toward the RFA. The agency does not appear to claim that the RFA doesn't apply to it because it in fact definitely does. However, because the FCC is

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an independent agency, it is largely not subjected to direct oversight by the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) as most other federal agencies are. The OIRA was created by Congress with the enactment of the Paperwork Reduction Act of 1980 and as such carries out several important functions, including reviewing Federal regulations, reducing paperwork burdens, and overseeing policies relating to privacy, information quality and statistical programs.

Interestingly, there is an entity within the U.S. Small Business Administration known as the Office of Advocacy (OA) that was established to be the independent voice for small business within the federal government and the watchdog of the RFA. In addition, the OA has the specific objective of advancing the views and concerns of small business before Congress, the White House, federal agencies, federal courts, and state policymakers. Through the years, NTCA has maintained a close relationship with the OA, which has often filed comments that sided with the rural communications perspective in terms of seeking regulatory variations designed to provide the sort of flexibility that is envisioned for small businesses by the RFA.

Nevertheless, again, because the FCC is an independent federal agency, it is not required to comply with Executive Order 13272, which specifically deals with cooperation between the OA and other federal agencies regarding implementation of the RFA, or Executive Order 12866, which requires a cost benefit analysis for all significant rules. The result is that the OA in dealing with the FCC has a few more challenges in terms of making the case for small businesses. At the very least, the OA simply does not enjoy the same sort of interagency relationship with the FCC that it does with any other non-independent federal agency where such an entity is required to submit draft rules to the OIRA for interagency review. Despite these hurdles we understand the OA has continued to persistently encourage the FCC to reach out to the OA earlier in the rulemaking process.

There is an Office of Communications Business Opportunities (OCBO) within the FCC that many believe could be better utilized to bring small business perspectives to the regulatory process within the agency. Apparently, this entity is responsible for overseeing compliance with

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the RFA for every agency rule, but our observation is that they are just not closely enough involved at the ground level of regulatory conception and development. It is the impression of some that the office doesn't currently work very closely with the various FCC bureaus until late – far too late – in the regulatory process.

#### **WHAT TO DO**

More needs to be done to protect and promote small telecommunications companies. The largest companies are getting larger and the small companies are becoming fewer. The FCC should be looking at regulation with an eye toward enhancing small business participation in the dynamic communications sector. We believe the following legislative actions would go a long way toward making that a reality:

- Codify the appropriate provisions of Executive Orders 13272 and 12866 in a manner to make them applicable to independent agencies in the same manner that they now apply to all other Executive agencies;
- Require all agencies to explain whether and how each rulemaking decision promotes and/or protects small businesses;
- Amend the RFA to clarify that all agencies are required to suggest and analyze alternatives that account for the nature and competitive position of small businesses when conducting rulemakings;
- Consult with the Small Business Administration's OA well in advance of rules being adopted and specifically address any suggested additions or modifications;
- Provide the FCC's OCBO with specific authority and responsibility to require agency bureaus to coordinate regulatory initiatives with the office from the very conception of action on any proceeding.

#### **CONCLUSION**

"Economic freedom is the foundation for individual success and prosperity. This freedom is evident in the entrepreneurial small business sector, which creates most of the new jobs and a large share of the innovations in the American economy. When government takes small

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businesses into consideration in developing regulations, it saves time and money for the nation's most productive sector."

Folks that is a direct quote from the pamphlet that was ordered to be distributed to all federal agencies regarding the implementation and compliance with Executive Order 13272 that was signed by President Bush on August 13, 2002. We hope this serves as further inspiration to you and your colleagues to pursue to its conclusion, the objective of this hearing today which is so clearly stated via today's hearing title – "Reducing Federal Agency Overreach: Modernizing the Regulatory Flexibility Act."

Mr. Chairman, we are excited to have someone with your knowledge of our industry and your commitment to rural America in a position to affect leadership and develop policies that will ensure America's small businesses are again able to flourish. With your leadership we have the confidence to continue to pursue our aggressive broadband deployment objectives that will ensure America's ongoing global communications preeminence. Thank you for the opportunity to testify today, and I look forward to answering any questions you or your colleagues might have.

**Testimony of David E. Frulla**  
**Before the House Small Business Committee**  
**“Reducing Federal Agency Overreach:**  
**Modernizing the Regulatory Flexibility Act”**

March 30, 2011

I very much appreciate the opportunity to testify today at the Small Business Committee’s hearing, “Reducing Federal Agency Overreach: Modernizing the Regulatory Flexibility Act,” to discuss the Regulatory Flexibility Act (“RFA”)<sup>1</sup> and the benefits that federal agency RFA compliance can have on small entities, including small businesses, non-profit organizations, and local governments.

My name is David Frulla and I am partner with the law firm Kelley Drye & Warren, LLP, in Washington, D.C. I am appearing today personally, and not on behalf of any other client or entity. My practice has been largely centered on regulatory and administrative law, with a long-established focus on helping small businesses and their associations in the rulemaking process and, when things go awry, in litigation.<sup>2</sup> In summary, the RFA, along with its “watchdog,”<sup>3</sup> the Small Business Administration’s (“SBA”) Office of Advocacy, have proven to be valuable tools in creating a more effective and responsive regulatory process. That said, the

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<sup>1</sup> 5 U.S.C. Chapt. 6.

<sup>2</sup> We at Kelley Drye have handled over a dozen RFA judicial challenges, prevailing in several notable instances, including the landmark case *Southern Offshore Fishing Ass’n v. Daley* (“*SOFA I*”), 995 F. Supp. 1411 (M.D. Fla. 1998), one of the first major victories for small entities under the RFA’s judicial review provisions, enacted via the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”), a part of the Contract with America Advancement Act of 1996, Pub. L. No. 104-121.

<sup>3</sup> *SOFA I*, 995 F. Supp. at 1435.

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fifteen years since the last major overhaul of the law<sup>4</sup> have pointed to ways the law can be improved to fulfill its purpose.

When Congress passed the RFA over three decades ago, it chose to require agencies specifically to consider how their proposed regulations would affect small businesses and other small entities. As a general matter, small businesses face relatively higher compliance costs, unique compliance challenges particularly with respect to paperwork and reporting requirements, and disadvantages in monitoring regulatory changes and participating in the rulemaking process. The RFA has helped to level the playing field.

Importantly, however, the RFA has been interpreted since the first reported RFA court decision, to be strictly procedural.<sup>5</sup> Agencies are not required to choose the least burdensome viable regulatory option. The law's impact comes from focusing regulators' attention on the particular needs and challenges facing small entities, backed by the oversight and guidance of the Office of Advocacy. The fact the RFA lacks any substantive obligation has, quite frankly, limited its utility. No requirement exists for an agency's RFA analysis to be based on the best scientific, economic, and social information available. No peer review of agency RFA analyses exists. Any review comes via the Small Business Administration's ("SBA") Office of Advocacy

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<sup>4</sup> Specifically, SBREFA, *supra* note 1. Since SBREFA's enactment, the Small Business and Work Opportunity Act of 2007, part of Title VIII, Subtitle C of Pub. L. No. 110-28, created the RFA requirement that agencies produce "small entity compliance guides" explaining regulatory requirements in plain language along with suggestions to assist small entities. Likewise, as explained below, section 1100G of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), Pub. L. No. 111-517, required that the newly created Consumer Financial Protection Bureau convene regulatory review panels for regulations impacting small entities and added analytical requirements relating to potential increased credit costs resulting from such rules.

<sup>5</sup> See, e.g., *Associated Fisheries of Maine, Inc. v. Daley* ("AFM"), 127 F.3d 104, 114 (1st Cir. 1997); *U.S. Cellular Corp. v. Fed. Comm'n Comm'n*, 254 F.3d 78, 88 (D.C. Cir. 2001).



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comments and the very deferential standard of review applicable in Administrative Procedure Act (“APA”)-based judicial review. Thus, regulatory flexibility analyses can and often do suffer from some of the same infirmities as other types of agency decisional documents.

Perhaps most significantly, an agency is not required to adopt any more flexible regulatory alternative to the proposed rule in question identified during the rulemaking process. When such a failure occurs, it generally has one of two roots: One, the agency really has not understood or acknowledged the true nature of the regulatory burden it proposes to inflict on small entities, or, two, the agency does understand the unnecessary burden and decides to inflict it anyway. Neither outcome should be acceptable.

Ultimately, the RFA will be judged successful when regulators look for meaningful opportunities to tailor necessary regulations to fit the realities and burdens faced by small business. Small businesses are looking for a regulatory system that protects the public, while not overburdening operations and stifling growth and job creation. They are generally not looking in the first instance for opportunities to sue governmental entities, which can be an inefficient, costly, and uncertain enterprise. Fortunately, there are many good ideas to amend the RFA being considered in both the House and the Senate, which I address in Part III. I have also included other concepts that may be worth considering.

My testimony will focus first on a very brief review of the RFA’s major requirements and purposes. I will then explain how the RFA has helped small business through practical examples, and conclude with the above-referenced recommendations for improvements. I commend the Committee for undertaking this important discussion, as Congress seeks to ensure that federal regulatory regimes do not impede economic recovery and job creation.

**I. RFA Major Elements**

The RFA establishes a process that requires federal agencies to assess the impacts of regulatory proposals on small entities and to develop and consider alternatives that, while being consistent with the agency's statutory mandate, help ameliorate anticipated adverse economic impacts on these small entities.

At the agency rule initiation stage, the RFA requires an agency to develop an initial regulatory flexibility analysis ("IRFA").<sup>6</sup> The IRFA is to identify the rule's purpose, objectives, source of authority, universe of impacted small businesses, reporting requirements, and any duplicative measures. At its heart, an IRFA should also explore significant alternatives that reduce adverse impacts on small entities, including differing or simplified compliance or reporting requirements, performance standards, or even exemption from the rule. An agency must provide for notice and comment on its IRFA.

In general, an agency can avoid the IRFA requirement if it can certify that the rule is not likely to have a "significant economic impact on a substantial number of small entities."<sup>7</sup> A certification of "no significant impact" is subject to judicial review. In the early days of RFA litigation, inappropriate "no significant impact" agency certifications provided fertile ground for litigation and even practical judicial relief.<sup>8</sup>

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<sup>6</sup> 5 U.S.C. § 603.

<sup>7</sup> 5 U.S.C. § 605(b).

<sup>8</sup> See, e.g., *SOFA I*, 995 F. Supp. at 1434-35; *Southern Offshore Fishing Ass'n v. Daley*, 55 F. Supp. 2d 1336, 1345-46 (M.D. Fla. 1999); *North Carolina Fisheries Ass'n v. Daley* ("*NCFI I*"), 16 F. Supp. 2d 647, 651-52 (D.N.C. 1997).

Following notice and comment on an IRFA, the agency must prepare a final regulatory flexibility analysis (“FRFA”) to accompany its final rule.<sup>9</sup> The FRFA responds to public comment and updates the impacts assessment from the IRFA, taking into account any changes to the rule made in response to such comments. Finally, the FRFA must explain the “factual, policy, and legal reasons” for the particular approach adopted, and why other – potentially less burdensome – alternatives were not. Any agency’s FRFA can be challenged under the Administrative Procedure Act’s arbitrary and capricious standard. It is exceedingly rare that a court will set aside a FRFA.<sup>10</sup>

The RFA also established the semi-annual Regulatory Flexibility Agenda, which requires an agency to provide mandatory reports of all its rules expected to have a significant impact.<sup>11</sup> Post-promulgation, all major rules are to be assessed every ten years for continued efficacy and need, considering changes in technology, economic factors, and overlap with other rules. Agencies are also directed to address “complaints and comments received concerning the rule from the public.”<sup>12</sup>

To assist with public outreach and comment process during a rulemaking, the RFA provides that each agency must “assure” small entities’ participation by providing for adequate

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<sup>9</sup> 5 U.S.C. § 604.

<sup>10</sup> As the First Circuit noted: “[A]n agency can satisfy section 604 as long as it compiles a meaningful, easily understood analysis that covers each requisite component dictated by the statute and makes the end product—whatever form it reasonably may take—readily available to the public.” *AFM*, 127 F.3d at 115. *But see Nat’l Ass’n of Psychiatric Health Sys. v. Shalala*, 120 F. Supp. 2d 33, 43 (D.D.C. 2000) (finding cursory analysis regarding economic impacts of a final rule inadequate to meet the standards for a FRFA).

<sup>11</sup> 5 U.S.C. § 610.

<sup>12</sup> 5 U.S.C. § 610(b)(2).

notice.<sup>13</sup> Among other tools, an agency is encouraged to: indicate in advance notices of proposed rulemaking that a subsequent proposed rule may have significant economic impacts; provide general notice in industry publications; directly notify small entities; and conduct public hearings or conferences for regulated small business, organization, and governmental concerns.

SBREFA added a requirement that major rules being considered by certain agencies be subject to statutorily-enhanced, pre-promulgation regulatory review and consultation. Specifically, SBREFA created a review panel process for major rules being considered by the Environmental Protection Agency (“EPA”) and Occupational Safety and Health Administration (“OSHA”).<sup>14</sup> Further, as part of the Dodd-Frank financial reform legislation enacted last year, the newly created Consumer Financial Protection Bureau (“CFPB”) also is required to comply with the SBREFA panel process. Under that process, EPA, OSHA, or CFPB, prior to publishing an IRFA, must notify the Chief Counsel for Advocacy, providing analysis of potential impacts of the proposed rule. Within fifteen days, the Chief Counsel must identify representatives of small entities to review and provide advice relating to the proposed impacts.

These selected small business representatives provide input to a panel comprised of personnel from the particular “covered agency,” staff from the Office of Management and Budget’s Office of Information and Regulatory Affairs (“OIRA”), and the Chief Counsel for Advocacy. This panel reviews material related to the rule, including comments from the panel of affected small business entities, materials prepared in compliance with the RFA, and the analyses required to be included in the IFRA. Within sixty days, the panel must provide a report

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<sup>13</sup> 5 U.S.C. § 609(a).

<sup>14</sup> 5 U.S.C. § 609(b).

regarding its review that the agency then can use to modify its proposed rule. SBREFA panels can and have helped EPA and OSHA avoid “ready, fire, aim” outcomes, albeit these agencies’ participation in panel processes has often been begrudging.

The SBA’s Office of Advocacy also oversees and enforces agencies’ implementation of the RFA more generally. The Chief Counsel of Advocacy has authority to comment on proposed rules, provide agencies with RFA compliance guidance, and serve as a liaison to and advocate for small businesses. The Chief Counsel has the authority to file an *amicus curiae* brief on the side of a small business plaintiff challenging agency compliance with the RFA.<sup>15</sup> The Office has intervened, with significant positive effect, in two of the RFA cases I litigated. In one instance, the Office settled its intervention literally on the courthouse steps, when the Federal Communications Commission opted to provide small businesses additional implementation flexibility. This right to be involved in litigation is a powerful tool, albeit one not utilized much, involving, as it does, one federal agency effectively litigating against another.

Finally, the Office of Advocacy is a point of contact for regulated small businesses. The Office often plays a constructive mediatory role, conveying industry concerns to an agency and working behind the scenes in ensuring RFA compliance.<sup>16</sup>

## **II. RFA Benefits and Limitations and Agency Non-Compliance**

The RFA serves the public interest by focusing agencies’ attention on the disparate impacts “one-size-fits-all” regulations can have on the significant engine of job creation provided

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<sup>15</sup> 5 U.S.C. § 612(b).

<sup>16</sup> See Executive Order 13272, “Proper Consideration of Small Entities in Agency Rulemaking,” 67 Fed. Reg. 53461 (Aug. 16, 2002); Presidential Memoranda – Regulatory Flexibility, Small Business, and Job Creation (Jan. 18, 2011).

by small businesses nationwide. The Office of Advocacy puts it best in the introduction to its

*Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act:*

Economic freedom is the foundation for individual success and prosperity. This freedom is evident in the entrepreneurial small business sector, which creates most of the new jobs and a large share of the innovations in the American economy. When government takes small businesses into consideration in developing regulations, it saves time and money for the nation's most productive sector.<sup>17</sup>

The law performs this function best when an agency works constructively and collaboratively to identify and implement regulatory alternatives that reduce regulatory compliance and paperwork burdens on small entities.

The RFA's requirement for agencies to identify the impacts their proposed rules will have on small entities to develop and consider alternative regulatory strategies to mitigate measures with disproportionate adverse impacts on small entities is itself a useful discipline. Indeed, as President Obama explained in his January 18, 2011 Presidential Memorandum regarding regulatory flexibility and small business<sup>18</sup>:

Adherence to these requirements is designed to ensure that regulatory actions do not place unjustified economic burdens on small business owners and other small entities. If regulations are preceded by careful analysis, and subjected to public comment, they are less likely to be based on intuition and guesswork and more likely to be justified in light of a clear understanding of the likely consequences of alternative courses of action. With that understanding, agencies will be in a better position to protect the public while avoiding excessive costs and paperwork.

President Obama's affirmation of the benefits provided by the RFA is consistent with a long line of similar pronouncements by presidents of both parties.<sup>19</sup>

<sup>17</sup> Available at <http://www.sba.gov/sites/default/files/rfaguide.pdf>.

<sup>18</sup> *Supra* n.16.

<sup>19</sup> See, e.g., President George W. Bush's Executive Order 13272, *supra* n.16.

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Enhanced public notice, particularly through direct communication and trade journals, helps to keep regulated businesses informed and engaged in the process. In my experience, other particularly beneficial aspects of the law include:

- Small Entity Compliance Guides: These guides assist regulated entities by providing a plain-language explanation of new regulatory requirements. They are often made directly available to regulated businesses and provide contact information for relevant agency personnel. While the reach and utility of such guides likely vary by regulatory bodies, Compliance Guides can be a vast improvement over *Federal Register* notices and the dense, legalistic language that inhabits the *Code of Federal Regulations*.
- The SBA Office of Advocacy: Without a doubt, the attorneys, economists, and other professionals in the Office of Advocacy are the single best resource available to small businesses, their associations, and representatives. They have facilitated communication between agencies and stakeholders as part of the rule development process. The Office can help to develop a record and hold regulators' feet to the fire in terms of RFA compliance and also plays an important coordinating role in OIRA regulatory review. Often, by necessity, the Office's efforts occur behind the scenes. Our experience with this Office has been uniformly positive, a compliment I can pay no other governmental agency.
- Judicial Review: Prior to SBREFA, the RFA was honored as much in the breach, rather than serving its intended function. Indeed, Congress added judicial review provisions<sup>20</sup> to ensure federal agencies do more than pay "lip service" to the RFA.<sup>21</sup> My experience in RFA litigation has shown both the benefits and limits of this right of review. On the positive side, the ability to litigate has prevented agencies from ignoring disparate impacts on small businesses and employing gambits to avoid RFA compliance altogether. RFA court victories in the years immediately following SBREFA's enactment did work to raise consciousness across agencies of the need to pay special heed to those protected by the RFA and address the law's mandates.

The RFA is not, however, a silver bullet. First, some agencies have become adept at negotiating the procedure to avoid full consideration of small business impacts and alternatives. In these instances, agency development and consideration of alternatives becomes little more than a *pro forma* exercise. Further, so long as the agency faces up to the most obvious economic

<sup>20</sup> 5 U. S. C. § 611.

<sup>21</sup> See 142 CONG. REC. S3242, S3245 (*daily ed.*, Mar. 29, 1996).

impacts and justifies the action in terms of its particular statutory mandate, courts have been increasingly unwilling to fault agencies for failing to explore and develop meaningful mitigating alternatives under deferential, applicable APA judicial review standards. This has been particularly apparent in the realm of fisheries management, even where regulated small businesses proffer feasible alternatives that meet the agency's conservation objectives.<sup>22</sup>

Another shortcoming is revealed in the ever-growing line of cases holding that agencies need not comply with the RFA if the rule does not "directly" impact a universe of small entities. For instance, we represented the National Federation of Independent Businesses as *amicus curiae* in an RFA case involving Food and Nutrition Service ("FNS") requirements relating to prices that could be charged by small business grocers primarily serving persons under the Women Infant and Children's Nutrition ("WIC") program. While the grocers were the obvious "targets" of the regulations, the challenge was dismissed because FNS' standards directly applied to the states administering the program.<sup>23</sup> The origins of this narrowing construction of the RFA's scope are sketchy and non-statutory, having been derived from the RFA's preamble, rather than its operative terms.<sup>24</sup> The direct impact standard has often allowed the EPA to avoid

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<sup>22</sup> See, e.g., *North Carolina Fisheries Ass'n v. Gutierrez*, 518 F. Supp. 2d 62, 93, 96 (D.D.C. 2007) (upholding agency rejection of alternative found to offset economic harm "to only a minor extent" and finding RFA satisfied because "the Secretary fully understood and publicly explained the [rule's] potentially dire consequences"); *Legacy Fishing Co. v. Gutierrez*, 2007 WL 861143, \*8, \*11 (D.D.C. March 20, 2007), *rev'd on other grounds, sub nom. The Fishing Co. of Alaska v. Gutierrez*, 510 F.3d 328 (D.C. Cir. 2007) (rejecting claim of agency failure to consider mitigating alternatives, holding "[m]ere allegations that the analysis was not sufficiently 'rigorous' are not enough for [a court] to find defendant's actions arbitrary and capricious").

<sup>23</sup> See *Nat'l Women, Infants, and Children Grocers Ass'n v. Food and Nutrition and note Svc.*, 416 F. Supp. 2d 92, 109-10 (D.D.C. 2006).

<sup>24</sup> See *Mid-Tex Elec. Coop. v. FERC*, 773 F.2d 327, 341 (D.C. Cir. 1985).



in-depth consideration of Clean Air Act cases, when states ultimately implement permitting regimes.<sup>25</sup>

The RFA section 610 regulatory review process has also failed to fulfill the role it was designed to play. As former Assistant Chief Counsel for Advocacy, Michael See, noted, following an exhaustive review of agency reports:

[O]ver 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.<sup>26</sup>

This history is particularly discouraging in that regulatory review is the focal point of many reform proposals currently before Congress. Clearly, as discussed below, an effort to foster meaningful review of existing rules that may be duplicative, out-dated, or which contribute to large cumulative regulatory impacts, will likely be frustrated unless the provision has teeth in the form of meaningful enforcement.

Finally, courts have deferred to an agency's finding of no significant economic impact, even in instances when the Office of Advocacy and the public weigh in with contrary data showing quite devastating impacts. Often this arises when agencies fail to appropriately identify the universe of small businesses impacted by a rule or fail to measure the proposed regulation's

<sup>25</sup> *American Trucking Ass'ns v. EPA*, 175 F.3d 1027, 1044 (D.C. Cir. 1999), *aff'd in part and rev'd in part on other grounds*, *Whitman v. American Trucking Ass'ns*, 531 U.S. 457 (2001).

<sup>26</sup> Michael See, *Willful Blindness: Federal Agencies' Failure to Comply with the Regulatory Flexibility Act' Periodic Review Requirement—and Current Proposals to Invigorate the Act*, 33 FORDHAM URB L.J. 1199, 1200 (2006).

impacts properly. For instance, the Environmental Protection Agency's RFA implementing guidelines authorize the agency to conduct RFA economic impact analyses based on small businesses' revenues, rather than their profitability. While any fair assessment of a regulation's economic impact ought to be measured against profits (and thus the entity's ability to pay for the regulation), a district court in Washington, D.C. deferred to the EPA guidelines.<sup>27</sup> Uniform, statutorily-authorized Office of Advocacy regulations consistent with its *Guide for Government Agencies* would have changed the deference calculus.

More generally, the caselaw is mixed regarding the level of deference accorded to the Office of Advocacy in its efforts to ensure RFA compliance. Certain cases are very respectful of positions and submissions from the Chief Counsel.<sup>28</sup> However, other cases are not deferential.<sup>29</sup> This is a matter that ought to be settled in favor of granting deference to the Office of Advocacy. The Office of Chief Counsel and its experienced staff have a detailed familiarity with the RFA and its requirements, small entities' ability to accommodate regulations, and the benefit of an overall perspective on the many and varied ways that rulemaking agencies attempt to avoid or defeat their RFA obligations.

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<sup>27</sup> *Ad Hoc Metals Coalition v. Johnson*, 1:01cv0766 (PLF) (D.D.C., Jan. 20, 2006), *slip op.*, at 12-13. The court explained, "The RFA does not define 'significant impact on a substantial number of small entities,' grants neither authority nor responsibility to any entity to develop a uniform definition of SEISNSE, and provides no guidance as to how certification decisions are made. Instead, the RFA grants federal agencies broad discretion regarding how key terms in the act should be defined and how certification decisions should be made." *Id.*, *slip op.*, at 12.

<sup>28</sup> See, e.g., *SOFA I*, 995 F. Supp. at 1435 (terming the Office of Advocacy as the Federal Government's RFA "watch dog").

<sup>29</sup> *American Trucking Ass'n v. EPA*, *supra* n.25 (no deference owed to either EPA's or SBA's RFA interpretations).

### **III. Potential Improvements to the RFA**

Give the Chief Counsel the authority to draft implementing regulations for agencies to follow. As I explained, intelligible standards and procedures that agencies have to follow with respect to, for example, calculating impacts and defining the universes of impacted entities, could make the process less susceptible to evasion or marginalization. H.R. 527, the Regulatory Flexibility Improvement Act (“RFIA”), does this. The Small Business Size Standard Flexibility Act, H.R. 585, likewise empowers the Chief Counsel to set size standards, along with the SBA Administrator. This should provide a second set of eyes on agency determinations, which, as my experience in *Legacy Fishing Company*<sup>30</sup> demonstrates, can only be helpful.

Expand small entity outreach during the pre-proposed rule stage, along with increased use of SBREFA-type panels. Seeking input from stakeholders on impacts analysis and alternatives and bringing together agency personnel, the Chief Counsel, and OIRA early in the development of major rules to vet issues and discuss approaches can only improve the regulatory process. Provisions to effectuate this approach are included in H.R. 527, as well as S. 474, the Small Business Regulatory Freedom Act.

Enhance other opportunities for pre-proposed rule notice and comment. To be effective, stakeholders and Advocacy must be given sufficient advance notice of proposed rules. SBA has called for amendments to section 609 that would require at least two-months advance notice and specification of the information that agencies should provide participants. Congress should also look to improve section 609(a), “Procedures for gathering comments,” by requiring agencies to

<sup>30</sup> *Supra* n.22. In that case, the agency had one classification for “fishing vessels” and one for “fish processing facilities.” Regulated catcher/processor vessels qualified as small entities under the latter standard, but generally not under the former standard, yet NMFS chose to apply the less inclusive “fishing vessel” classification for RFA purposes. 2007 WL 861143 at \*10.

utilize one of the several options for seeking early small business comment. The required use of such tools as scoping hearings, ANPRMs, and direct notification to the regulated community prior to solidification of a proposed rule, represents a highly effective way to facilitate the development and serious consideration of alternatives.

Include indirect effects. While this needs to be cabined in some way to be administratively feasible, the “target” concept is a good place to start. When states merely act as intermediaries, such as in the Clean Air Act, Clean Water Act, and the WIC examples discussed above, there is no reason an agency cannot assess the rule’s impact on the small business universe that ultimately will be responsible for complying with a rule. Also, where the substantive law protects a class of businesses or specific interests that are predictably impacted by a regulatory program, foreseeable impacts on small entities to those classes should also be assessed and minimized.<sup>31</sup> H.R. 527 and S. 474 both include workable definitions of such indirect effects, including that such effects be “reasonably foreseeable” and result directly from compliance with the rule.

Regulatory review. Agencies should be held accountable for failure to review rules or follow specified procedures in conducting reviews. The public should be allowed to petition for review of specific rules under set conditions. Also, rules scheduled for section 610 review should be incorporated in the section 602 Regulatory Agenda. These requirements should be included specifically in the RFA, to ensure 610 reviews are not illusory at best and counter-productive, at worst. Review and petition measures are included in many of the regulatory

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<sup>31</sup> One such example of a protected group are “fishing communities” under the Magnuson-Stevens Fishery Conservation and Management Act, which NOAA Fisheries is charged with maintaining. *See, e.g.*, 16 U.S.C. § 1851(a)(8).

reform review bills, including H.R. 214, the Congressional Office of Regulatory Analysis Creation and Sunset and Review Act, H.R. 527 and S. 474.

Add teeth to alternatives. Courts and agencies both have lost sight of the admonition in the RFA's legislative history that the terms of the law are to be liberally construed to fulfill its ameliorative purpose.<sup>32</sup> The RFA should more affirmatively seek to ensure, consistent with the RFA's legislative record, that an agency not only develop and consider feasible ameliorative or beneficial alternatives, but actually implement the "least cost" alternative consistent with that agency's statutory mandate. An agency's failure to conscientiously develop meaningful alternatives has also been problematic.<sup>33</sup>

Mandate the use of the "best scientific and economic information available" and provide for peer review in appropriate instances. I would recommend consideration of a requirement that agencies employ the "best scientific and economic information available" in their RFA analyses. The Office of Advocacy should be authorized to draft regulations defining the meaning of these terms under the RFA. Congress should also consider developing a process by which small entities could petition the Office of Advocacy to convene a peer review of the quality of the information and analysis employed in an agency's "no significant economic impact" determination, IFRA, and/or FRFA. A peer review should also be available to address whether an agency appropriately developed and considered ameliorative alternatives. The results of any

<sup>32</sup> See 126 CONG. REC. H24589 (Sep. 8, 1980) ("The legislation is intended to be as inclusive as possible, and doubts about its applicability should be resolved in favor of complying with the provisions of the Act.").

<sup>33</sup> For instance, in *National Association for Home Care v. Shalala*, 135 F. Supp. 2d 161, 165 (D.D.C. 2001), the court recognized Congress' admonition to read liberally the RFA's terms, but then used the deferential APA "arbitrary and capricious standard" to favor the agency's interpretation that it had no authority to consider any alternative approaches at all.

such peer review should be accorded equal deference to an agency's own RFA analyses in any subsequent judicial challenge.

Explicit provision for expedited judicial review. When the issue involves whether the RFA applies in the first instance or when an agency certifies that a rule has no significant economic impact on substantial number of small entities, protected entities should have speedy recourse to judicial review. From time to time, an agency will persist in claiming that binding, widely-applicable actions are not legislative rules subject to the RFA. We have prevailed on this issue twice at the D.C. Circuit level. However, in *National Association of Home Builders v. U.S. Army Corps of Engineers*,<sup>34</sup> we waited for well over three years for the district court to (erroneously) dismiss the case for lack of jurisdiction, and then spent another year-plus in the appellate phase.

Reform Equal Access to Justice Act ("EAJA") for prevailing small entities. The RFA's judicial review provisions also should be amended to provide for attorneys' fees under the EAJA whenever a small entity obtains a judgment in its favor on an RFA/SBREFA claim. Small entities and associations representing them often lack the funds to sustain RFA litigation, particularly once it reaches the often-protracted remedy phase. RFA litigation and compliance efforts should not become—as they often are—a war of attrition for these often economically marginal entities and associations representing them.<sup>35</sup>

Finally, Congress should ensure the Office of Advocacy has the resources to fulfill its statutory mission. These resources will be especially important if legislation greatly expands the

<sup>34</sup> 417 F.3d 1272 (D.C. Cir. 2005).

<sup>35</sup> See, e.g., *United States Telecom Ass'n v. FCC*, 2005 U.S. App. LEXIS 18599 (D.C. Cir., Aug. 25, 2005) (denying EAJA award to prevailing small business associations).

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Office's regulatory and oversight role. While I recognize the budgetary realities of the times, such a public investment in RFA compliance pays dividends in terms of "more just application of the laws and more equitable distribution of economic costs, which will ultimately serve both the society's and the government's best interests."<sup>36</sup> In this instance, an ounce of prevention can truly be worth a pound of cure.

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While the RFA can be improved, as the many suggestions above attest, this should not detract from the value and positive influence the law has had on the regulatory process for the past thirty-plus years. The RFA has been a valuable tool, one which can be better refined to meet its broadly accepted and important goals. Thank you for your time and attention. I would be pleased to answer any questions you may have.

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<sup>36</sup> See 126 Cong. Rec. H24589 (Sep. 8, 1980).



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

**Testimony of Craig Fabian  
Vice President of Regulatory Affairs & Assistant General Counsel  
Aeronautical Repair Station Association  
Before the United States House of Representatives  
Committee on Small Business**

**March 30, 2011**

Chairman Graves, Ranking Member Velázquez, and members of the Committee, thank you for the invitation to testify this afternoon.

My name is Craig Fabian and I am the vice president of regulatory affairs and assistant general counsel to the Aeronautical Repair Station Association (ARSA). ARSA is the premier association for the international maintenance industry; it also represents certificated aviation design, production, and maintenance facilities before Congress, the Federal Aviation Administration (FAA), and other national aviation authorities.

The efforts of ARSA's certificated repair station members facilitate the safe operation of aircraft worldwide by providing expert maintenance services for general and commercial aircraft. Overall, these types of services generate over \$39.1 billion of economic activity in the United States and, according to a recent study, employ more than 274,000 workers in all 50 states.<sup>1</sup> On a global scale, North America is a major net exporter of aviation maintenance services, enjoying a \$2.4 billion positive balance of trade.

Although ARSA members represent a wide cross-section of the aviation industry, the vast majority of these companies are small businesses. In fact, recent surveys confirmed that nearly three quarters of our members employ fewer than 50 people and nearly half of the businesses are owned by a single individual or family. In light of that data, and due to the heavily regulated nature of the aviation industry, agency rulemaking activities have a significant impact on a substantial number of ARSA members. As a result, the protections afforded by the Regulatory Flexibility Act (RFA) are particularly meaningful to our members.

Today, I will discuss ARSA's experience challenging an agency rule under the RFA. I will also propose ways that Congress can improve the RFA and avoid creating barriers to a full and proper RFA analysis.

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<sup>1</sup> For details, see the "Aviation Maintenance Industry Employment and Economic Impact" table, found on ARSA's Web-site at the following link: <http://www.arsa.org/files/ARSA-StatebyStateOnePager-20100505.pdf>. That information is also attached to this written testimony.



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#### **Rulemaking that failed to fulfill RFA requirements**

When an agency engages in rulemaking, the RFA requires it to prepare an initial regulatory flexibility analysis describing the impact of the proposed rule on small businesses; the agency must make this analysis available for public comment. When the final rule is issued, the agency is required to prepare a final analysis describing the steps the agency took to minimize economic impact on small businesses, including reasons for selecting or rejecting alternatives to the final rule. Unfortunately, as ARSA has learned first-hand, agencies have at times ignored these RFA requirements.

ARSA's experience contesting a rule under the RFA began with a decision by the Federal Aviation Administration (FAA) to expand the scope of its drug and alcohol (D&A) testing requirements. The FAA's desired result was to mandate testing for not only air carriers and repair stations working on air carrier aircraft – as required by the D&A rules at that time – but also for the employees of maintenance contractors at any tier in the process. Once revised, the D&A rules would suddenly impact metal finishers, machine shops, electronic repair shops, and a host of other traditional small companies that repair stations rely on for ancillary services.

To effect this change to the D&A rules, the FAA published a notice of proposed rulemaking (NPRM) which contained a tentative RFA analysis on February 28, 2002. That NPRM was followed by a supplemental notice of proposed rulemaking (SNPRM) on January 12, 2004 which reasoned that most if not all repair stations and their contractors fit the definition of "small entity". The FAA received detailed comments from ARSA and other organizations throughout the rulemaking process raising significant concerns about the initial RFA analysis.

However, the agency decided in its final rule, issued on January 10, 2006, that no RFA analysis was required because repair stations and their contractors were not entities directly covered under the regulation. In reaching its conclusion that the rule was only aimed at air carriers - who by and large were not small entities - the agency believed it was relieved of its RFA obligations.

#### **ARSA challenged the rule in court**

The far reaching impact of the expanded D&A rule (ARSA had concluded that as many as 22,000 contractors were affected), and the fact that aviation work represented a small portion of the overall business for many of those firms, was of great concern to the industry. The choice faced by many small businesses was to either implement a U.S. Department of Transportation-approved drug and alcohol testing program for their employees or stop serving the aviation industry altogether. Although it was theoretically possible for contractors to be absorbed into an air carrier or repair station testing

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program, that option was impracticable for many reasons, including the fact that the small businesses performed work for a multitude of repair stations and may not have even been aware of the ultimate users.<sup>2</sup>

Due to these concerns, ARSA filed a lawsuit in the U.S. Court of Appeals for the District of Columbia Circuit on March 10, 2006, challenging the new D&A rules on several grounds, including the FAA's violation of the RFA. In a 2-1 decision issued in July 2007, the court agreed with ARSA and found that the FAA violated the RFA by not properly considering the impact of its drug and alcohol testing rules on small businesses. The court stated that despite the FAA's assertions to the contrary, repair stations and their contractors were directly affected by the expanded rule. It reasoned that although the regulations are immediately directed at air carriers, the employees of their maintenance contractors and subcontractors at any tier are required to be tested. Thus, the rule imposed responsibilities directly on the small businesses to which the expanded rule applies. As a result, the FAA was instructed to perform an analysis to comply with the RFA.

Despite the mandate from the court, for over three years the FAA made no effort to perform the required analysis. This blatant disregard of the court's order once again forced the association to take action. On Feb. 17, 2011, ARSA filed a petition for *writ of mandamus* with the U.S. Court of Appeals for the District of Columbia Circuit to compel the FAA's compliance. In response, on March 1, 2011, the FAA was ordered by the court to show cause and explain why ARSA's petition should not be granted. The court's order noted that if the writ were issued, only a final regulatory flexibility analysis would be required within 90 days and the D&A rules applicability to contractor employees at any tier would be stayed pending completion of the analysis.

ARSA is currently in the process of reviewing what the FAA has characterized as a "supplemental regulatory flexibility determination" which was published in the Federal Register on March 8, 2011. That supplement purports to "preliminarily certify" that the D&A rule will not have a significant impact, and therefore a full and complete RFA analysis is not required.

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<sup>2</sup> For instance, a certificated repair station may perform engine maintenance for several air carriers; in turn, when disassembling the engines received from those carriers, the gearbox assemblies may be shipped to another certificated repair station. The contracting chain may continue as a variety of assemblies are broken down into subassemblies and piece parts, which are sent to repair stations specialized in repairing the various items. Along the way, a small part may require metal plating and a shop dedicated to performing that specialized service may be used. The metal plating shop is most likely a small business and not a certificated repair station; the majority of its customers are probably not involved in aviation. Although a certificated repair station receiving the newly plated part will inspect, certify and install it into an aircraft component, which will then be received by another certificated repair station for inspection and installation on the engine, the small plating shop may be unaware of that contracting chain.

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### Improving the RFA

The foregoing example provides a sense of the challenges facing small business advocates who are seeking to improve the quality and effectiveness of federal regulations. We believe the time has come 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. Indeed, even when specifically commanded by a court of law to carry out an analysis, federal agencies are prone to engage in foot dragging in the apparent hope that the requirement will just go away. The following are 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 often 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 potential burden hanging over an agency (and its budgets), it is certain to be more mindful of the RFA obligations.
- **Ensure agencies account for indirect impacts.** The RFA requires agencies to analyze the direct impact a rule will have on small businesses. However, by merely evaluating the direct impact of a rule, agencies fail to account for the true repercussions of the regulation. Agencies should be required to assess direct and indirect costs for small companies in order to accurately measure the impact of a rule.
- **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. During ARSA's battle with the FAA, the agency initially indicated that repair stations and their contractors at all tiers were affected by the rule and most were small businesses. Once the FAA realized the multitude 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

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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 companies 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 Small Business Administration's Office of Advocacy (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.

#### **Congressional complicity in bypassing the RFA**

In addition to the aforementioned adjustments to the RFA, Congress must refrain from setting strict timelines that agencies must meet to complete the rulemaking process. It is critical that small businesses, like ARSA members, have ample opportunity to respond to proposed rulemakings to help agencies understand the real impact of new regulations. Consequently, agencies must be permitted sufficient time to consider the impact these rules will have on regulated parties or the RFA will be undermined.

RFA analysis and compliance is a process that 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 while altering regulatory proposals accordingly. Unfortunately, Congress does not always make this possible.

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### **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 have been reluctant to do so, even when specifically ordered by a federal court. That 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.



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### Aviation Maintenance Industry Employment and Economic Impact

State	Aviation Maintenance Industry Employment			Aviation Maintenance Industry Economic Activity (\$M USD)	
	Maintenance, Repair and Overhaul (MRO)		Total Employment (MRO plus Parts Manufacturing/ Distribution)	MRO	Total Economic Activity (MRO plus Parts Manufacturing/ Distribution)
	FAA-Certificated Repair Station	Air Carrier (Base and Line Maintenance)			
AK	518	912	1,435	\$147.9	\$149.6
AL	5,836	112	6,046	\$615.2	\$656.5
AR	3,254	22	3,351	\$338.8	\$363.8
AZ	5,849	2,227	13,445	\$835.3	\$2,700.0
CA	30,670	2,709	37,566	\$3,452.5	\$5,004.6
CO	1,340	614	2,008	\$202.1	\$220.1
CT	7,503	89	12,109	\$785.3	\$2,290.9
DE	1,122	0	1,170	\$116.1	\$132.1
FL	16,658	1,659	20,191	\$1,894.6	\$2,683.9
GA	11,173	1,414	13,741	\$1,301.9	\$1,704.9
HI	140	718	863	\$88.7	\$90.4
IA	3,003	68	5,156	\$317.6	\$1,019.3
ID	471	103	593	\$59.4	\$65.7
IL	4,121	1,810	6,833	\$613.5	\$937.5
IN	3,127	180	3,888	\$342.0	\$535.7
KS	7,029	98	9,792	\$737.2	\$1,647.2
KY	709	904	1,657	\$166.8	\$181.5
LA	2,354	127	2,589	\$256.6	\$292.6
MA	1,740	746	2,659	\$257.1	\$314.8
MD	1,338	128	1,622	\$151.6	\$203.6
ME	884	25	984	\$94.0	\$119.0
MI	4,322	705	5,676	\$520.0	\$749.6
MN	2,235	561	3,054	\$289.2	\$375.2
MO	2,349	367	2,852	\$280.9	\$326.3
MS	838	45	964	\$91.3	\$118.3
MT	363	14	393	\$39.0	\$44.3
NC	3,601	1,131	5,504	\$489.4	\$746.8
ND	187	17	261	\$21.1	\$40.1
NE	1,205	69	1,311	\$131.8	\$144.1
NH	554	34	690	\$60.8	\$94.8
NJ	2,593	196	3,522	\$288.5	\$564.3
NM	604	67	729	\$69.4	\$88.7
NV	671	384	1,122	\$109.1	\$131.5
NY	6,112	2,260	9,462	\$865.9	\$1,275.1
OH	4,710	1,885	8,382	\$682.1	\$1,277.8
OK	13,090	99	13,485	\$1,364.2	\$1,462.8
OR	1,508	435	1,978	\$201.0	\$212.6
PA	2,904	1,219	4,661	\$426.5	\$605.8
RI	294	0	402	\$30.4	\$66.4
SC	2,358	185	2,661	\$263.0	\$302.4
SD	66	24	188	\$9.3	\$42.0
TN	2,049	2,520	5,109	\$472.6	\$734.1
TX	25,057	4,523	32,673	\$3,059.5	\$4,430.0
UT	338	722	1,301	\$109.6	\$215.0
VA	1,287	108	2,635	\$144.3	\$588.5
VT	169	22	363	\$19.8	\$77.1
WA	8,353	841	13,898	\$951.0	\$2,585.6
WI	1,728	212	2,085	\$200.7	\$249.0
WV	1,448	0	1,470	\$149.8	\$157.1
WY	81	14	105	\$9.8	\$13.2
<b>Total</b>	<b>199,913</b>	<b>33,324</b>	<b>274,634</b>	<b>\$24,124</b>	<b>\$39,032</b>

Last update: April 2010. Developed by AeroStrategy for ARSA based on analysis of 2009 federal government and industry data. For more information, contact ARSA Legislative Counsel Daniel Fisher at daniel.fisher@arsa.org or 703.739.9543.



**International Dairy Foods Association**  
Milk Industry Foundation  
National Cheese Institute  
International Ice Cream Association



**Statement of Richard D. Draper  
CEO & Co-Founder  
The Ice Cream Club, Inc.**

**on behalf of  
International Dairy Foods Association**

**Before the Committee on Small Business  
United States House of Representatives**

**March 30, 2011**

Good afternoon, my name is Rich Draper from The Ice Cream Club®.

Thank you Chairman Graves, Ranking Member Velazquez, and members of the Committee for the invitation to testify today. And, particular thanks to my Congressman, Allen West from Florida's 22nd District, who is so committed to the success of small businesses. I also want to thank the International Dairy Foods Association, the leading voice of the dairy industry, for their help with today's hearing. And I would be remiss if I did not mention my wife and business partner Heather who is with me today.

In 1982, I opened an ice cream store, along with a buddy from University of Illinois, Tom Jackson, in a little town called Manalapan in south Florida, near Palm Beach. Those were the good ole days when you could come across an opportunity and just pack up and go. We started making ice cream in the back of the store and shortly thereafter began wholesaling. We named our business, the Ice Cream Club®, Inc.

We steadily grew to become the leading regional manufacturer and distributor of premium parlor style ice cream, yogurt and related products in the Southeast. The Ice Cream Club® now distributes ice cream and mixes to over 500 ice cream shops, retirement communities, restaurants, food service accounts and wholesale accounts throughout the Southeastern US and the Caribbean. About 7% of our business is export and that percentage is growing. In order to ensure the success of our long-term customers, our company's award-winning products are only found in select dipping stores and food service accounts. The secret to the company's success is our unbeatable taste along with our creative and unique selection of over 120 premium flavors.

We now employ 50 people and operate from an 18,000 square foot factory and we continue to grow. In fact, we hired seven new employees this year. We produce and distribute over 1 million gallons of finished product per year. We still have our original store and Tom is still our Partner.

We deal with regulations at the local, state, and federal levels by multiple agencies, so we are very interested in today's hearing topic and supportive of all efforts the



government makes to streamline and make regulations as efficient and least burdensome as possible.

Because this committee is interested in how the Regulatory Flexibility Act (RFA) could be improved to be more tailored to better assure that federal agencies consider the impact that regulations have on small businesses like the Ice Cream Club®, I would like to mention some regulatory areas particularly important to us, where we would like to see the RFA fully enforced or improved. These areas are food safety, federal procurement, and dairy policy.

There is nothing more important to the success of our small business than the confidence our customers have in the safety and quality of our products. The food recalls in recent years have heightened consumer awareness over food safety and in response Congress just passed comprehensive new food safety legislation. We understand the concern but are wary of how new federal regulations will be developed and implemented

As the dairy industry is already subjected to significant regulation, we are worried about duplicative regulatory efforts by various levels of government. For example, we are inspected regularly by the US Department of Agriculture (USDA), working with the Florida Department of Agriculture, and also the US Food and Drug Administration (FDA). We have four major inspections by the Florida Department of Agriculture each year as well as numerous other visits to collect samples and calibrate equipment. The new bill calls for even more inspections for food manufacturers, so it will be particularly important that the FDA utilize existing inspections in the dairy industry as much as possible.

We are also concerned that instead of targeting increased inspection to high risk areas as is required by the bill, there is a perception by the government that food companies are cutting corners and they will take a “once size fits all” approach over the entire food sector. We hope that there is not an adversarial “gotcha” stance coming down the pike.

Our view is that the vast majority of food producers adheres to strict food safety procedures and is working very hard to provide safe, quality and consistent products to the public. We welcome government regulation, inspection and education when it is utilized as a partnership between industry and government to further enhance the safety of food production. We pride ourselves on 29+ years of consistently producing quality products and strictly adhere to food safety standards, utilizing Hazard Analysis and Critical Point Plans and Good Manufacturing Practices, Preventative Maintenance Programs, Proactive In-House Training and employing a full-time Quality Control Director with over 25 years of experience in the dairy industry. So my concern about the prospect of additional regulations, absent a comprehensive understanding of the ultimate impact to small businesses, is that the effects could ultimately make the cost of doing business prohibitive, especially to small business.

An example of a one-size-does-not-fit-all when it comes to regulations is selling to the government. My experience is that only a few of the larger companies sell ice cream to government facilities. The reason for this is that the bids we see require supplying all dairy products and we only produce ice cream. We would like the opportunity to go in with our product line and see if the facility would have an interest, especially if we have products not available from other producers. For example, we produce over 20 awesome flavors of no-sugar-added ice cream. That is a great selection (and priced right) and might be welcomed at a VA Hospital.

Another example is the Environmental Protection Agency's (EPA) oil spill prevention rule. As you may know, the EPA has recognized that including milk under its oil spill prevention rule is unsound and is working to prevent the oil spill rule from applying to milk and dairy product containers. As a manufacturer of ice cream mixes, we receive cream in 300 gallon containers, well above the 55 gallon minimum to be covered under the oil spill rule. As such, those containers of cream would be subject to the oil spill rule unless they are also included in the exemption for dairy products. Although we believe that the EPA is working to define the milk and dairy product exemption in a way that those containers are treated equitably, we are unsure if these containers will ultimately be in or out of the rule.

I would also like to suggest more small business involvement and input at the inception of new regulation. This process has worked successfully in my industry. In May of 2009, the International Dairy Foods Association participated in a Small Business Regulatory Enforcement Fairness Act (SBREFA) panel on OSHA's intended regulation of foods containing diacetyl. Prior to the convening of the panel, the Occupational Health and Safety Administration (OSHA) publicly stated it was ready to regulate foods containing diacetyl which would include dairy products such as yogurt, cottage cheese, some ice creams and other dairy products. Thankfully, the SBREFA process gave our industry an opportunity to offer our insights to OSHA and in response OSHA altered its regulatory process and has pursued businesses that use diacetyl under the National Emphasis Program rather than companies that make food products.

It's my understanding that currently only the EPA and OSHA are required to convene SBREFA review panels to consult with small entities on regulations expected to have a significant impact on them. Regulations from other agencies, such as FDA and USDA could benefit from this practice and I'm sure small business people like myself would volunteer for a period to help out with these reviews. This would not be a way to create short cuts or gain a competitive edge, just real world input from folks in the front line.

Since milk is the primary ingredient we use in our business, I want to say that no area of regulation should be outside the scope of the Regulatory Flexibility Act and other safeguards Congress has put in place to require agencies to measure small business impact. Although we do not buy milk directly from producers, we are indirectly impacted by the milk pricing system. While USDA puts great emphasis on having a safety net in place for dairy farmers, their price regulations can be a stranglehold especially for small dairy businesses.

In conclusion, I would like to say that I feel very fortunate that we are in a country where we are free to grow our business. Most of the world's population is under an oppressive or restrictive regime of some kind so it is hard for us to complain too much. I will take reasonable regulation over the alternative. Thank you again for inviting us here today to review this very important topic.

**March 30, 2011**  
**Statement**  
**Congressman Roscoe G. Bartlett**  
**Before the House Small Business Committee**  
**Hearing on Reducing Federal Agency Overreach:**  
**Modernizing the Regulatory Flexibility Act**

Thank you, Chairman Graves for calling this hearing on the Regulatory Flexibility Act. The persistent problem of costly regulation yielding minimal benefits and maximum burdens to the true engine of our economy, small businesses, must stop.

Government Accountability Office reports over 20 years have held Congress is as responsible for ambiguity in the law as those who promulgate the rules. GAO states there is a “lack of clarity in the act regarding key terms and a resulting variability in the act’s implementation. For example, what constitutes a “significant” economic impact to small businesses. While I am pleased that you and Judiciary Chairman Lamar Smith are addressing these issues in HR 527, the Regulatory Flexibility Improvements Act of 2011, I believe that this critique is not completely accurate.

We are never at a lost for anecdotes and I would like to add one more for the record. Currently, National Institute of Health’s Office of Laboratory Welfare is reviewing its Guide for the Care and Use of Laboratory Animals. The current guide has been in use for 30 years. The proposed rules change the size of rabbit cages. My hope is that NIH personnel will review the concerns of Dr. Louis DeTolla of the University of Maryland, School of Medicine and the owners of a small business located in my district, Spring Valley Laboratories.

Addressing the need for the complete set of new guidelines Louis DeTolla, V.M.D.,Ph.D.,DACLAM of the University of Maryland, School of Medicine states that, “There are no deficiencies in the currently used 7<sup>th</sup> Edition of the Guide, so its continued use fully supports animal welfare, best practices, and quality biomedical

research. The proposed changes to the Guide in the 8<sup>th</sup> Edition are not supported by data that demonstrate any improvement in scientific outcome of animal studies or benefits in animal welfare as a result of these changes.”

But for the purposes of this hearing focusing on the impact of regulations on small businesses, I would like to highlight the comments of one small business owner, Robert M. Shaw of Spring Valley Laboratory located in my district. One seemingly minor change involves increasing the height requirement for rabbit cages from 14” to 16”. To Mr. Shaw this is one costly rule. The rule will require that he buy 100 cage racks (8 cages per rack) at a cost of about \$400,000 but the rule if implemented without any type of grandfather clause *might cost him his business and at the very least during these perilous economic times will prevent them from hiring new employees.*

While agencies can claim “lack of clarity in the act,” I think there are true warning signs that can clue agencies on the rules’ impact. As with the case of the animal cage size, when a business says it might have to close down --this a definitive signal. If it quacks like a duck then perhaps the regulation is a burden and we in Congress should expect that agencies rulemaking personnel are not so obtuse that they can’t see the duck walking though the door and avoid poor rulemaking decisions.

Congressman Bill Owens (NY-23)

Question for the Record

Reducing Federal Agency Overreach: Modernizing the Regulatory Flexibility Act  
March 30, 2011

**Question:** In the spring, this Committee is expected to hold a hearing and markup of H.R.527, the Regulatory Flexibility Improvements Act of 2011. Please indicate what changes you would like to see made to this legislation and the reasoning behind them.

Congressman Bill Owens (NY-23)  
 Question for the Record  
 Reducing Federal Agency Overreach: Modernizing the Regulatory Flexibility Act  
 March 30, 2011  
 Bill Squires

**Question: In the spring, this Committee is expected to hold a hearing and markup of H.R.527, the Regulatory Flexibility Improvements Act of 2011. Please indicate what changes you would like to see made to this legislation and the reasoning behind them.**

Thank you for the opportunity to comment on H.R. 527. While the bill contains several good provisions that will strengthen the Regulatory Flexibility Act, there are a few amendments that could make the bill even better.

Small entities are disproportionately burdened by the myriad rules and processes for gaining rights-of-way over federal lands. Section 2(e) of the bill orders the Secretaries of Agriculture and Interior to conduct the enhanced regulatory flexibility analysis when revising or amending land management plans. This section would be improved by explicitly referencing revisions and amendments to right-of-way rules. This could be accomplished by adding a subsection (D) after line 6 on page 7 that reads: “(D) RIGHTS-OF-WAY.—The terms ‘revision’ and ‘amendment’ also mean any change to a rule or regulation promulgated pursuant to the authority granted in 43 USC Sec. 1761 or in response to the directive contained in the ‘Broadband Rights-of-Way Memorandum’ signed by President George W. Bush on April 26, 2004.” Forcing agencies to engage in robust regulatory flexibility analysis when changing right-of-way rules would help streamline the process and make it more efficient for small entities.

On page 14, subsection (b) allows the Chief Counsel for Advocacy of the Small Business Administration to intervene in agency adjudications to inform the agency of the potential impact the adjudication may have on small entities. This is a good provision that could be helpful to small businesses, but it appears to be rendered ineffective by forbidding intervention if the agency is authorized to impose a fine or penalty in the adjudication. Subsection (b) would be improved if the provision in parentheses on lines 6-8 were deleted.

Section 5 of the bill strengthens the Chief Counsel’s office by enhancing opportunities to comment on rules before a proposed rule is published. However, subsection (B) on page 16 exempts independent regulatory agencies from providing exact language of rule drafts to the Chief Counsel. Independent regulatory agencies are able to unnecessarily burden small entities in the same manner as other agencies and it is important for the Chief Counsel to have authority to comment on all rules prior to publication. Further, page 16 lines 17-18 and page 17 line 4 provide special protection for independent agencies. Page 16 subsection (B) should be deleted in order to further empower the Chief Counsel to improve unnecessarily harmful rules before they are published. Section 5 does not give the Chief Counsel power to direct any agency outcome and therefore the independence of the independent agencies will not be compromised by this amendment.

The determination made under subsection (e) of Section 5 on page 17 could also be improved by authorizing the Chief Counsel to determine if a proposed rule falls under Section 5. Currently, the subsection (e) determination would be made by OMB or an agency head, thus giving agencies (especially independents) a lot of leeway if they wanted to exempt proposed rules from Section 5.

Similarly, the agencies themselves are given too much leeway to decide if rules fall under the Section 6 "Periodic Review of Rules". Page 19 lines 1-3 puts the determination of whether rules have a "significant economic impact on a substantial number of small entities" under the head of the agency promulgating the rules. The Chief Counsel should also be authorized to make this determination to ensure that all unnecessarily harmful rules are thoroughly vetted in keeping with the spirit of the bill.



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April 14, 2011

Response of David E. Frulla to Question for the Record from:

The Honorable Bill Owens (NY-23)

Reducing Federal Agency Overreach: Modernizing the Regulatory Flexibility Act

**Question:** In the spring, this Committee is expected to hold a hearing and markup of H.R. 527, the Regulatory Flexibility Improvements Act of 2011. Please indicate what changes you would like to see made to this legislation and the reasoning behind them.

**Answer:** In general, I support the amendments to the Regulatory Flexibility Act ("RFA") contained in H.R. 527, the Regulatory Flexibility Improvements Act of 2011. In my written and oral testimony, I explained the importance of considering reasonably foreseeable indirect economic impacts. *See* H.R. 527, § 2(b). I also strongly support H.R. 527's clarifying and refining the full range of RFA analytical requirements, as well as explicitly to require these analyses to consider cumulative and any disproportionate impacts on small entities. *Id.*, § 3. In my testimony, I emphasized the importance of providing the SBA Chief Counsel for Advocacy with authority to draft RFA implementing regulations for other agencies to follow; these regulations, which would be subject to notice and comment, would also provide an appropriate venue for clarifying and delimiting new requirements for analyses of indirect economic effects, cumulative impacts, and disproportionate impacts, as described above. *Id.*, § 4. Such a step should also help ensure courts appropriately defer to the Chief Counsel's construction of the RFA. H.R. 527 also contains an incremental extension of the valuable panel process to "major rules." *Id.*, § 5. Limiting extension of the panel process to major rules should help to address concerns regarding the resources needed for the Office of Advocacy and the rulemaking agencies to satisfy the new requirements H.R. 527 would impose. H.R. 527's clarifications to the Chief Counsel's intervention rights and the RFA's judicial review provisions are also well-founded. *See id.*, § 7.

In addition, the Committee should consider the following issues:

**Ensuring Appropriate Rigor of Agency RFA Analyses**

Issue: As I explained in both my written and oral testimony, federal courts reviewing agency RFA analyses increasingly are concluding the RFA's requirements are "procedural," meaning that, if an agency prepares the appropriate analyses, the court will not assess the quality of those analyses. Such an approach to review appears even more deferential than the "hard look" standard applicable to agency analyses under the National Environmental Policy Act.

The level of deference being provided by many courts to superficial agency RFA analyses should not be so high. At this stage, many agencies are paying "lip service" to the RFA, just as they were doing before Congress enacted the Small Business Regulatory Enforcement Fairness Act ("SBREFA") in 1996 to provide for judicial review. *See* 142 CONG. REC. S3242, S3245 (Mar. 29, 1996) (SBREFA—Joint Managers' Statement of Legislative History and Congressional Intent). The appropriate standard of review should be the Administrative Procedure Act's "arbitrary and capricious standard," *see* 5 U.S.C. § 706(2)(A), rather than its even more forgiving "without observance of procedure required by law" standard, *see* 5 U.S.C. § 706(2)(D). Indeed, in *Southern Offshore Fishing Ass'n v. Daley*, 995 F. Supp. 1411, 1425 (M.D. Fla. 1998), the SBA Chief Counsel for Advocacy intervened pursuant to 5 U.S.C. § 612(b) to contest the Federal Defendant's assertion the "without observance of procedure required by law" standard applied to judicial review of the agency's "no significant economic impact" certification pursuant to 5 U.S.C. § 605(b). Following oral hearing on summary judgment motions, the Federal Defendant "reexamine[d] our position," after conferring with the Chief Counsel and the Civil Division at the Department of Justice, and conceded that the "arbitrary and capricious" standard should apply. I attach the Federal Defendant's Clarification of Applicable Standard of Judicial Review, dated November 21, 1997. The United States has been running away in court from this concession ever since, unfortunately with some success. The SBREFA Joint Managers' Statement's Section-by-Section Analysis for Section 342, providing for judicial review, confirms, however, the "arbitrary and capricious standard" should apply. 142 CONG. REC. at S3245.

Further, courts should not disclaim authority to ensure agencies make rational decisions regarding the existence and suitability of alternatives that may help tailor a proposed rule to the scope and scale of small entities. In 1980, when the RFA was first enacted, the House's "Discussion of RFA Issues" explained, "It would not be reasonable for an agency to publish a finding that a rule is unnecessarily burdensome and that it could and should be made flexible, and for the agency to then fail to promulgate such a flexible rule." 126 CONG. REC. H24590 (Sep. 8, 1980). Similarly, Sen. Charles Robb (D-VA), a SBREFA co-sponsor, explained in debate that, "In order to make the Regulatory Flexibility Act work as intended, it has become necessary to make it judicially enforceable. Agencies will now be required to explain how a rule likely to

have significant impact has been crafted to minimize that impact on small businesses or else risk court action.” 142 CONG. REC. S2148, 2163 (Mar. 15, 1996).

**Proposed solution:** Congress should specify in 5 U.S.C. § 611(c) that the standard of review set forth at 5 U.S.C. § 706(2)(A) should apply to challenges to agency RFA analyses brought under the RFA’s judicial review provisions. The Committee should also more formally and clearly confirm in report language that, as a general rule, it is arbitrary and capricious for an agency to identify a less burdensome (or more beneficial) alternative for small entities, and then fail to adopt it.

Further, to help ensure the analytical rigor of agencies’ RFA analyses, Congress should add a sub-section (d) to the amendments to 5 U.S.C. § 608, *Additional Powers of the Chief Counsel*, contained in Section 4(a) of H.R. 527, to provide for peer review of agency RFA analyses. These peer review provisions would apply to any “major” rulemaking, that is, any rulemaking meeting the standards of 5 U.S.C. § 609(e), as it would be amended by Section 5 of H.R. 527. More specifically, the Chief Counsel for Advocacy should be provided authority to convene a peer review of: (1) an agency’s analysis of a proposed or final rule’s adverse, beneficial, cumulative, or disproportionate economic impacts pursuant to 5 U.S.C. §§ 603, 604, and 605(b); and (2) an agency’s identification and consideration of alternatives that either minimize adverse economic impacts or maximize beneficial economic impacts on small entities pursuant to 5 U.S.C. §§ 603(c) and 604(a)(5). The Chief Counsel should be able to convene such a peer review based on either his own determination of need or upon a petition from an affected small entity. An affected small entity should have 30 days from the date any such analysis is made publicly available to petition for a peer review. The Chief Counsel should have discretion to determine whether to grant any such petition from a small entity for peer review. The peer review should consider whether the agency’s analyses, referenced above, were: (1) sufficiently detailed to be reviewed; (2) prepared consistent with the analytical standards prescribed by the Chief Counsel in RFA implementing regulations promulgated pursuant to 5 U.S.C. § 608, as amended by Section 4 of H.R. 537; (3) based on the best available economic and social information; (4) conducted pursuant to appropriate analytical techniques; and (5) in the case of an alternatives analysis, are commensurate with the magnitude of the proposed rule’s estimated adverse economic impact or beneficial economic impact. A peer review would be required to be completed within 60 days of the date the peer review panel is convened by the Chief Counsel. The Chief Counsel should have authority to draft regulations to implement the peer review program.

**Leveling the RFA Compliance Playing Field**

**Issue:** Litigation under the RFA's judicial review provisions can help ensure agency RFA compliance. However, RFA litigation, as is generally the case for all federal court litigation, is time-consuming and expensive, particularly for a small entity plaintiff with limited resources. Furthermore, as the hearing testimony of the Aeronautical Repair Station Association and the National Telephone Cooperative Association demonstrated, even if a small entity plaintiff secures a judicial determination that an agency is required to conduct an RFA analysis, the plaintiff must thereafter possess and deploy the financial and analytical resources necessary to ensure the agency's RFA analysis is complete and well-reasoned. Agencies' track records of providing flexibility on remand from court decisions requiring them to conduct RFA analyses are, simply put, poor. Small entity plaintiffs often lack the resources to continue the RFA litigation battle to "round two." The RFA's legislative history emphasized that an agency should resolve any doubt about the RFA's application in favor of conducting the full set of RFA analyses. 126 CONG. REC. H24589 (Sep. 8, 1980) ("The legislation is intended to be as inclusive as possible, and doubts about its applicability should be resolved in favor of complying with the provisions of the Act."). Accordingly, an agency should be required to act at its peril if it erroneously concludes either the RFA does not apply or that its proposed rule will not have a significant economic impact on a substantial number of small entities. Otherwise, obtaining adequate judicial relief under the RFA can inappropriately become a war of attrition.

**Proposed Solution:** First, Congress should amend the Equal Access to Justice Act to require a court to award attorney's fees to a small entity or small entity representative if that entity or representative obtained a final decision in federal court that an agency inappropriately: (1) determined the RFA did not apply to its proposed action, or (2) certified that a proposed rule did not have a significant economic impact on a substantial number of small entities.

Second, the RFA's judicial review provisions, 5 U.S.C. § 611 should be amended to provide for expedited judicial review of an agency determination either that: (1) the RFA does not apply to its proposed action, or (2) its proposed rule did not have a significant economic impact on a substantial number of small entities.

**ATTACHMENT**

UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

SOUTHERN OFFSHORE FISHERY  
ASSOCIATION, et al.,

Plaintiffs,

v.

WILLIAM M. DALEY,

Defendant.

Civil No.  
97-1134-CIV-T-23C

DEFENDANT'S CLARIFICATION OF APPLICABLE  
STANDARD OF JUDICIAL REVIEW

Following the submission of cross-motions for summary judgment and oral argument before the Court, the defendants have reexamined their position regarding the applicable standard of judicial review that should govern the Court's consideration of the Regulatory Flexibility Act (RFA) claims (Counts 15 and 16 of the Complaint). Initially, defendants had asserted that the "standard for such claims is whether the Secretary has acted 'without observance of procedure required by law'" under the Administrative Procedure Act. Defendants' Summary Judgment Memorandum at 24, 44. In the alternative, Defendants asserted that, if the Court reviews the substance of the Secretary's RFA certification, the APA's arbitrary and capricious standard of judicial review should apply. *Id.* at 44-45. The plaintiffs contested the first point and insisted that only the "arbitrary and capricious" standard applied.

Defendants now have reconsidered our initial position, particularly in light of several recent court decisions applying the RFA, which defendants identified and discussed in our Hearing Brief dated November 7, 1997. In addition, defendants have conferred with both the Small Business Administration's Chief Counsel for the Office of Advocacy and with the Civil Division at the Department of Justice on the appropriate standard of review.

After reexamining our position, defendants now agree that the appropriate standard of judicial review is the APA's "arbitrary and capricious" standard, and we no longer rely on the initial point that the Court should consider only whether defendants acted "without observance of procedure required by law." In clarifying the appropriate standard of review, defendants reiterate our position that the record in this case fully supports the decision reached under the RFA, in which they certified that the rule reducing the shark fishing quota does not have a significant impact on a substantial number of small entities for purposes of complying with the RFA.

Respectfully submitted,

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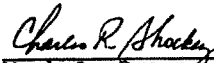
CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 21st day of November, 1997, true and correct copies of the foregoing "Defendant's Clarification of Applicable Standard of Judicial Review" were mailed by U.S. first class mail, postage prepaid, to:

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**Reducing Federal Agency Overreach:  
 Modernizing the Regulatory Flexibility Act  
 March 30, 2011**

**Answer to Question for the Record by Congressman Bill Owens (NY-23)**

**Craig Fabian  
 Vice President of Regulatory Affairs & Assistant General Counsel  
 Aeronautical Repair Station Association  
 Before the United States House of Representatives  
 Committee on Small Business**

**In the spring, this Committee is expected to hold a hearing and markup of H.R. 527, the Regulatory Flexibility Improvements Act of 2011. Please indicate what changes you would like to see made to this legislation and the reasoning behind them.**

The Aeronautical Repair Station Association (ARSA) commends Chairmen Sam Graves and Lamar Smith for introducing the Regulatory Flexibility Improvements Act (H.R. 527). The reforms proposed in H.R. 527 are a great start to ensuring agency compliance with the Regulatory Flexibility Act (RFA). ARSA fully supports legislative efforts requiring agencies to account for the indirect impact of rules on small businesses and strengthening the role of the Small Business Administration's Office of Advocacy.

In addition to the improvements outlined in H.R. 527, ARSA recommends the following measures be added to compel agency compliance with the RFA:

- **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 often 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 potential burden hanging over an agency (and its budgets), it is certain to be more mindful of the RFA obligations.
- **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. During ARSA's battle with the Federal Aviation Administration (FAA) over revised drug and alcohol testing rules, the agency initially indicated that repair stations and their contractors at all tiers were affected by the rule and most were small businesses. Once the FAA realized the multitude 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.

Congressman Bill Owens (NY-23)  
Question for the Record  
Reducing Federal Agency Overreach: Modernizing the Regulatory Flexibility Act  
March 30, 2011  
Rich Draper Response

**Question:** In the spring, this Committee is expected to hold a hearing and markup of H.R.527, the Regulatory Flexibility Improvements Act of 2011. Please indicate what changes you would like to see made to this legislation and the reasoning behind them.

**Rich Draper Response:**

I would like to see wider application of the Small Business Regulatory Enforcement Fairness Act (SBREFA) review panels. It is my understanding that currently only the EPA and OSHA are required to convene SBREFA review panels to consult with small entities on regulations expected to have a significant impact on them. Regulations from other agencies, such as FDA and USDA could benefit from this practice and I'm sure small business people like myself would volunteer for a period to help out with these reviews. This would not be a way to create short cuts or gain a competitive edge, just real world input from folks on the front line.

Additionally, since milk is the primary ingredient we use in our business, I want to say that no area of regulation should be outside the scope of the Regulatory Flexibility Act and other safeguards Congress has put in place to require agencies to measure small business impact. Although we do not buy milk directly from producers, we are indirectly impacted by the milk pricing system. While USDA puts great emphasis on having a safety net in place for dairy farmers, their price regulations can be burdensome, especially for small dairy businesses.