Testimony of

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Improving the Regulatory Flexibility Act-H.R. 682

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

Success of the Small Business Regulatory Enforcement Fairness Act

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

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

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

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

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

Executive Order 13272

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

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

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

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

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

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

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

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

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

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

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

Foreseeable Indirect Economic Impacts

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

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

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

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

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

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

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

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

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

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

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

Section 610 Review of Existing Regulations

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

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

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

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

Codification of E.O. 13272

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

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

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

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

Compliance Guides

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

Suggested Improvements to H.R. 682

Panel Process

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

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

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

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

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

Conclusion

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