SBA Office of Advocacy

A Voice for Small Business

Testimony of

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Before the

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U.S. House of Representatives
Committee on Small Business

On

CRS Regulations and Small Business in the Travel Industry

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Chairman Schrock, Representative Gonzalez and Members of the Subcommittee:

Good morning and thank you for the opportunity to appear before you today to address whether the Department of Transportation (DOT) is following the Regulatory Flexibility Act (RFA) in its proposal to revise the rules regarding computer reservation systems (CRS).

My name is Thomas Sullivan and I am Chief Counsel for the Office of Advocacy at the U.S. Small Business Administration. Pursuant to our statutory authority, Advocacy actively solicits input from small entities to assist our office in setting policy priorities and identifying rules that will affect them. Advocacy's involvement in the CRS rulemaking is a result of those outreach activities. Please note that my office's views expressed here independently represent the views of small business and do not necessarily reflect the views of the Administration or the U.S. Small Business Administration.

As Chief Counsel for Advocacy, I am charged with monitoring federal agencies' compliance with the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). Before discussing DOT's treatment of the RFA in its proposal to revamp the rules regarding CRS, I would like to give you a brief overview of the Regulatory Flexibility Act and our office's responsibility. Congress enacted the RFA in 1980 after determining that federal regulations produced a disproportionate adverse economic hardship on small entities. In an attempt to minimize the burden of regulations on small entities, the RFA mandated administrative agencies to consider the potential economic impact of federal regulations on small entities and to examine regulatory alternatives that achieve the agencies' public policy goals while minimizing small business impacts.

Agency compliance with the RFA, however, was not judicially reviewable. Therefore, agencies could not be held 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 the Small Business Regulatory Enforcement Fairness Act. The 1996 Amendments reshaped the requirements of the RFA and provided for judicial review of agencies' final decisions under the RFA. To further agency compliance with the RFA, President Bush signed Executive Order (E.O.) 13272 on August 13, 2002. E.O. 13272 requires agencies to implement policies protecting small entities when writing new rules and regulations. In addition, E.O. 13272 instructs agencies and Advocacy to work closely together as early as possible in the regulation writing process to address disproportionate impacts on small entities and reduce their regulatory burden. Section 3(c) of the E.O. requires agencies to respond to Advocacy's written comments in an explanation or discussion of the final rule that is published in the *Federal Register*.

Executive Order 13272 also requires the Office of Advocacy to train agencies so that they can better comply with the RFA. To accomplish that task, we have hired an outside contractor to assist us in developing a training program. A pilot program is currently being developed that will involve the Centers for Medicare and Medicaid Services (CMS), the U.S. Environmental Protection Agency (EPA), and the National Oceanic and Atmospheric Administration (NOAA). These three agencies will provide feedback to assist in the development of the government-wide training. This training is currently scheduled for July 23 and 24. Since our budget is limited, we

cannot train all regulators at all of the agencies. The agencies will receive Advocacy's new RFA compliance guide, training materials, and a CD-Rom that can be used by the agencies themselves to train additional staff or new employees.

Advocacy has also engaged DOT in our federal agency outreach efforts. The Assistant General Counsel for DOT arranged for Advocacy to speak to a group of general counsels from DOT and other agencies and policy staff about Executive Order 13272 last September. I went there yesterday to address the same group and update them on our progress. DOT's RFA compliance training will occur after the pilot project is completed and Advocacy has made the necessary adjustments to the training program.

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 will have a significant economic impact on a substantial number of small entities. The analysis is prepared in order to ensure that the agency has considered the economic impact of the regulation on small entities and all significant regulatory alternatives that would minimize the rule's economic impact on affected small entities. The RFA exempts an agency from these requirements if the agency "certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." An agency must provide a factual basis for making such a certification.

On November 15, 2002, DOT published a proposed rule on the "Computer Reservations System (CRS) Regulations; Statements of General Policy" in the *Federal Register*. The proposal examines whether the existing CRS rules are necessary and, if so, whether they should be modified. DOT's stated intent is to eliminate some of the existing rules to promote competition in the airline industry, to lower travel costs, and to provide travel agencies with protection from costly contracts.

Advocacy commends DOT for proposing changes that it believes would increase competition and protect travel agencies from costly contracts, thereby assisting small businesses who rely on air travel. However, as part of our outreach efforts, Advocacy learned that small travel agencies and small businesses were concerned about the potential economic impact of the proposal. Advocacy therefore reviewed the proposal to ascertain whether DOT had fully analyzed its potential impacts as required by the RFA. Upon reviewing the proposal, Advocacy became concerned about the potential harm to the travel industry and small businesses and the lack of analysis to justify DOT's findings. Advocacy submitted written comments on the proposed rule to DOT, requesting that DOT perform a supplemental IRFA that more fully considers the impact of the proposal on small entities as required by the RFA.

The analysis provided by DOT in their proposal lacked some of the elements that we believe should be part of an IRFA. Although DOT admits that the economic impact of the proposal will be significant, the agency provides only general statements about increased costs and potential savings rather than specific information to provide the public with insight into the potential magnitude of those costs. For example, DOT states that the proposal to restrict or prohibit productivity pricing may increase CRS costs for some travel agencies, but the affected travel

agencies would be larger agencies.[1] DOT's IRFA should provide insight into how this assumption was made and what those potential costs could be.

Moreover, Section 603(b) (3) of the RFA requires an agency to provide a description of the estimated number and types of small entities to which the proposed rule will apply. Although DOT states that the proposal will have an impact on small U.S. and foreign airlines; firms providing services and databases that compete with those offered by the systems; and small travel agencies, there appears to be no information regarding the estimated number of small entities that may be affected by this rule.

Based on information available through the SBA's Office of Size Standards, a small travel agency is defined as a business with less than $6 million in receipts. A small airline reservation service is also defined as a business with less that $6 million in receipts. An airline is small if it has less than 1,500 employees.[2] The SBA's Office of Size Standards is responsible for recommending size standards to the SBA Administrator. To support its work, that office obtains a special report from the U.S. Bureau of the Census that provides industry data on the number of businesses by various size categories. From that data, the Office of Size Standards can estimate the number of businesses that qualify as small using SBA's size standards and provide data on the economic breakdown of the particular industry.

The Office of Advocacy encourages DOT to contact SBA's Office of Size Standards for this information and integrate the information into a more thorough analysis. This information should enable DOT to provide an estimate of the number of businesses that may be impacted by the proposal.

It is my opinion that a supplemental IRFA by DOT will give the public greater insight into this rulemaking process as well as provide the necessary information to achieve compliance with the RFA. I urge DOT to carefully consider the economic impact of this rule on small business and to examine any alternatives that may minimize that impact. I further urge DOT to fully consider the comments submitted by small businesses to the rulemaking record and the testimony provided by small businesses at the hearing DOT held on this issue. The Office of Advocacy is available to work with DOT to ensure compliance with the RFA while accomplishing DOT's desire to improve the CRS system.

Thank you for the opportunity to appear today. I am happy to answer any questions you may have about my testimony.

[1] Fed. Reg. at 6924.
[2] See, Office of Size Standards website at www.sba.gov/size; 13 CFR 121.201.