H.R. 3310, SMALL BUSINESS PAPERWORK REDUCTION ACT AMENDMENTS OF 1998

HEARINGS

BEFORE THE

SUBCOMMITTEE ON NATIONAL ECONOMIC GROWTH, NATURAL RESOURCES, AND REGULATORY AFFAIRS

OF THE

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTH CONGRESS

SECOND SESSION

ON

H.R. 3310

TO AMEND CHAPTER 35 OF TITLE 44, UNITED STATES CODE, FOR THE PURPOSE OF FACILITATING COMPLIANCE BY SMALL BUSINESSES WITH CERTAIN FEDERAL PAPERWORK REQUIREMENTS, AND TO ESTABLISH A TASK FORCE TO EXAMINE THE FEASIBILITY OF STREAMLINING PAPERWORK REQUIREMENTS APPLICABLE TO SMALL BUSINESS

MARCH 5 AND 17, 1998

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CONTENTS

H.R. 3310, SMALL BUSINESS PAPERWORK REDUCTION ACT AMENDMENTS OF 1998

THURSDAY, MARCH 5, 1998

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON NATIONAL ECONOMIC GROWTH,
NATURAL RESOURCES, AND REGULATORY AFFAIRS,
COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT,
Washington, DC.

The subcommittee met, pursuant to notice, at 2 p.m., in room 311, Cannon House Office Building, Hon. David McIntosh (chairman of the subcommittee) presiding.

Present: Representatives McIntosh, Sessions, Tierney, and Kucinich.

Staff present: Mildred Webber, staff director; Karen Barnes, professional staff member; J. Keith Ausbrook, counsel; Andrew Wilder, clerk; William Moschella, deputy counsel and parliamentarian, full committee; Judy McCoy, chief clerk, full committee; Elizabeth Mundinger, minority counsel; and Ellen Rayner, minority chief clerk.

Mr. SESSIONS [presiding]. A quorum being present, I call to order the Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs. The purpose of today's hearing is to examine the Government paperwork burden on small businesses, and to consider proposed legislation to help reduce it.

This hearing will provide an opportunity for the subcommittee to hear from members of the small business community and others about their efforts to manage Government paperwork from the Small Business Administration Office of Advocacy, and to have their input about the value of the proposed legislation.

I am pleased to be joined today by one of my colleagues, the new ranking member of this subcommittee, Mr. Tierney of Massachusetts, and would ask him if he has an opening statement at this time.

[The text of H.R. 3310 follows:]

105TH CONGRESS
2D SESSION

H.R. 3310

To amend chapter 35 of title 44, United States Code, for the purpose of facilitating compliance by small businesses with certain Federal paperwork requirements, and to establish a task force to examine the feasibility of streamlining paperwork requirements applicable to small businesses.

IN THE HOUSE OF REPRESENTATIVES

MARCH 3, 1998

Mr. MCINTOSH (for himself, Mr. KUCINICH, Mr. FROST, Ms. WOOLSEY, Mr. GORDON, Mr. HAMILTON, Mr. HASTERT, Mr. SCARBOROUGH, Mr. SUNUNU, Mr. SESSIONS, Mr. SHAYS, Mr. MCHUGH, Mr. DAVIS of Virginia, Mr. MILLER of Florida, Mr. LIVINGSTON, Mr. DELAY, Mr. ARMEY, Mr. BOEHNER, Mr. THORNBERRY, Mr. BARR of Georgia, Ms. DUNN, and Mr. SNOWBARGER) introduced the following bill; which was referred to the Committee on Government Reform and Oversight, and in addition to the Committee on Small Business, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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A BILL

To amend chapter 35 of title 44, United States Code, for the purpose of facilitating compliance by small businesses with certain Federal paperwork requirements, and to establish a task force to examine the feasibility of streamlining paperwork requirements applicable to small businesses.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Small Business Paperwork Reduction Act Amendments of 1998".

SEC. 2. FACILITATION OF COMPLIANCE WITH FEDERAL PAPERWORK REQUIREMENTS.

(a) ANNUAL PUBLICATION OF PAPERWORK REQUIREMENTS.—Section 3504(c) of chapter 35 of title 44, United States Code (commonly referred to as the "Paperwork Reduction Act"), is amended—

(1) in paragraph (4), by striking "; and" and inserting a semicolon;

(2) in paragraph (5), by striking the period and inserting "; and"; and

(3) by adding at the end the following new paragraph:

"(6) publish in the Federal Register on an annual basis a list of the requirements applicable to small-business concerns (within the meaning of section 3 of the Small Business Act (15 U.S.C. 631 et seq.)) with respect to collection of information by agencies.".

(b) ESTABLISHMENT OF AGENCY POINT OF CONTACT; SUSPENSION OF FINES FOR FIRST-TIME PAPERWORK VIOLATIONS.—Section 3506 of such chapter is amended by adding at the end the following new subsection:

"(i)(1) In addition to the requirements described in subsection (c), each agency shall, with respect to the collection of information and the control of paperwork—

"(A) establish one point of contact in the agency to act as a liaison between the agency and small-business concerns (within the meaning of section 3 of the Small Business Act (15 U.S.C. 631 et seq.)); and

"(B) in any case of a first-time violation by a small-business concern of a requirement regarding collection of information by the agency in which the head of the agency determines that the violation has not caused actual serious harm to the public health or safety—

"(i) provide that, except as provided in clause (ii), no civil fine shall be imposed by the agency on the small-business concern if the small-business concern corrects the violation on or before the date that is six months after the date of receipt by the small-business concern of notification of the violation in writing from the agency; and

"(ii) if the violation presents an imminent and substantial danger to the public health or safety, provide that, except as provided in paragraph (2), no civil fine shall be imposed by the agency on the small-business concern if the small-business concern corrects the violation during the 24-hour period immediately following receipt by the small-business concern of notification of the violation in writing from the agency.

"(2) In a case described in paragraph (1)(B)(ii), the head of the agency may waive the suspension of imposition of a civil fine provided in that paragraph. The head of the agency shall notify Congress of any such waiver not later than 60 days after the date that the suspension is waived.

"(3) For purposes of paragraph (1)(B), the term 'agency' does not include the Internal Revenue Service.".

SEC. 3. ESTABLISHMENT OF TASK FORCE TO STUDY STREAMLINING OF PAPERWORK REQUIREMENTS FOR SMALL-BUSINESS CONCERNS.

(a) IN GENERAL.—Chapter 35 of title 44, United States Code, is further amended by adding at the end the following new section:

"§ 3521. Establishment of task force on feasibility of streamlining information collection requirements

"(a) There is hereby established a task force to study the feasibility of streamlining requirements with respect to small-business concerns regarding collection of information (in this section referred to as the 'task force').

"(b) The members of the task force shall be appointed by the Director, and shall include the following:

"(1) At least two representatives of the Department of Labor, including one representative of the Bureau of Labor Statistics and one representative of the Occupational Safety and Health Administration.

"(2) At least one representative of the Environmental Protection Agency.

"(3) At least one representative of the Department of Transportation.

"(4) At least one representative of the Office of Advocacy of the Small Business Administration.

"(5) At least one representative of each of two agencies other than the Department of Labor, the Environmental Protection Agency, the Department of Transportation, and the Small Business Administration.

"(c) The task force shall examine the feasibility of requiring each agency to consolidate requirements regarding collections of information with respect to small-business concerns, in order that each small-business concern may submit all information required by the agency—

"(1) to one point of contact in the agency;

"(2) in a single format, or using a single electronic reporting system, with respect to the agency; and

"(3) on the same date.

"(d) Not later than one year after the date of the enactment of the Small Business Paperwork Reduction Act Amendments of 1998, the task force shall submit a report of its findings under subsection (c) to the chairmen and ranking minority members of the Committee on Government Reform and Oversight and the Committee on Small Business of the House of Representatives, and the Committee on Governmental Affairs and the Committee on Small Business of the Senate.

"(e) As used in this section, the term 'small-business concern' has the meaning given that term under section 3 of the Small Business Act (15 U.S.C. 631 et seq.).".

(b) CONFORMING AMENDMENT.—The table of sections at the beginning of such chapter is amended by adding at the end the following new item:

"3521. Establishment of task force on feasibility of streamlining information collection requirements.".

Mr. TIERNEY. Thank you, Mr. Chairman.

Mr. Chairman, I want to thank you for holding this hearing today. Small and family owned businesses spend a great deal of their resources learning about and complying with applicable laws. I am pleased that we are looking at ways to simplify and streamline the resulting paperwork.

Mr. Chairman, it is my understanding that Mr. McIntosh has worked closely with Representative Kucinich in drafting H.R. 3310. This cooperative effort has led to specific improvements in this bill.

I also look forward to working with Mr. McIntosh and Mr. Kucinich to further improve the bill. This hearing is an important step in the process. The small business owners and advocates that we will hear from today will help us focus on the most egregious paperwork problems that need to be addressed.

However, the subcommittee also needs to hear from the agencies that are affected by H.R. 3310. This bill has provisions that under some circumstances would prohibit agencies from assessing civil penalties for first time paperwork violations. These provisions could have some unintended negative consequences, and we should take the time to hear what the agencies have to say on the matter.

The agencies can also shed some light on the policies that they already have in place to address first time paperwork violations.

As you may know, 2 years ago, the Small Business Regulatory Enforcement Fairness Act, also known as SBREFA, was enacted into law. This bill had strong bipartisan support. It passed the House by a vote of 328 to 91.

SBREFA afforded small businesses regulatory relief, including relief from civil penalties. Section 223 of SBREFA requires the agencies to develop policies and programs that would reduce or waive civil penalties for small business violations under appropriate circumstances.

The law specifically allows the agencies to provide relief for good faith violations, violations that are corrected within a reasonable period of time, and violations that do not pose a substantial threat to public health, safety, or the environment. These policies should have been implemented by April of last year.

SBREFA also requires the agencies to report to Congress about their policies. These reports are due at the end of this month. These reports are expected to describe the scope of the policies, the number of enforcement actions that the agency took against small businesses, and the total number of penalty waivers or reductions that the agencies have given.

Perhaps these reports will indicate that the relief provided by SBREFA has been a success, and that there has been no need to legislate again in this area.

Mr. Chairman, I think that it is imperative that we learn about the agency's current policies for first time violations, and learn whether H.R. 3310 could lead to some unintended negative consequences. That is why the minority is requesting that the subcommittee hold a hearing with administration representatives before the subcommittee marks up the bill.

Mr. Chairman, I would like to submit to you a written request signed by a majority of the minority members for the record, and ask that with unanimous consent it be entered into the record.

And I want to thank you again for holding this hearing, and I look forward to hearing from the witnesses on this important issue. Thank you.

Mr. SESSIONS. Thank you, Mr. Tierney.

Without objection, this will be entered into the record. And Chairman McIntosh, who will be here shortly, will consider this, and provide you with that response before the ending of today's hearing.

Mr. TIERNEY. Thank you.

[The information referred to follows:]

Congress of the United States

House of Representatives

March 5, 1998

Via Hand Delivery
David McIntosh
Chairman
Subcommittee on National Economic Growth,
Natural Resources, and Regulatory Affairs
Committee on Government Reform
B377 Rayburn HOB
Washington, D.C. 20515-6143

Dear Chairman McIntosh:

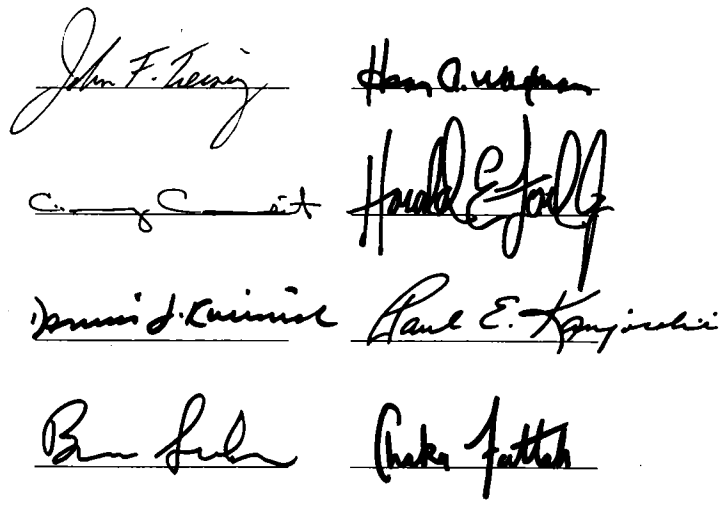
Pursuant to House rule XI, clause 2(j)(1), we are writing to request a separate day of hearings to allow witnesses selected by the minority to testify on the subject of today's hearing, "the Small Business Paperwork Reduction Act Amendments of 1998."

The minority would like to invite Administration officials from the federal Occupational Safety and Health Administration, Department of Transportation, Food and Drug Administration, Environmental Protection Agency, Securities and Exchange Commission, and other relevant federal agencies.

Before providing their testimony, the Administration will need some time to review the bill which was introduced only two days ago. However, in order to take advantage of the Administration's comments, this hearing should be scheduled before the Subcommittee marks up the legislation.

Thank you, in advance, for your assistance in this matter.

Sincerely,



Mr. SESSIONS. Mr. Kucinich, do you have any opening statement?

Mr. KUCINICH. Yes, I do, Mr. Chairman. I know that Chairman McIntosh will be joining us, and I want to thank you for your presence.

And I also recognize the presence of Mr. Tierney, our new ranking member. I look forward to working with you on this subcommittee. And I congratulate you. This is an extremely important subcommittee, whose work has tremendous implications for the American people. And I know that you are going to be an outstanding member of the subcommittee in the role of ranking member.

Mr. Chairman, I would like to thank you, and I would like to thank Chairman McIntosh for calling this hearing today on an important topic, the continued reduction of paperwork requirements on small businesses.

Over the past month, we have had the opportunity to work together to prepare truly bipartisan legislation that would help small businesses and Government agencies to continue to streamline their paperwork requirements. This will be a constructive give and take process that will show what Congress can do when they sit down and cooperate on issues important to the jobs and income of the American people.

This hearing takes the process on step forward. And I commend Chairman McIntosh for his foresight. Today, we will be talking about H.R. 3310, the Small Business Paperwork Reduction Act Amendments of 1998. This bill has a dual purpose. First, to help small businesses more easily comply with Federal paperwork requirements. And second, to buildupon the progress that Federal agencies have already made in streamlining and consolidating the paperwork.

Since the passage of the Paperwork Reduction Act of 1995, Federal agencies have launched a number of programs to reduce the paperwork burden of small businesses. In accordance with the Vice President's reinvention of government initiative, agencies have made sincere efforts to streamline their operations and improve their services to the public, while saving tax dollars in the process. We appreciate these efforts, and ask all Federal agencies to move full speed ahead.

Some aspects of the legislation are relatively simple. By mandating a single point of contact in agencies, small businesses will know exactly who to call with paperwork questions. By requiring OMB to publish a list of all paperwork requirements, small business owners will have a central source of information to rely upon.

And having read the written testimonies of Mr. Saas and Mr. Smith, I believe that the bill should be modified to require the OMB to publish paperwork information on the Internet with descriptions in plain English, and the material broken down by industry sector or SIC code.

Other aspects of the legislation are more challenging. This bill would give the heads of Federal agencies the ability to waive the imposition of a fine on small businesses that have first time violations in their paperwork filings.

I would like to stress, and this is a very important point for every member of the committee and the public to be aware of, that this penalty relates only to civil fines, not of a criminal nature. We

have made sure to include language that seeks to protect the health and safety of the public.

If the head of an agency discovers a first time paperwork violation that presents an imminent danger to the public health and safety, the business must correct that problem within 24 hours in order to avoid a fine. Even if this is done, the agency has the discretion to impose the fine if the violation is serious.

We have been consulting with Federal agencies and the small business community on these provisions. And everyone agrees that the health and safety of the public is paramount. I fully expect that this provision will go through more revisions in the weeks ahead. I am committed to that process.

Finally, Mr. Chairman, it gives me great pleasure to see two of my fellow Clevelanders in our hearing today. Bill Saas is the president of a blue collar manufacturing company called Taskem, Inc. It provides chemicals to the metal finishing industry. Every day, Bill sees firsthand how Federal paperwork when it is badly planned and unnecessary draws time and energy away from small business operators.

Robert Smith, who is president of Spero-Smith Investment Advisors, Inc., a white collar consulting firm that works with a wide variety of firms.

Both of these small business owners bring a wealth of experience to our deliberations, and I welcome them at this time, and I look forward to hearing their insights.

And I thank you very much, Mr. Chairman. I also want to thank the staff of Congressman McIntosh, and my staff, and the committee staff for the input that they have had in this process. And as this is evolving, that we have the input of agencies, so that we can make a better bill.

Thank you very much.

Mr. SESSIONS. Thank you so much, Mr. Kucinich.

I would like to, if I can, just give a little bit of information that would provide those of you who are here—and by the way, I have got a group of some 11 students from Dallas, TX who were here visiting me in Washington, DC, today. For their background, what I would like to do is let them know that what we are talking about is the Small Business Paperwork Reduction Act and its amendments, which was introduced on Tuesday by Chairman McIntosh and co-joined by co-sponsors Kucinich, myself, and others.

In particular, what we are going to talk about today is the Paperwork Reduction Act that Congress has been working with OMB, the Office of Management and Budget, on the Paperwork Reduction Act, and a goal that was established to reduce that by 25 percent.

We have received information that shows that the goal for 1996 of a 10 percent reduction was not achieved. But rather, it was at a 2.6 percent reduction. And it is estimated that we reduced that paperwork 1.8 percent in 1997. So obviously, you can see that we have a long way to go, and that is what this hearing is expected to achieve today, to see how we can continue in this process toward reducing paperwork on small businesses by 25 percent.

At this time, I would now like to call up our witnesses. That will include Mr. Gary Roberts, president of Roberts Pipeline, which is a small company which installs pipelines in Sulphur Springs, IN.

Second will be William Saas, president of Taskem, Inc., a small chemical processing company in Brooklyn Heights, OH. Victoria Nelson, owner of Jarnel Iron and Forge from Hagerstown, MD. Teresa Gearhart, owner of Mhart Express, Inc., a small trucking company in Hope, IN. And Mr. Robert C. Smith, president of Spero-Smith Investment Advisors, Inc., from Cleveland, OH.

I would now like to ask each of these panelists to be sworn. If you would please raise your right hands. And if you would answer in the affirmative, if you agree.

[Witnesses sworn.]

Mr. SESSIONS. If you would please note that each of the witnesses answered in the affirmative.

Each of the testimonies, we are asking that they be 5 minutes. That way, we can get through the panel, and then we will allow each Member to ask questions of each panel member.

I would ask Mr. Gary Roberts, if you would please lead the testimony today. Mr. Roberts.

STATEMENTS OF GARY ROBERTS, PRESIDENT, ROBERTS PIPELINE, SULPHUR SPRINGS, IN; WILLIAM SAAS, PRESIDENT, TASKEM, INC., BROOKLYN HEIGHTS, OH; TERESA GEARHART, OWNER, MHART EXPRESS, INC., HOPE, IN; VICTORIA NELSON, OWNER, JARNEL IRON AND FORGE, HAGERSTOWN, MD; AND ROBERT C. SMITH, PRESIDENT, SPERO-SMITH INVESTMENT ADVISORS, INC., CLEVELAND, OH

Mr. ROBERTS. Mr. Chairman and members of the subcommittee, I am here today to address the members of this subcommittee in my role as an American small business owner. My name is Gary Roberts. Along with my father, Leland Roberts, I am a co-owner of Leland Roberts Construction Co. Our business is in Sulphur Springs, IN, a small community of approximately 300 people, which is located in east central Indiana.

Roberts Construction was started 34 years ago by my father. At that time, the number of employees totaled one, my father. Over the years, Roberts Construction has grown. Today it employs approximately 75 employees during the peak construction season. Its main business is water, gas, and sewer line construction.

As a teenager, I worked for my father. Later, I worked with my father in building the company. There is not a job performed today that neither my father nor I have not done. On this very day, my 24 year old son, Jason, is doing the same work as other employees.

As you can tell, Roberts is a small family business. My wife, Teresa, also works full-time with the company. She could, probably better than I, tell you how paperwork affects a small business.

I would like to share with you a problem our company is currently facing. On May 20, 1997, the Indiana Department of Labor, Occupational Safety and Health Administration, inspected our work site in Matthews, IN. Approximately 2 months later, our company received a 12-page document entitled Safety Order and Notification of Penalty. Until then, our company had only been cited by IOSHA on one prior occasion. That citation was later dismissed without payment of any penalty. Roberts Construction has a good record when it comes to employee health and safety. Our Workers'

Compensation rates reflect our good safety record. Our company has had an active safety program in place for many years.

As a result of the May 20, 1997, inspection, our company was cited for violation of 29 CFR 1910.1200(e)(1). In plain English, that meant we did not maintain a Hazardous Communication Program at the Matthews job site. This charged violation was immediately corrected by our employees during the inspection process, inasmuch as we already had such a program in place. We had years before developed this program. During our regular safety meetings, our employees had been trained on it. Yet, the charge was not that we did not maintain the program, but the charge was that we did not have the written program onsite. We are now faced with a proposed penalty of $750. We have never been cited for a program or similar matter before. Left unchallenged, this penalty would be used as a factor in our insurance rates and future contacts with IOSHA.

To put this whole matter in perspective, the most hazardous product that we had on this job site was concrete mix.

As you may suspect, the 12-page safety order we received from IOSHA was a very detailed document. It made references to numerous Indiana Codes and Federal Regulations. Quite simply, it appears to be a document written by a skilled lawyer.

We decided to contest this citation. Yet in order to do so, we were required to hire a lawyer. We filed a Petition for Review. Due to the short time limits set by IOSHA, it was necessary to file this petition even before we could have an informal settlement conference with IOSHA.

To further complicate matters, once we filed the petition, we received another document called Complainant's Interrogatories and Request for Production of Documents. Our attorney tells us this is standard procedure. The instructions for this document were three and a half pages in length. The document contained over two pages of definitions. I would like to share with you one of the definitions.

As used herein, "document" and "documents" mean all original writing of any nature and all non-identical copies thereof in the possession or custody, or under control of the respondent regardless of where located, including, but not limited to, contracts, agreements, records, tape recordings, correspondence, communications, reports, studies, summaries, minutes, notes, diaries, appointment calendars, bulletins, announcements, instructions, charts, manuals, brochures, schedules, memoranda, computer listings, interoffice and intraoffice memoranda, and other documents as that term is used under Indiana Rules of Trial Procedure.

In any case in which the original or non-identical copy is not available, "document" and "documents" include an identical copy of an original or a copy of a non-identical copy. Any document bearing notations, markings, or writings or any kind different from the original shall be treated as an original document.

I am sure someone somewhere is quite proud of these definitions. What may be good for those who write definitions though is not necessarily good for small business. I cannot spend time reviewing all my documents, creating new documents, and talking with a lawyer when I have a business that needs my full-time attention.

To further show you what a small business faces today, I have here with my rules, regulations and laws I need to be familiar with each day. Many of these are required to be on each job site. Frankly, this is getting to be too much.

I am not here today asking that you create a loophole which would allow small businesses to ignore their safety responsibilities.

As I indicated, our employees are also often our families, They are also our neighbors and friends.

Our company has many long time loyal employees. We want them to be safe on the job site, because quite simply that means they are also productive.

As larger companies leave our communities, as they have in neighboring Muncie, IN, small businesses need to be able to step in and fill the void with new jobs. We cannot do this when we need to worry more about the definition of documents than we do with the concept of running a small business that benefits not only its owners, but also its employees and its community.

In closing, I would ask for your help in reducing the paperwork burden that is flooding small businesses.

Roberts Construction has not received any Federal contracts or Federal grants this fiscal year.

Thank you.

Mr. SESSIONS. Thank you, Mr. Roberts.

The next witness will be Mr. Saas.

Mr. SAAS. Thank you, Mr. Chairman, and members of the subcommittee. I appreciate this opportunity to come and testify on behalf of H.R. 3310.

My name is Bill Saas, and I am the president and owner of Taskem, Inc., a company located in Cleveland, OH. It manufactures chemicals used in the metal finishing industry.

The surface finishing industry is an industry of about 8,000 different operations that apply various coatings to part to either enhance the appearance of those parts, to provide better corrosion protection for those parts, or to provide them with physical characteristics that they would not otherwise have.

Our industry is characterized by small owner-operated firms. Typically, they employ about 20 people. They do about $1 million in sales. They have invested anywhere from a half a million to three-quarters of a million dollars of pollution prevention equipment. And it costs them about anywhere from $110,000 to $140,000 a year on average to operate this equipment.

It is a substantial employer. It represents about $50 billion a year in the U.S. economy. And if you look at the supplier as well as the finisher side, it includes about 520,000 jobs. In my own city of Cleveland and northeastern Ohio, we employ about 3,000 people in the metal finishing industry.

About 3½ years ago, the common sense initiative was part of EPA's reinvention of government program. And although they have accomplished a great deal of positive things, I would like to focus just on one issue, and that is a program called RIITE, the Regulatory Information Inventory Team Evaluation.

Simply what happened is, the EPA inventoried all of the environmental regulations that applied for a typical metal finishing operation. Believe it or not, some astounding things came out of this. For example, they discovered that there are over 160 regulations that apply just for a typical metal finishing operation, each of them requiring some degree of reporting.

Another thing that they discovered is that there is duplicative reporting of information. It may be in a slightly different format, but

largely it is the same information that has to be supplied to multiple sources.

I think it is better to offer suggestions than simply criticism of the existing system. What I would like to do is tell you that as we read H.R. 3310, it seems to match up with our conclusions about what should be done to improve the system. In particular, we want to minimize overlap of reporting. We also want to improve the definition of exactly which regulations apply for our industry.

That can be done in the same manner in which it was done with the RIITE program for other industries as well as the metal finishing industry. We think that those 160 different reports could be condensed to 30 to 40 reports, and still provide at least equivalent if not better protection of the environment and human health exposure.

Finally, there are two other recommendations. We would like to suggest that as much be done as possible to reduce the number of different locations to which reporting must be done. We would like to suggest that modern technology such as electronic reporting be incorporated to whatever degree possible.

Some of my colleagues in the metal finishing industry in northeastern Ohio asked me if I would also make a point that it helps them considerably if they know more of why a particular piece of information is needed. No. 1, there may be ideas that we have of a more efficient way in which some of that data can be collected.

Second, I think that no one in our industry is opposed to supplying information that is really needed. But I think conceptually that we are all opposed to providing information that simply fills up filing cabinets in offices someplace in the world.

Finally, I would ask one other thing. And that is there is a proposal that EPA is going to be putting forth called Reinventing Environmental Information. It is a wonderful program in concept. What we want to be sure of is that there is a commitment to truly reducing the number of reports that have to be submitted that is followed.

I think that if Congress initiates some followup with the EPA and requires a little more definition of how it is going to be accomplished, that it will be to everyone's benefit.

Thank you very much. I appreciate the opportunity to offer this testimony. And I would confirm also that Taskem has not received any Federal funding or grants, not only this year but any year.

[The prepared statement of Mr. Saas follows:]

Good morning, Mr. Chairman, and members of the Committee. My name is Bill Saas. I am owner and President of Taskem, Inc. in Cleveland, Ohio, and am testifying today on behalf of the nation's metal finishing industry. The metal finishers fully support the effort you and Mr. Kucinich have undertaken through legislation to address the very real problems of paperwork for small business. I have 30 employees, and supply chemical products to primarily family-owned metal finishing firms that are literally awash in paperwork. The companies I supply are typical of the more than 3000 surface finishing operations across the nation.

The surface finishing industry as a whole is really an invisible industry, but adds about $50 billion and nearly 520,000 jobs a year to the U.S. economy. Its work is critical to virtually every manufacturing sector and our national defense.

Without the hundreds of complex metal coatings, paints and other surface treatments we apply, most products -- from automobiles, satellites and computers to door knobs and Harley-Davidsons (which, to some, is an absolute necessity of life) -- would cease to function effectively.

Most of us who are part of the industry are located in urban areas, and provide good jobs at above minimum wage pay, sometimes considerably more. We work hard in our communities, and in fact, in my home town of Cleveland in Mr. Kucinich's district, I'm proud to say that my industry has just developed formal metal finishing training courses with Cuyahoga County. We've successfully trained nearly 30 welfare recipients in a first-of-its kind welfare-to-work program. We're excited about being able to give people good jobs, health benefits and solid work experience.

Paperwork Burdens

Metal finishers are challenged every day with the cumulative burden of paperwork that is the result of two and a half decades of fairly aggressive, command and control-oriented statutes and regulations. Even though Congress and EPA have sought to reduce paperwork, metal finishers have not benefited. Based on the regulations we see in the pipeline now, paperwork and reporting requirements will continue to proliferate.

In practical terms, this means that the overall regulatory cost for the average metal finisher will continue to rise from its current level of

around 11 to 14 percent of company sales – during which time our profit margins will remain in the single digits.

Reinventing Reporting under the Common Sense Initiative

When the metal finishing industry first began working with EPA a few years ago under the agency's Common Sense Initiative, we jumped at the chance to try some new experiments that might hold the potential to fundamentally change the way the regulatory system works. From the outset, we raised paperwork problems as one of our top priority issues.

Our view was that if the EPA and metal finishers aimed to reinvent environmental regulation, it was necessary to try and accurately define the true dimensions of the paperwork challenge. We had always complained about paperwork, but what did the landscape really look like from an objective point of view?

To its credit, EPA agreed to focus on our concerns and initiated an ambitious project called the RIITE program. It's a terrible acronym that stands for "Regulatory Information Inventory Team Evaluation." It may be a strange name, but the project itself was an extremely worthwhile endeavor, and after working with EPA as well state regulators to come up with some recommendations, it is now being piloted in Texas and Arizona.

The RIITE program is highly relevant to the topic of our hearing today. What the RIITE program essentially did was employ Business Process Reengineering (BPR) techniques – some simple analytical tools consultants use to help change large organizations – and we analyzed the paperwork system as it impacted metal finishers as one single industry sector.

First, we inventoried and mapped all the environmental reporting burdens at the federal, state and local level that apply to metal finishers. And the project revealed some pretty astounding things. We found out that when you look ONLY at environmental paperwork, and exclude paperwork burdens from all other agencies – there were an estimated 160 different reporting requirements that applied solely to metal finishers. Bear in mind that some of these reporting mandates are annual, and some come more frequently.

We found that similar information on different reports was going to all sorts of different places, and we concluded that we could just as effectively protect the environment and human health under a system that had maybe 30 or 40 reporting requirements.

The second thing we did was contrast the paperwork status quo with what a new, more efficient, more effective system might look like. When we compared the "What Is" with the "What Could Be" we discovered that a good paperwork system has some fundamental characteristics. Instead of dozens and dozens of reports, you have consolidation. Instead of many different agencies and locations to send information and reports, you have one point of entry or contact into the reporting system.

Instead of having to repeat filling out the same data on multiple reports, a facility might only have to submit that information once. Instead of inconsistent definitions across regulations for similar types of industrial activity or data, you have consistency. And in the place of paper-based reporting, you have electronic reporting. These are some of the building blocks of a new and better system, and they came out of a process where industry was working with EPA, states, local regulatory authorities and environmental groups.

Metal Finishing Perspective on the "Small Business Paperwork Reduction Act Amendments of 1998"

We see the approach we took in the RIITE project as entirely consistent with the approach that you have proposed in your bill in several key respects. First, both attempt to move us from many points of contact for interfacing with regulatory agencies to one point of contact.

Second, Section 2 of the bill calls for the Office of Information and Regulatory Affairs (OIRA) within OMB to publish all regulations that apply to small business. We fully support this exercise in some form – partly because it sheds light on what has truly become in some ways a sort of hidden universe of scattered, duplicative and overlapping paperwork and reporting requirements. Since they've never really been counted, no one really knows how many there are, or how they all fit together – all we know for sure is that the universe keeps on expanding.

Perhaps this is where our experience as metal finishers can offer some guidance as the legislation moves forward. We got a great benefit in the RIITE program from analyzing a list of reporting burdens that applied specifically to our industry sector, and not to small business in general. This gave us the ability to assess and be creative about how to intelligently consolidate and streamline a set of paperwork requirements that is uniquely ours.

It would seem that OIRA could publish without too much trouble

separate lists of paperwork burdens broken down either by small business industry sector or by a 4-digit SIC (Standard Industrial Classification) Code. This exercise would have twin objectives. It would spur discussion on tailoring requirements to fit each industry sector's needs, as well as assist small business sectors in doing an inventory of what their paperwork obligations are. This is far from fundamentally changing the system, but it's an improvement over the status quo.

Third, Section 3 calls for a Task Force to study the feasibility of streamlining reporting requirements for small business. Based on our experience in identifying paperwork burdens and assessing options to streamline with EPA, this would go a long way toward showing where small companies could get some practical, bottom-line benefits.

Recommendations for Oversight – Reinventing Environmental Information

Beyond suggestions to improve the bill, metal finishers urge Congress in the coming months to closely track EPA's activity as the agency gears up for a major reporting reform effort called "Reinventing Environmental Information" – or REI. REI plans to transform in a very significant way our current reporting and data collection infrastructure.

REI is extremely technical and complex, and is truly an ambitious undertaking that will require considerable effort and resources. REI intends to achieve a wide range of things. It aims to improve EPA's own administrative efficiency through better use of reported information and facility data. It lays a foundation for the shift toward electronic reporting for companies large and small. And it builds in a framework to maximize public access to company environmental data.

The problem with REI, in our view, is that it seems to address everything in the world except aggressively and intelligently tackling the volume and the logic of current paperwork and reporting requirements for small business. It would be a shame if at the end of REI, we fail to make fundamental change, and instead simply pave with shoulders the worn-out, meandering cow path that is the current paperwork system.

We urge the Congress to invite EPA to outline more fully than I have what the agency is contemplating under REI and how paperwork issues fit into the first really major change of our environmental information system in a generation. Oversight of this kind would add value to the kind of discussion we're having here today, and would certainly point up both the strengths and weaknesses of the agency s approach to information collection in general.

Information and Results

I will close my remarks by noting that before I came here today, I asked some of my colleagues in the industry in Cleveland about their thoughts on paperwork. They told me what I've heard repeated many times before.

They as business owners are not diametrically opposed to submitting paperwork when they clearly understand that there is an explicit connection to protecting the environment and public health. Under these conditions, they recognize the government's legitimate purpose in collecting it and their legal obligation to provide it.

Frequently, however, they haven't a clue regarding how the information might be used. This rankles even the most conscientious small business owner. And it should. My colleagues in Cleveland and, for that matter, throughout the metal finishing industry, believe that if the process of information collection was linked more closely to results – to concrete environmental and health outcomes – paperwork would be less frustrating to deal with.

Thank you, Mr. Chairman.

* Taskem Inc. has not received federal grant monies or funding through any other mechanism during Fiscal Year 1998.

Mr. SESSIONS. Thank you, Mr. Saas.

The next witness will be Victoria Nelson.

Ms. NELSON. Good afternoon, Mr. Chairman, and members of the subcommittee.

It is with great pleasure that I appear before you this afternoon on behalf of the National Federation of Independent Business, and my own company, Jarnel Iron and Forge, of which I am the CEO and president. And that just lets you know that I do all of the paperwork, because we have three people in my company. It is very small.

I appreciate being able to tell you about a small business woman's experience with the Government "ir-regulation" and "non-paperwork reduction," and to tell this subcommittee about some of the ongoing situations that I face with the kind of work that I do to make a living. Thank you for holding this important hearing.

My small business fabricates and manufactures ornamental metal. And when I say that, picture in your mind wrought iron. We primarily act in the capacity as a subcontractor to a larger general contractor.

Most of our work is done with Government contracts. We are very fortunate. They could be with the GSA, the Corps of Engineers, or the Smithsonian Institution. These Government projects are required to apply the Davis-Bacon Act to employee payrolls. One of the mandates under the Davis-Bacon Act is that I must fill out and complete certified payrolls for my business, and submit them to my general contractor.

I am coming at this from a little different point of view than the previous witnesses. I am a small business, and this is where the buck starts, right here. And this is how I have to work with it on a contractual agreement.

Now this requirement in itself is not too terribly unreasonable. However, if you will follow along with me, in my particular kind of work, we will probably only be on the job site to take field measurements, if there is anything to be able to measure. Sometimes there is nothing there at all to field measure. So we do it from architectural drawings.

But let's say that we are one time visiting, but oftentimes we do all of our work just from the architectural drawings. This happens after we have submitted shop drawings in voluminous numbers, as required by contract.

This poses a question. If the Government entity has already secured the professional services of a qualified architect and has secured the professional services from the engineering and consulting firms, why must I be redundant and repeat this action and paperwork, and provide additional drawings, and have a certified engineer duplicate exactly what the Government has already agreed with and paid for.

With regard to Davis-Bacon, when I am on the job site with my employee, I have to generate a required certified reporting of payroll until the end of the project. In my case, let's say that I am there for field measurements with my employee. I must send a certified payroll report with my employee's information for that week to the general contractor, who in turn sends copies of that certified

payroll to the governmental contracting officer, and I do not know who else.

But that is not my main concern. I am required for henceforth and ever more, until the project is complete, and whether or not my employee is ever on the job site again, to send in triplicate certified payroll reports, and actually mark each one with the week ending date and showing no hours on the job site. That is a true story.

Just my telling about this is somewhat embarrassing. It sounds foolish, not to mention wasteful of time, effort, paper, and costs. I would like to see the big warehouse that the government uses to house these documents.

The second issue that I would like to define is the project data sheets. Let me go back to my previous remarks regarding the Government entity that hires and pays for the professional services of architects, engineers, and consultants, et cetera, and relies on these professionals to specify products that are to be used in any given project.

These are called specifications which provide information about the products that the Government has decided it wants used in, on and around this project.

In other words, it would appear to me that they know the products and/or materials that they want this project made from, and they are articulate in specifying by name brand, company name, material analysis, et cetera.

My question is why must I provide them with the very same product data sheets that they must have already known about in the first place?

I am required to supply them with all of these product data sheets in multiple copies. Again, this is a waste of time, effort, paper, and cost.

I want to commend you for your leadership in trying to reduce the burden of paperwork on small business. I believe that the Federal Government should be required to make every effort possible to reduce the burden of paperwork on small business. Publishing an annual list so that small businesses know about all of the requirements, and establishing one point of contact will be helpful. I agree that small businesses, especially given the sheer number of paperwork requirements, should be allowed to correct what often are minor paperwork violations without being fined.

I also would like to mention that I was appointed by my Congressman, Roscoe Bartlett, to be a delegate for the 1995 White House Conference on Small Business. I was the chairman of the paperwork reduction and regulatory reform committee for the State of Maryland.

In the ensuing years of that conference, a regional implementation task force has been put in place. I am pleased to say that we are getting some results concerning the issues we had coming out of that committee.

I understand that this committee and the Chair is familiar with

some of the recommendations that have just been issued again and the action that was taken.

Having said that, I thank you very much for asking me to be a witness. If there are any questions, I would we happy to respond.

[The prepared statement of Ms. Nelson follows:]

Mr. Chairman, it is with great pleasure that I appear before you this afternoon on behalf of the National Federation of Independent Business. I appreciate being able to tell you about a small business woman's experiences with government "ir-regulation" and "non-paperwork reduction" and to tell this committee about some of the ongoing situations that I face with the kind of work that I do to make a living. Thank you for holding this important hearing.

My small business fabricates and manufactures ornamental ironwork. We primarily act in the capacity as a sub-contractor to a larger general contractor. Most of our work is done with government contracts. They could be with the GSA, Corps of Engineers, or the Smithsonian Institute. These government projects are required to apply the Davis-Bacon Act to employee payrolls. One of the mandates under the Davis-Bacon Act is that I must fill out and complete certified payrolls for my business and submit them to my general contractor.

Now this requirement in itself is not too terribly unreasonable. However, if you will follow along with me, in my particular kind of work, we will probably only be on the job site to take field measurements--if there is anything to measure. Often times we do all of our work just from the architectural drawings. This happens after we have submitted shop drawings in voluminous numbers, as required by contract. This poses a question: If the government entity has already secured the professional services of a qualified architect and has secured the professional services from engineers and consulting firms, why must I be redundant and repeat this action, and paperwork, and provide additional drawings and have a certified engineer duplicate exactly what the government has already agreed with and paid for?

With regard to Davis-Bacon, when I am on the job site with my employee, I have to generate a required certified reporting of payroll until the end of the project. In my case, let's say that I am there for field measurements with my employee. I must send a certified payroll report with my employee's information for that week to the general contractor, who in turn sends copies of that certified payroll to the governmental contracting officer, and I don't know who else. But that is not my main concern. I am required for henceforth and ever more, until the project is complete, and whether or not my employee is ever on the job site again, to send in triplicate, certified payroll reports, and actually mark each one with the week ending date and showing no hours on the job site. This is a true story.

Just my telling about this is somewhat embarrassing. It sounds foolish, not to mention wasteful of time, effort, paper, and costs. I'd like to see the big warehouse that the government uses to house these documents.

The second issue I would like to define is the "product data" sheets. Let me go back to my previous remarks regarding the government entity that hires and pays for the professional services of architects, engineers, consultants, etc. and relies on these professionals to specify products that are to be used in any given project. These are called "specifications" which provide information about the products that the government has decided it wants used in, on and around this project. In other words, it would appear to me that they know the products and or materials that they want this project made from, they are articulate in specifying by name brand, company name, material analysis, etc. My question is, "Why must I provide them with the very

same "product data" sheets that they already must have known about in the first place?" I am required to supply them with all of these product data sheets in multiple copies. Again, this is a waste of time, effort, paper, and cost.

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I also would like to mention that I was appointed by my Congressman, Roscoe Bartlett, to be a delegate for the 1995 White House Conference on Small Business. I was the Chairman of the Paperwork Reduction and Regulatory Reform Committee for the State of Maryland.

In the ensuing years of that conference, a regional "Implementation Task Force" has been put into place. I am pleased to say that we are getting some results concerning the issues we had coming out of this committee. Let me recite some of the actions and/or laws that have been successfully addressed from that committee:

1. Recommendation: Regulatory reform, including judicial review of federal regulations. Executive Activity: The President signed into law the Small Business Regulatory Enforcement Fairness Act of 1996. It provides for full judicial review of agency certification and regulatory flexibility analyses. Congressional Activity: Regulatory reform legislation passed in the 104th Congress.

2. Recommendation: Periodic review of all regulations, simplify and eliminate regulations, and provide the single source of regulatory information. Executive activity: Implementation of the Small Business Regulatory Enforcement Fairness Act of 1996 is taking place throughout federal agencies. Congressional Activity: Regulatory reform legislation passed in the 104th Congress. H.R. 852, the Paperwork Elimination Act, passed the House.

3. Recommendation: Change the nature of the federal government's enforcement of regulations. Executive Activity: SBREFA established a small business ombudsman and 10 regional boards to monitor enforcement of federal rules. The legislation is being implemented.

4. Recommendation: Tort Reform. Executive Activity: the President vetoed the product liability legislation submitted by the 104th Congress. Congressional Activity: The 104th Congress passed a product liability reform but failed to override the veto. New legislation was introduced in the Senate.

Again, I am pleased to be able to bring to this committee some of the small business

issues I must face. I would be happy to respond to any questions you may have for me.

Jarnel Iron & Forge

March 4,1998

Congressman David M. McIntosh, Chairman
Subcommittee in National Economic Growth, Natural
Resources, and Regulatory Affairs

Please be advised that I am currently in contract, as a sub-contractor, with K-LoConstruction, Inc, P.O. Box 1480, Upper Marlboro, Maryland 20773. K-Lo Construction, Inc. is in contract with the Smithsonian Institution, Washington, D.C. for the project for American and Art Portrait Gallery Sidewalk Repairs.

Our contract is in the amount of $47,300.00.

Should you need further information, please advise.

Yours truly,

JARNEL IRON AND FORGE

Victoria Nelson,
President

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Mr. SESSIONS. Thank you, Ms. Nelson.

Our next witness will be Teresa Gearhart.

Ms. GEARHART. I thank you, Mr. Chairman, and the subcommittee, for allowing me to be here today. I am the vice president of a small trucking company. We employ about 15 people. And we also have about 25 leased owner operators and other lease trucks.

The proposed legislation to amend the PRA would be a tremendous benefit for small business. As a small business owner, I have often spent valuable time searching for the correct answers to filing and meeting the deadlines of the numerous Government agencies. The requirements in themselves can sometimes overwhelm a small business owner, especially the owner of a new business. Our company has gone to great lengths to be on top of these issues, even to the point of hiring additional staff, just to address the volume of mandates. Obviously, this cannot be cost productive. I feel that a combined listing would not only benefit the small business, but would also be an invaluable step for the startup business trying to make sense of the never ending task of paperwork, requirements, set-up, and deadlines. As with most companies, our business is required to also file a volume of paperwork for each specific trade. The DOT regulations that we are required to do are sometimes actually staggering, and in itself keeps us very busy.

This, too, can seem staggering to a small business to the point of asking ourselves: Are we in business to serve our customers or to file paperwork for Government?

Our company is located in a small town. We take pride in supporting our community, whether it is sponsoring the activities of the summer playground, helping other businesses and individuals in need, or promoting local chamber business initiatives. I feel this is the benefit of having businesses in the community working together to improve the lifestyles of our families, friends, and neighbors. There are times when this goal seems out of reach, because of the over-abundance of regulations that can bog down a business. For our company, the varied dates of notifications, election timeframes, and terminating events of COBRA have led us to restructure and to seriously weigh the value of growing in the near future. The business is there for growth, and we have the openings available for staff increase. However, the demands to keep up with the agencies' requirements if we do increase our staff, have led us to remain at our present employment level. I feel this is the most serious problem of the agencies. It has put a hold on our business growth. And more importantly, it is letting down our community. Employment opportunities could be readily available, but instead there are none.

As most small businesses, we strive for perfection in our company's customer service quality, and in the other day-to-day business activities. When a customer's service expectation has not been achieved, it is great to know that it is possible to hear the customer's concern, address it, and ensure that it is corrected, going forward without a penalty from the customer. This level of communication between the agencies and small businesses would be just as beneficial. If a paperwork error has been made, if the fine would be suspended, the business notified, and corrections could be made. Even today, but more importantly when our company was starting

and our growth was rapid; we struggled to keep up with the requirements. Knowing the heavy burden of documents required by the long list of agencies, it would be very easy to make errors in meeting those deadlines and filings. Yet fines for a small business can be detrimental. The proposed legislation to suspend fines for first time violations would recognize such an important fact.

I feel privileged to be given this opportunity to voice what I fee is a vital organizational step for Government and small business. The utilization of this legislation for small business can only be a benefit to its growth and success. Likewise, this would seem to be a great asset to the agencies involved, and eliminate their costly time spent reversing such fines and paperwork.

As a small business owner, I cannot monitor all the day-to-day activities of the governing bodies affecting small business. Yet, I recognize how the actions proposed today could dramatically improve our business' bottom line and improve our community.

I thank you for giving me this opportunity to speak to you today.

Mr. MCINTOSH [presiding.] Thank you, Ms. Gearhart. I appreciate that.

And thank you to the witnesses who have been here previously. I had a meeting with the Speaker that detained me. And I appreciate Mr. Sessions for chairing.

And thank you, Mr. Kucinich and Mr. Tierney, for being with us.

Let's proceed with this panel. The next witness will be Mr. Robert Smith, who is president of Spero-Smith Investment Advisers, Inc., of Cleveland, OH.

Mr. Smith, thank you for joining us today.

Mr. SMITH. Thank you.

Mr. Chairman, and members of the House Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs, thank you for allowing me to appear before you.

I am president of Spero-Smith Investment Advisers, located in the Cleveland suburb of Beachwood, OH. I am also a member of the board of trustees, and currently the vice chair of advocacy, for National Small Business United, the Nation's oldest small business advocacy organization.

Further, I am a member of the board of trustees, first vice chairman, and former vice chair of the government action group for COSE, the Council of Smaller Enterprises, the largest local small business organization in the country. COSE is a division of the Greater Cleveland Growth Association, of which I am also a board member and a member of its government affairs council. Most importantly, I reside in the 10th District of the great State of Ohio, and am a constituent of Representative Dennis Kucinich.

Foremost, I wanted to thank Representatives McIntosh and Kucinich for their leadership and understanding of the serious dilemma that paperwork presents for America's 22 million plus small businesses. With the introduction of H.R. 3310, the Small Business Paperwork Reduction Act Amendments of 1998, you are attempting to help small businesses deal with the perpetual tidal wave of paperwork we are faced with day in and day out. On behalf of NSBU's 65,000 members in all 50 States, I applaud you and support this legislative effort to bring sanity to the paperwork requirements that we face.

NSBU has long been a supporter of a strong and viable Paperwork Reduction Act, which was passed in 1980. The PRA is designed to centralize the regulatory process, end redundancy in data collection, simplify and reduce paperwork requirements, and ensure that small business is not inadvertently harmed by unreasonable Federal regulations and paperwork.

Yet despite the best intentions of the Paperwork Reduction Act, small business has been fighting for years to fill the holes that Federal regulatory agencies have punched into this law. Before one can assess the current bill, one must look back at the history of small businesses fight for paperwork reduction and reform.

By their very nature, unnecessary Federal regulation and paperwork burdens discriminate against small businesses. Without large staffs of accountants, benefits coordinators, attorneys, and personnel administrators, small businesses are often at a loss to implement or even keep up with the overwhelming paperwork demands of the Federal Government. Big corporations have already built these staffs into their operations, and can absorb a new requirement that could be very costly and expensive for a small business owner.

As investment advisers, Spero-Smith, we are constantly filling out paperwork for the Securities and Exchange Commission, which generally is painless. But there are many other paperwork concerns that we encounter.

Let's say that we grow to the point of having 100 employees. There are special requirements for the Department of Labor and the IRS, because of a multi-purpose form, for any health benefit planned that is fully insured, and they must then file Form 5500, which is a very troubling and complicated form that kicks in once a company exceeds 100 employees. This is a very confusing and complicated task.

I want to tell you that the 5500 form started out as a pension form. But at some point, this became a form that the Department of Labor is using for health care plans, cafeteria plans, and other benefits. Imagine the small business owner having to wade through a 6 inch thick manual to fill out this 20-page form. It is not an easy task.

A friend of mine has recently gone through this. He has a business that has locations in more than one city. To complicate matters, this company opened one location during the year. Because of the complexity of all of this, they were honestly uncertain if they met this 100 level requirement.

But the anxiety over potential fines, people inside and outside of the company spent 23 hours extra per person and thousands of dollars just to figure this out. They made their best effort to find out. At one point, they actually did have over 100 employees. Believe me, the fines for not filling out the paperwork or checking the proper boxes are $25 a day up to $15,000.

If this legislation had been passed, they could have focused on their business growth and job creation, and not the disruption caused by the 5500 form and other DOL requirements.

There are other examples as well. Take a typical small business owner who must file emergency plans, such as a plan for hazardous waste, a fire report, a leak report, or a storm water plan.

As one small business owner recently informed me, he must maintain nine notebooks each containing a different emergency plan. From these notebooks, he has to scramble to find the booklet that covers a particular area when the agency regulating that area comes to inspect or paperwork is due.

Inevitably, the paperwork due dates are all different, and require him to keep a separate calendar simply dedicated to these dates. This is not uncommon. And it would be useful if the various agencies came together with small businesses, and we were allowed to file paperwork and worked harder to eliminate duplication or contradictory requirements.

As I said, this onslaught of paperwork is too much for small business. The NSBU members and all small business owners are on the front line in a perpetual battle to stay in compliance and up to date with the myriad of mandates and paperwork that agencies like OSHA and EPA place upon them.

The McIntosh and Kucinich legislation will be a significant aid for them in their efforts to stay in compliance. As you know, oftentimes the hardest part about staying in compliance is knowing what you have to comply with and what the paperwork requirements are for a particular agency. This bill will help small businesses be more informed and will help alleviate major fines for innocent paperwork mistakes.

One of the most important aspects of H.R. 3310 is a suspension of fines for first time offenders. There are certain times when all businesses are not in compliance with every law, regulation, and form that this town, and State and local governments throw at them.

On the first occasion of a Federal paperwork mistake, the McIntosh and Kucinich bill calls for a suspension of the fine. This is a critical aspect to this bill, and something that NSBU has been lobbying in favor of for many years.

Honest men and women make honest mistakes. When our Federal regulation agencies realize this and accept, the notion that not every single small business person with a paperwork violation is trying to pollute the environment, endanger his workers, or gain a competitive advantage, then we have indeed made progress on reforming our Government and returning it to the people.

On behalf of NSBU and our 65,000 members, I believe that H.R. 3310, the Small Business Paperwork Reduction Act Amendments of 1998 lead us in the proper direction, and is legislation that should pass Congress this year.

Mr. Chairman, and members of the subcommittee, thank you for allowing me to be a witness before you today.

Mr. MCINTOSH. Thank you very much, Mr. Smith. I appreciate your statement.

Now I will turn to the portion of this hearing when Members can address questions to the panelists.

Let me begin by asking unanimous consent that my introductory statement and Mr. Shadegg's introductory statement be placed in the record.

[The prepared statements of Hon. David M. McIntosh and Hon. John Shadegg follow:]

Congress of the United States

House of Representatives

Subcommittee on National Economic Growth,
Natural Resources, and Regulatory Affairs
Chairman David McIntosh
Opening Statement
Hearing: Small Business Paperwork Reduction Act Amendments of 1998

Today we are going to examine a very important issue -- giving small business owners relief from government paperwork. I particularly want to thank Mr. Kucinich, who has worked with me from the start to develop the legislation we are considering today -- the Small Business Paperwork Reduction Act Amendments of 1998.

I want to welcome the small business owners who have traveled from around the country to tell us about the problems they face in coping with voluminous, and often unnecessary, paperwork from the government. I also want to welcome Jere Glover, Chief Counsel of the Small Business Administration's Office of Advocacy. The SBA has given us valuable input in crafting this legislation so that it will give the maximum relief to small businesses.

We are proposing to add some new provisions to the Paperwork Reduction Act to help small businesses. The federal agencies have not met the goals for reducing paperwork set by the Paperwork Reduction Act in 1995. The Office of Management and Budget (OMB) reported to Congress that instead of a 10 percent reduction in 1996, paperwork was only reduced 2.6 percent. And it is estimated to have been reduced 1.8 percent in 1997. Some agencies are worse than others: the Department of Housing and Urban Development increased its paperwork by 10.3 percent; the EPA increased its paperwork by 4.5 percent.

The problem we are addressing today stems from the growing cost and number of regulations on the American people. Total regulatory costs in 1997 were $688 billion. When these costs are passed on to the consumer, the typical family of four pays approximately $6,875 per year. Families spend more on regulation than on medical expenses, food, transportation, recreation, clothing, and savings. Paperwork counts for one third of total regulatory costs or $225 billion. It took 6.7 billion man hours to complete paperwork in 1996.

Small businesses are particularly hurt by regulations and paperwork. The SBA reports that the smallest firms carry the heaviest regulatory burdens-- small businesses bear 63 percent of the total regulatory burden. And small businesses cannot afford to comply with regulations in the same way that large businesses can. The high cost of regulations often makes it impossible for small businesses to expand, threatens their ability to stay afloat, or prevents them from opening

in the first place. The smaller the business, the more expensive it is to comply with paperwork. Paperwork costs per employee for firms with under 20 employees are $2,017, but for firms with more than 500 employees costs drop to $1,086. It costs 50 percent more for the small business than the large business. Paperwork represents approximately one third or 33 percent of total regulatory costs. That's up from 21 percent in 1977. And the costs are still rising.

Our Subcommittee heard from small business owners at the 18 field hearings we held over the past three years. One of their biggest complaints was government paperwork. We heard from Pat Cattin, who is the owner of Cattin's Restaurant in Tacoma, Washington. As a result of a surprise OSHA inspection, Mr. Cattin was fined $1000 for having one missing Material Safety Data Sheet (MSDS). This particular MSDS was for hand soap, not a hazardous product. During the inspection, Mr. Cattin's manager called the soap manufacturer and got a copy of the MSDS form by fax within two minutes. But OSHA would not lift the fine.

We heard from Judi Moody, who is a small business owner from Sumner, Washington. When she and her husband tried to open a small bookstore and cafe, they ran into so much regulation and paperwork that they couldn't go forward. She recalled at least 25 forms they would have to complete, in addition to getting industrial insurance, and those were from the Department of Labor alone. It seemed that they would need to hire a lawyer before they even opened the door. Mrs. Moody and her husband just wanted to hire a couple of employees to sell books and coffee. But because of government paperwork, they were not be able to realize their dream or create more jobs.

Situations like this one made paperwork compliance one of the top concerns reported by delegates to the 1995 White House Conference on Small Business. The legislation we are proposing would add some new provisions to the Paperwork Reduction Act to address these concerns. It is the next step in regulatory relief, consistent with President Clinton and Vice President Gore's Reinventing Government Initiative. President Clinton told the American people that he wanted to stop the agency inspectors from "playing gotcha." In 1995, the President sent a memo to the agency heads instructing them waive fines for small businesses so that they could correct their mistakes. Our bill simply builds on the President's directive and would make it law.

The legislation we are proposing would accomplish four things: (1) create a list of all the Federal paperwork requirements for small businesses; (2) give small businesses a chance to correct first-time paperwork violations before fines are assessed by government agencies; (3) establish one point of contact at each agency for small businesses on paperwork requirements; (4) establish a task force including representatives from the major regulatory agencies to study how to streamline reporting requirements for small businesses.

Small businesses are the driving force behind our nation's economy. More than 99 percent of employers are small business owners. This legislation would give these hardworking Americans a break on government paperwork and make it easier for them to grow and create more jobs.

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NATIONAL SECURITY, INTERNATIONAL AFFAIRS, AND CRIMINAL JUSTICE

Congressman John Shadegg

Statement

"Small Business Paperwork Reduction Act Amendments of 1998"
March 5, 1998

Thank you Mr. Chairman. I want to thank the witnesses for coming today to discuss with us the burdens placed on small business by the federal government and how we can lighten some of those burdens. I believe that we in Congress have an obligation and duty to make sure government regulation doesn't cause undue harm.

There is no doubt that the federal government requires an unbelievable amount of paperwork for even the simplest of business endeavors. Add to this the cost of non-paperwork regulations and mandates and some businesses struggle to even make a profit.

Today we are discussing a long overdue remedy for some of the hurdles small businesses face. The Small Business Paperwork Reduction Act Amendments of 1998 is designed to help small businesses deal with the burden of federal requirements. This is a common sense bill which merely gives small businesses the ability to comply with paperwork requirements. Let me share with you an experience which demonstrates the need for this legislation.

In 1992, a small company in Phoenix that produces marble products, under advisement from a environmental consultant, filed forms under Section 312 of Emergency Planning and Community Right to Know Act, (42, U.S.C. 11023).

EPCRA requires businesses who have inventory of 10,000 lbs. or more of certain chemicals to file documentation with the EPA. This is the same type of form required by state law to be filed to Arizona Department of Environmental Quality. It's purpose is to help emergency workers know what kinds of chemicals they may encounter in the event of an emergency. This company had already filed this information with state, county and city agencies.

In the fall of 1994, L&M received a letter from a local citizens environmental group, Don't Waste Arizona, Inc. (DWA) -- who's membership includes a total of 3 people -- informing them of intent to sue within 60 days for violation of EPCRA sec. 312. DWA claimed that L&M was in violation from the date of the passage of the law (1987) and 1992 and was responsible for fines on those years not in compliance (1988-92) at a cost of $25,000 per day. In effect more than $40 million.

The only reason DWA was aware of L&M's non-compliance was that once L&M went into compliance in 1992 they were put into the EPA database which is available under Freedom of Information Act and DWA saw that L&M was not in compliance for previous years. Essentially DWA was punishing them for doing the right thing. Think about the horrible precedent that would be set for other businesses that realize they are not in compliance, but to comply is to put themselves at risk of being sued if they do.

Keep in mind that local emergency services were informed through required forms of the chemicals used in the business, so the failure of filing with the EPA did not put anyone at risk. It was merely a case in which a business was not notified of new paperwork requirements and when they found out through their own efforts and complied, they were pursued by a local environmental organization. (The case was settled out of court with the company agreeing to pay attorney and research fees of the environmental organization.) Had the suspension of fines for first-time offenders been in place, the environmental organization would not have had the legal leverage to threaten a huge lawsuit.

This bill would allow small businesses to correct innocent oversights of paperwork filing requirements. This is quite reasonable and consistent with both Congress and the Administration's intent to make the federal government more user-friendly for small business.

I look forward to the testimony today and hope that we can pass this legislation in the near future.

Mr. MCINTOSH. Let me briefly say that I am delighted that we are moving forward with this legislation, and delighted that we can work with it in a bipartisan fashion to try to shape this effort.

Reducing the paperwork burden on small businesses is a critical, critical component of what we need to do to get to a reasonable regulatory system. President Clinton and Vice President Gore have been working in this area with the reinventing government effort.

And one of the things that President Clinton said that I agreed with was when he indicated that he wanted to have the agencies change their enforcement proceedings so they would not play gotcha with small businesses—coming in to inspect and find minor violations, paperwork violations, and then hit them with large fines. But instead, they would work with small businesses, so they can comply.

What I have found in the field hearings we have held all over this country, is that virtually all small businesses want to comply with the rules and regulations with which they are presented. They are law abiding citizens. They believe they are making a sacrifice to contribute to our society, to produce a product, to provide a service, and to create job opportunities in their community.

And sometimes they are just overwhelmed both by the sheer number of forms and paperwork that they have to fill out and the confusion which comes with them.

So it is the hope of Mr. Kucinich and myself that we may reduce the overall amount of paperwork, and provide some structures where there is a central clearinghouse for small businesses to find out what it is that they have to comply with. But we also want to change the behavior of the agencies, so they view their mission as primarily to educate and to get law abiding small businesses to comply with the regulations.

And then if they find somebody who is a bad actor, or is acting in a way that is unsafe or violates the laws as to health and safety, then they may use the enforcement mechanisms to go after those bad actors.

I would like to say again thank you to each of you for coming today. Your participation and traveling to Washington will help us enormously to build the record on this issue.

Let me ask each of the panelists about one thing that I have heard from small businesses over and over again is that it is not the paperwork requirements that they know about that really bother them, and concern them, and keep them up at night, but it is the ones that they do not know about, that they may suddenly find that they are in violation of.

Has that been your experience, and how does each of you relate to the fact that it is difficult to know all of the different requirements? Mr. Saas.

Mr. SAAS. Thank you, Mr. Chairman. Unfortunately, you were with Speaker Gingrich at the time that I made a comment. Our particular industry happened to study a particular metal finishing operation, and discovered that there are over 160 just environmental reports that have to be filed. Some only have to be filed once. Both others have to be filed sometimes monthly, sometimes semi-annually, et cetera.

Honestly, with 160 potential regulations, no one can really be sure that they have touched every base. The model that we try to use with the RIITE program basically puts the responsibility on EPA to determine by SIC code number which regulations apply for a given industry. And I think that is the model that has applications for other industries as well.

Mr. MCINTOSH. So it would be helpful to have a central clearinghouse as this bill would provide?

Mr. SAAS. Absolutely.

Mr. MCINTOSH. OK, great.

Are there any other comments?

Ms. NELSON. Mr. Chairman, I am Victoria Nelson.

In my work, I do work as a subcontractor here in Washington, DC. So I am very close to where the paperwork regulations come from. There is no way in my particular business, being ornamental metal, that I am not ready, willing, and able to comply with the rules and regulations. Because where I get my people to work for me, there is not a vast employment waiting line. So I definitely want to be able to continue to comply and keep them safe.

And it would be great to know when I do see my subcontract come through and the specifications that come with the job, that there would be a compartmentalized page or something that says this is the agency that you need to go to by virtue of the division you are working with. Thank you.

Mr. MCINTOSH. Thank you, Ms. Nelson.

Yes, Mr. Smith.

Mr. SMITH. Regarding a centralized location for all of these regulations, that is a good first step. I guess that it would be not critical that it be in the Federal Register. Because I do not know many small business owners who really go to that on a regular occasion.

So I think that the Internet is something that small business owners are using a lot thanks in the reduction in price of PCs and the development of the Internet network. So I would encourage an addition to the bill for that.

Mr. MCINTOSH. Great. Publishing it on the Internet, a web site that could be visited, by different industry codes maybe. I like that.

Mr. Roberts, did you want to add anything?

Mr. ROBERTS. Yes, Mr. Chairman. I would just like to say that it would be nice to have a relief for first time penalties. People are not trying to be violators. Also, if you have someone come out and inspect you on your job, and he picks out a certain page that you have missed, and here is a $750 penalty in our case, not that we did not have it but just that we did not have it on the job site, it would be nice to have somebody work with us instead of against us, and give us a chance to show that yes, we are trying to work safe and take care of our people. Thank you.

Mr. MCINTOSH. Thank you. I appreciate that.

Ms. GEARHART. Mr. Chairman.

Mr. MCINTOSH. Yes.

Ms. GEARHART. Our concern was, especially when we were new and did not know even where to go to get the answers. And when we would try to get the answers, and looking for the specific department to find the answers was a problem for us. You need to go to this one, you need to go to this one, and we would take a lot

of time on the phone just to try to get the answers that we needed. Not that we would not go ahead and comply, but trying to find the correct department to give us anything.

Mr. MCINTOSH. How about within a department, did you sometimes get shuffled from one person to the next within a department?

Ms. GEARHART. Certain agencies, yes.

Mr. MCINTOSH. That is another feature that we have got in the bill, to have some paperwork czar in each of the departments trying to help direct people and reduce the paperwork, and also tell the public what it is that they need to comply with. Thank you.

Let me turn now to the co-author of this legislation, Mr. Kucinich.

Mr. KUCINICH. Thank you very much, Mr. Chairman. And again, I want to thank you for the leadership that you have shown on this issue, and for the assistance that your staff has given in working on this bill. It is a bipartisan effort, and it is important that we proceed in this way. I think that the input of staff and the input of committee staff has been useful in perfecting this bill.

The thing that I am hearing from all of the witnesses, and you can feel free to respond to these comments, what you are saying is you not only want to comply with the laws but you want to know what the laws are, (a); and (b), you want to comply with the laws, but there is just so much paperwork that you are tied down by paperwork, even though you are making an effort to comply.

Mr. Saas, is that correct?

Mr. SAAS. Yes. Congressman Kucinich, that is in fact the case. I think that Mr. Smith made an excellent point. I think that the mentality of all small business owners is that they want to be in compliance with whatever the appropriate regulations are.

We are all people who have families, and we want to live in a clean environment. And we do not want to do anything that is illegal, unsafe, inappropriate, et cetera.

Mr. KUCINICH. Do you find, for example, in your business that compliance can in some ways be cost effective?

Mr. SAAS. Of course. The so-called P2 programs are an excellent example. The EPA has put a lot of responsibility on us to establish numerical goals by which we are going to reduce the amount of material that goes into the atmosphere or down the sewer. And those things turn out to be cost effective. Because we are forced to implement plans and to be creative in creating new plans that accomplish this. So yes, there are definitely opportunities to be cost effective.

Mr. KUCINICH. The thing, Mr. Chairman, that I think is exciting about this endeavor is that while we are trying to streamline the paperwork requirements and reduce paperwork, at the time we are relying on an evolutionary path in terms of the consciousness of this country on issues like the environment. As Mr. Saas says, they are looking at prevention of pollution, which actually makes businesses more profitable, and has the socially beneficial effect of reducing pollution.

And I see that in many ways, which confirms that there are businesses which want to do the right thing. And I also believe that we have developed at times an adversarial relationship with the

Government, where people do not want to comply. But where they want to comply, that it is not working.

Mr. SAAS. Congressman, you have not really asked a question, but I would like to interject a couple of points. An excellent example of precisely what you were describing is the relationship that needs to exist between the EPA and the metal finishing industry.

Up until let's say 8 or 10 years ago, the relationship was largely adversarial. It was characterized by mutual distrust, and it was the type of relationship that you wanted to avoid. The common sense initiative has been a major step forward in improving the communication between the agency charged with protecting the environment and an industry that has to use some hazardous chemicals in order to function.

The fact that we have been able to work together so closely has really resulted in some remarkable programs. There is a new program that has just kicked off in the past month and a half called the strategic goals program. It is also part of this common sense initiative. What it has done is through a multi-stake holder involvement, which includes environmentalists, the water treatment facility operators, plus members of industry, and people within the EPA, they have established a set of numerical goals in plating shops and metal finishing operations in general that they will meet by the year 2002, using 1992 as a base year.

The numerical goals, and I will not cite all of them, but the specific ones, the more interesting ones, is 98 percent utilization of metals that are brought into the plant. That means material that is included in the water affluent that is sent back to the sewer systems. A 50 percent reduction in water usage, a 50 percent reduction in energy consumption, a 80 percent reduction in air emissions.

These are numbers by the way that were not given to the industry by EPA. The industry was challenged by virtue of the pollution prevention techniques to say yes, we can meet those. They are numbers that we established ourselves, in other words.

Mr. KUCINICH. I appreciate that additional information, because it is consistent with what I think is a forward looking approach dealing with the environment and compliance.

Another question, if I may, Mr. Chairman?

Mr. MCINTOSH. Certainly. And then I have one last one question. And then we will move on to the next panel.

Mr. KUCINICH. One aspect of the bill that has not really been commented on relates to the waivers for first time paperwork violators when it does not impact on the health and safety of the public.

As you can imagine, some have speculated that this provision may lead to more willful violations. Because companies would be able to get amnesty for failing to report the first time around. Just think about it from the standpoint that people would be a little bit leery about this.

So my question is how do you think that a provision like this will affect the behavior of small business when it comes to reporting? This is a critical question, and I need your input on it.

Mr. SMITH. I think that most small businesses want to comply with rules and regulations. I think that they have a great fear that if they do not comply, even if this new legislation should be passed,

that it will snowball if they do not stay on top of compliance issues. So I think that it is very important. And you will not see a snowball effect the other way where they will just ignore rules and compliance.

Ms. NELSON. I concur with what he says. I do not see it snowballing in the other direction.

Mr. KUCINICH. You do not think that people are going to try to say this is a great chance for us to get out of compliance?

Ms. NELSON. Not in my community or in any other business community that I have been in, where the careless attitude would take place, where they would say I do not care, and now that I do not have to comply I am not going to comply. No, I do not see that. It is not a silver bullet to let them get away with it.

If there are those out there who think that they are going to get away with it, they will get caught. And we honest people, as it were, are going to have to pay for that. But it is not going to grow, because there is a knowledge that they are going to get away with a first time and not a monetary fine.

Mr. KUCINICH. Is it possible then that something that streamlines the process could achieve more and even quicker compliance, is that possible?

Ms. NELSON. Yes, sir.

Mr. KUCINICH. Mr. Roberts, what is your answer to this idea?

Mr. ROBERTS. The first time, it is going to get you aware. The next time they come back, it may be a fine that is tripled. Because you did not comply the first time that you got the free pass. For a regulation that you did not know about in a book this thick. When my guys are out on a job site, when they are out on a job site, they are not going to be sitting around reading a book. I cannot police them. Yes, we would get a free chance to correct that. So the next time that the inspector comes out, he is complying. He can say they were written up for this problem 2 months ago, and here it is again. And I am sure that we would get fined triple instead of a free pass.

Mr. MCINTOSH. Mr. Saas.

Mr. SAAS. Thank you. I would like to make a couple of comments. First of all, having essentially one get out of jail free card, I do not think represents a mentality change for small businessman or any businessmen either. If you only have one exemption that you can use, I do not think that there is a danger that you are going to change your attitude.

But I would point out that frankly that is a nice clause, but it does not really do anything to reduce the paperwork load. If you reduce the paperwork load, I think that you will automatically minimize the instances where there are violations of paperwork. That is No. 1.

No. 2. In our industry, again the metal finishing industry, there is a term called a SNC, a significant noncompliance. As far as I am concerned, it is even more important for a paperwork violation. Because it has no effect on the environment, and it would have no effect on human health and so forth. That that not be considered a significant noncompliance. In other words, that it be considered what it is, a minor offense, a venial sin, if you will.

And even if there had to be a fine, as long as there is not a significant noncompliance attached to it, I think that it is a step in the right direction.

Mr. MCINTOSH. Ms. Gearhart.

Ms. GEARHART. Speaking for our own company, I think that would be very beneficial and very helpful for us. However, in our own industry, I know that there are some companies that it may not be a good idea for them. That they may need to have a little more stricter compliance for them. So I can see where it would be good for some. But hopefully, others would be guided and watched over too, that they would not be able to get away with that.

Mr. KUCINICH. Thank you very much.

Mr. Chairman, I appreciate you indulging the answers for this question. Because this is a question that is almost central to what we are trying to do. Because we know that there are people out there trying to beat any system that is set up. We understand that. But we also understand, and I understand this hearing from literally hundreds of small business people in my district, that they would really appreciate an effort made in the Congress to recognize the problems, notwithstanding the efforts that SBREFA made, that they would like to see if we could go a little bit further on some of these issues. So thank you very much.

Mr. MCINTOSH. I very much appreciate that question. I think it is good to get that into the record. It occurred to me that Mr. Roberts' analysis is right, that in effect people will be careful. And Mr. Saas said do not use your get out of jail card too early. Because if you do, you will get triple the fine and more intensive inspection in the future.

And that is the way it should be. If somebody is not cooperating and not trying to comply to the fullest, those are businesses where the enforcement agency should spend their time.

I have one other question, if I might. Let's go back to the paperwork burden.

In your business or in your industries, do you see a relationship between the level of paperwork and the ability to expand and create more jobs or to maintain your work force, depending on how you want to frame it; in other words, if we reduce paperwork, would that let you have resources available to be able to create more productive jobs in your businesses?

I would have each of you address that—what effect you see in your individual business or in your industry.

Ms. GEARHART. That for us is one of biggest concerns. We are at a level and we are keeping our employees at a level, because of the requirements needed. If we increase, we will have more paperwork to be filing. So if they could combine some of the paperwork, if some of the agencies could combine some of their efforts together, that would be really helpful for us.

And we have some openings that we want to do. We have the business to grow. But we cannot do it at this time. So that would be very helpful for it.

Mr. MCINTOSH. Thank you.

About how many jobs would you like to grow in your business?

Ms. GEARHART. At this point, in the next year or two, we can see at least five. And for businesses very small, that would be helpful for them.

Mr. MCINTOSH. But your level of paperwork burden makes you delay that or reduce that?

Ms. GEARHART. Right. Because we would probably have to hire someone to take care of more of that paperwork and to be on top of all of that. So it would not be worth it to us to do that, to hire one person just to take care of paperwork to hire four more people.

Mr. MCINTOSH. Right. Thank you.

Mr. Saas.

Mr. SAAS. Mr. Chairman, the two most valuable resources that a small business has is one its asset base, its financial base; and second is time. Both things typically in small business are in critically short supply. Reducing the paperwork burden affects both in a positive manner. It may reduce the number of personnel that are actually needed to stay in compliance, and freeing up some capital to put in other personnel that may be more productive.

Second, again in owner operated firms, it is not unusual for the president of the company, as has been described here, they are the person who actually has to fill out the paperwork. So if they have lots of paperwork to fill out, we have more time available to go out and generate more business for their business.

Mr. MCINTOSH. Thank you.

Mr. Roberts.

Mr. ROBERTS. Mr. Chairman, I would like to agree with Mr. Saas. I am the only one in my company who goes out and bids new jobs. And if I can hire a person to look over these regulations and fill paperwork out, and in the end result I have to come in, proofread and sign. And if it is taking up my time, then I do not have time to go out here and get new jobs and hire more employees. We would expand our operation by 30 to 40 people this summer. Small business operators work 14 hours a day 7 days a week generally. Thank you.

Mr. MCINTOSH. Thank you.

Ms. NELSON. Mr. Chairman, if you can picture a small ornamental metal shop. Here is the office, and here is the shop. I am the office, and my husband and partner is the shop, besides a couple of employees we have. If you increase my load, it means that I cannot keep my shop business, because I am just doing paperwork. I am not bidding jobs, and I am not looking for new work, because I am buried in paperwork.

In answer to your question, yes, reduction of paperwork would be an absolute benefit.

Mr. MCINTOSH. Thank you.

Mr. SMITH. Mr. Chairman, I would just add that I had a discussion with a client about adding a 401(k) plan. It would be the only retirement plan they would have. And he just said absolutely not, I am not going to take on any more paperwork for this business.

That is very sad. Congress passed pension reform legislation last year in an attempt to simplify pension and retirement plans for small businesses, because they are such an important part of our long term future. Not only to deal with the Social Security problem long term, but also for small business owners to be competitive in

the marketplace in hiring workers in this very tight labor market that we are in right now.

There are a lot of instances like that. It is stopping the growth of jobs because of paperwork.

Mr. MCINTOSH. It sounds like it is stopping the creation of benefits for the employees that make the jobs even more attractive.

Mr. SMITH. Exactly.

Mr. MCINTOSH. Let me again say thank you to each of you.

Mr. Kucinich, did you have any followup?

Mr. KUCINICH. Just again to thank the witnesses for coming to Washington. We appreciate your input. And I think that it has been very valuable in assisting us as we continue to craft this bill. Thank you.

Thank you, Mr. Chairman.

Mr. MCINTOSH. Thank you all very much. I appreciate it.

Our second panel today is Mr. Jere Glover, who is the Chief Counsel for Advocacy at the Small Business Administration. Mr. Glover, welcome back to our subcommittee. The chairman of the full committee has asked that we swear in all witnesses in our subcommittee.

[Witness sworn.]

Mr. MCINTOSH. Thank you. Let the record show that the witness answered in the affirmative.

Welcome. Share with us your testimony, or a summary of it, as you would prefer.

Mr. GLOVER. I think what I will do is summarize it, and add a few things to it that I think may be relevant.

STATEMENT OF JERE W. GLOVER, CHIEF COUNSEL FOR ADVOCACY, U.S. SMALL BUSINESS ADMINISTRATION

Mr. GLOVER. In the 20 years of the Office of Advocacy, we have actually funded more than 50 studies on the regulatory burdens on small business. And I notice that you have made good use of some of those studies, particularly those done by Professor Hopkins. At the time that study was done, it was extremely controversial. We see now that there is a lot of information that has come out that indicates that his study was pretty much right on the money.

What I want to talk about a little bit is a couple of things. And I was able to delete some of my prepared remarks, because the panel before me made some good comments and they included a number of things that I wanted to say.

In addition to the actual regulatory and paperwork burden is the perception that is very clear in the minds of small business, that perception that at some point some investigator or some auditor is going to walk in that door and cite them for some regulation that they know existed, and the fine will be so great that it will impact their business and their livelihood.

The perception is real. They actually believe that. Whether it is true, that is another question. But small businesses wake up, many of them, every day worrying about some regulation and some paperwork problem that they do not know about, and what it would do to their business.

Now what I want to say about that is I was one of the officials who worked with the Vice President and the President to promul-

gate the March 1995 memorandum that said, much like your bill does, that where it is reasonable, where it is a first time violation, do not go in and play gotcha with the business. I think that makes a lot of sense. And I think that your legislation also makes a lot of sense.

As to the balance of the regulation, what I thought I would do is share some of the history, recent history, which I think is important. First of all, the White House Conference on Small Business, in 1995, came out with a very strong recommendation on regulatory and especially paperwork burdens. And that suggested that this burden be reduced and be reduced significantly. That is not unlike the 1980 and 1986 White House conferences which has similar recommendations.

I would like to share with you a couple of examples of things that I have done as Chief Counsel for Advocacy in specific attempts to reduce the regulatory burdens. I shared this with your staff, because I knew that you could not see it from here, but there is a chart that the GAO did. And what this chart does is indicate all of the things necessary to hire your first employee, all of the decisions that have to be made, and all of the paperwork that has to be done.

Not only do you have to start filing Bureau of Labor Statistics, Social Security forms and information, and other things, but what you see is you have State rules and regulations. Looking at that, I thought this is a problem that we can do something about today.

So I got together with the Internal Revenue Service, and said let's look at this problem. Certainly, we can eliminate the duplicative filings at the State level and the Federal level. So we got together, and I convened several meetings. And we sat down and we worked with the IRS, and we worked with the State revenue officers, who were very excited about this, because they wanted to be able to reduce the paperwork burden.

Let me just tell you that in spite of our noble intents that the general counsel said you cannot exchange that information, and therefore the whole idea is now dead.

Mr. MCINTOSH. Could you repeat that?

Mr. GLOVER. The general counsel of the Internal Revenue Service said that there is a provision in the Internal Revenue Code that does not allow them to share information with the States. That is an example of when we try to do something that we have not yet succeeded.

And I think that one of the things that your task force could easily do that is being created in this legislation is look at those issues. I think that we have to take a whole new approach to paperwork reduction. Not form by form, but what we need to do is look at the overall issue. And your inventory of forms is going to allow us to look and see how many common elements there are between all of the agencies.

We can develop a Form 1, which is a standard form that all small businesses fill out at one time. And if the agency wants any information on that form, they should not have to fill out that information again. It is not sending the paperwork in. It is a small business thinking about and thinking about what the form is and what it means that eats up all of the hours.

So, if we could take all of the common elements and put it on one form. And whenever any agency needs the information, you pull it out of your drawer, and xerox a copy and send it in.

Look to what our paperwork burdens are, duplicative and redundant forms that do not need to be done. We could simplify that tremendously. And in your inventory of all of the paperwork requirements and all of the forms would be a big help in that regard.

Let me give you one other example of a regulatory activity that we undertook. A small businessman called us up or sent us a letter and said I am a service station operator, I have filed three separate forms in three separate places to tell people that I have gasoline in my station, this is really ridiculous.

I tell you, I agreed with him. So I said this is easy. I am going to call EPA. The Paperwork Reduction Act had just passed. This will give EPA a great opportunity to prove that they are going to really take this seriously and reduce the paperwork burden. Because they can certainly eliminate one of those forms.

EPA objected, and they said the fire departments really need these forms. I said I will tell you what, you call a fire department and I will call a fire department, and I will guarantee you that not one of them looks at the EPA form to determine whether a gas station has gasoline. And we all agreed very quickly that there was a not a problem.

It has taken us 2½ years, but I am pleased to report that EPA sent to OMB a regulation to eliminate that form. That form alone is over 500,000 hours of regulatory burdens, eliminating that for 200,000 small business service stations. It has taken longer than it should, but EPA came up with a real good regulation, common sense.

There can be significant improvements made in the regulatory burdens on small business. And clearly, it is a wonderful idea that you are coming forward with. I compliment you and Mr. Kucinich going forward on this. It needs to be a bipartisan approach, and it needs to be reasoned and fair. And I think you are doing that, and I think it is really worthwhile. Thank you.

[The prepared statement of Mr. Glover follows:]

Good afternoon, Mr. Chairman and Members of the Subcommittee. My name is Jere W. Glover. I am Chief Counsel for Advocacy with the U. S. Small Business Administration. The Office of Advocacy was established by Congress 20 years ago as an independent entity to be a spokesperson for small business in the formulation of public policy. The Chief Counsel is, by law, appointed by the President from the private sector and confirmed by the Senate.

I am pleased to appear before this Subcommittee to discuss an issue of extreme significance to small business, namely, regulatory paperwork and reports, and the burdens such mandates impose on small business. Before proceeding, however, please note that my comments are my own and do not necessarily reflect the views of the Administration or the Small Business Administration.

First, let me say that I endorse the concepts incorporated in the legislative proposal sponsored by Chairman McIntosh and co-sponsored by Representative Kucinich. That proposal would require:

- annual publication of paperwork and reporting requirements imposed on small business;
- waiver of fines for first paperwork/reporting violations if corrected within a specified time period, except in cases where violations could result in imminent danger; and
- the formation of a task force to study the feasibility of streamlining information collection from small business.

Why do I endorse these concepts? Paperwork and reporting requirements remain a major cost problem for small businesses. Small companies do not have specially hired staff to complete the myriad of reports required by government. Very often it is the owner or the CEO who must take on this task, making it a very high-cost activity for small business, diverting a valuable resource from running the business to an activity that does not generate revenue or contribute to the firm's output. And despite the reduction goals established for federal agencies by the Paperwork Reduction Act, the problem persists.

There is also a "perception" problem, as well as a real one. I think it is fair to say that small businesses live in fear that an inspector or auditor will walk through their doors and find them in violation of some law, imposing penalties that will bankrupt them and wipe out life savings invested in their businesses. Reality? I do not know. The fear, however, is real. This gives added importance to the penalty waiver provision in the proposal, which, if enacted, should go a long way toward mitigating that fear.

As for the balance of the proposal, let me review recent history which I believe will be helpful to the Subcommittee's deliberations.

Let me start with the 1995 White House Conference on Small Business. About 1600 small business people attended that conference and voted on 60 policy recommendations the delegates believed warranted administrative and/or legislative action. One of those recommendations, edited here in the interest of brevity, urged that Congress enact legislation that would require agencies to:

- simplify language and forms;

- sunset and reevaluate all regulations every five years with the goal of reducing the paperwork burden by at least 5 percent each year for the next five years;
- assemble information through a single source on all small business reporting; and
- eliminate duplicate regulations from multiple government agencies.

If I were permitted editorial license, I would substitute the word "reporting" for the word "regulations" in the last item, an issue I will address later in my testimony. Not surprisingly, paperwork burdens were also an issue addressed by the 1980 and 1986 White House Conferences on Small Business.

It is clear that the proposed legislation addresses almost all the concerns detailed in this recommendation of the White House Conference on Small Business.

In the fall of 1995, the Office of Advocacy submitted to Congress: *The Changing Burden of Regulation, Paperwork and Tax Compliance on Small Business: A Report to Congress.* A major resource for that study was another report commissioned by Advocacy: *A Survey of Regulatory Burdens,* (Research Summary attached), authored by Thomas D. Hopkins, Rochester Institute of Technology, a leading researcher in quantifying the impacts of regulations on business, especially small business. In brief, Advocacy reported to Congress that the total regulatory cost projected for 1998 would be $700 billion, with one-third of this cost attributed to "process" costs - primarily paperwork. Advocacy further reported that the average annual cost of regulation, paperwork and tax compliance to small business is 50 per cent higher than for large

business - actual dollar costs amounting to about $5,000 per employee per year. Keep in mind, however, that this cost is for all regulations, not just paperwork and reporting.

Unlike capital costs, which involve a one-time expenditure, process costs (paperwork) do not go away. They never disappear from the books.

The significance of this annual 50 per cent cost differential is that it produces an inequitable cost allocation between small and large firms. This gives larger firms a competitive advantage in the marketplace, a result at odds with the national interest in maintaining a viable, dynamic and progressive role for small business in the economy. The information in both of these studies should also put to rest the canard that efforts to lessen the burden on small business are tantamount to "special treatment" and, ergo, unfair. Not so. Such efforts merely level the playing field and are sound public policy.

The Paperwork Reduction Act, which in and of itself was a good first start, did not focus on the disproportionate burdens that mandated reports impose on small business. The current proposal provides that focus and the additional costs to small business justify consideration of its provisions. Advocacy's research furnishes a rationale for mandating an analysis of how to simplify paperwork and reporting burdens on small business without sacrificing public policy objectives.

The first step toward simplification and the elimination of duplication is the compilation of the reports small businesses must file. I do not believe that this has ever been done. At least the information has never been published in one place and it is likely to be an eye-opener. The compilation should also help distinguish between requirements imposed by *regulation* and those imposed by *congressional mandate*. As you know, this has been an issue in determining how well agencies are doing in achieving the paperwork

reduction goals set by the Paperwork Reduction Act. The Administrator of OIRA has testified, as has the General Accounting Office, that a factor contributing to the failure of agencies to reach goals has been added congressional requirements. Regardless, the compilation will be valuable fodder for the work of the proposed task force and help focus discussion on ways to simplify and reduce reporting requirements.

Another benefit likely to emerge from such a compilation is identifying where duplication occurs, and, given the right kind of analysis, where there is overlap with other reports. As you know, Advocacy reviews regulatory proposals to assess their impact on small business and to evaluate agency compliance with the Regulatory Flexibility Act. One of its tasks is to comment on the value and usefulness of proposed recordkeeping and reports. We have raised questions about how records will be used either by firms or by the agencies, the frequency of agency review of the data reported, what decisions will be based on the information collected, etc. On this point, I would like to share with you a very specific example of how regulatory reporting can be off the mark in achieving a stated policy objective. I believe the following example will underscore the value of the effort you are considering.

Under the Emergency Planning and Community Right-to-Know Act, communities are entitled to information about the storage of hazardous materials in their communities. This is useful in the event of accidents, for example, so that local officials will know how to deal with such incidents, the nature of the hazards with which they may have to deal, what precautions to take, etc. The reports mandated by regulation under this law require gas stations with 10,000 pounds of gasoline in underground storage tanks to file reports that they, in fact, have gasoline on their premises. It has never been clear to

me how these reports enhance the community's knowledge. Particularly ironic is the fact that the estimated 200,000 gas stations - almost all small businesses - have to submit similar reports to three other state and local entities - 800,000 pieces of paper annually, at a minimum, advising public officials that the gas stations have gasoline on their premises! And when they don't, they put out signs: "No gas today." It is clear that this regulation did not save any trees or tell the public anything it did not already know.

Advocacy first sought repeal of this requirement in 1987. After 2.5 years of my personal involvement, I am pleased to be able to report that last week EPA sent a regulation to OMB repealing this reporting and paperwork requirement. Small businesses will save over 500,000 hours annually - that is significant paperwork reduction and cost savings - not counting the agency paperwork storage costs that will be saved!

The repeal applies to reports required from other industries. EPA is also proposing to eliminate reporting by small sand, gravel and rock salt operations and the remaining reporting requirements applicable to storage of chemicals in excess of 10,000 pounds will be in plain English.

This is a major step forward. EPA's action eliminates duplicative reporting, helps small businesses and does not hurt the environment. It is one of the best proposals I have seen. *It has almost been worth the 2.5 year wait.*

This brings me to my final issue. It is a topic that I think the proposed task force will be able to address, particularly when it is armed with the information on the number and kind of reports small businesses must file. As the task force looks to the question of simplification and consolidation of reports, the compilation will demonstrate that some of the same information is repeatedly requested by federal agencies - whether it is IRS,

Census, Labor, EPA or other agencies. Internet technology is making it easy to develop a simple form for small business that contains the basic information requested by each agency which can be used as a header, if you will, for each and every report that is required. The header could be on file in a consolidated data base, could be modified by the company as information about the business changes, could be pulled up, along with the core of any report mandated by an agency, completed and sent to the requesting agency electronically. This is an option that should be explored and is within the realm of feasibility, thanks to Internet technology and to the fact that more and more small businesses are converting their business processes to computers containing multi-purpose software. This is an idea I have had for some time and I am now convinced the time is ripe for its implementation. The technology is here - we just need the commitment to make it happened.

In closing I want to emphasize that the proposal you are considering is conceptually sound and right on the money. I cannot address the difficulty or cost of compiling the annual list of reports. If it is difficult -- and -- if it is costly -- and -- if it is burdensome on agencies, this will be clear evidence of the need for this compilation and the benefits to be derived from this proposal. It gives you even more justification for determining exactly what reports small businesses must file with which agencies. However, this is not my expertise and I am sure others will address that issue. What I do know is that paperwork reduction is no one's priority except small business.' Success will come when agencies fully realize how disproportionately small business is burdened by paperwork and reporting requirements, how anti-competitive the costs can be, and that

there are often less burdensome alternatives to help agencies achieve their public policy objectives.

Mr. MCINTOSH. Thank you very much, Mr. Glover.

It may endanger my reputation, but let me say that I want to praise EPA for that effort that you have just described. I am glad to hear that. That is the type of common sense that we need in regulatory programs.

Let me pick up on the comment you made about a common element. Because it occurred to me as we were drafting this bill that that idea would go a long way toward helping to reduce duplication, and is a significant part of the problem.

I am glad to hear your testimony that the inventory could lead to such reduciton. It is one of my fondest dreams to set up a system exactly like that. And then each agency could submit a copy of your Form 1 and add to it additional schedules to get the other information they need. And then we could work to make sure that there is no duplication among the schedules. So I very much appreciate your testimony on that.

Let me ask you, what are some of the biggest problems that your office hears from small businesses regarding paperwork?

Mr. GLOVER. I think that the biggest problem is the fear of something they did not know they had to do right off the bat. I think that the next biggest problem, and I recognize that it is a conflict, is taxes, and simply the records burden that they have to maintain in keeping taxes.

We get involved in a lot of issues with the Internal Revenue Service where they unknowingly were going to do something that results in a tremendous burden. One of the successes that I think that we have seen in the last couple of years is the new pension plan regulations that have been coming out where they dramatically reduce the amount of paperwork and concerns about 401(k) plans and the new SMPA plan.

That is a real success story. I think that there are a few of those. There needs to be a whole lot more. But the paperwork around taxes is the biggest one that I hear about.

Mr. MCINTOSH. Let me ask unanimous consent to hold the record open for a week or so. If you could give us a couple of examples of successes, maybe we could trumpet those as an example to some of the other agencies as we move this bill forward.

You mentioned in your written testimony that paperwork reduction goals have not been met to date.

Do you think that agencies have sufficient incentive to do that, or do we need to have additional structures in place to help try to achieve those goals?

Mr. GLOVER. Paperwork is kind of like small business, paperwork reduction. It is everybody's second priority. And unfortunately, people do not get around to it very often. And I think that we suffer from that. Everybody says yes, we are going to reduce paperwork, but it is really hard when you have other things to do to focus on it.

I think that this legislation will be some incentive. I would suggest that the representatives be somebody who reports directly to the head of the agency. So you do not get it down so far in the organization that they cannot jump across lines.

But I think that there is an incentive needed. And I think, quite frankly, that we need a whole new reporting system. Technology is

marvelous when you think about how much information can be stored and how quickly it can be sorted, compared to the old days when you had manual files and manual information. A lot of this information does not need to be reproduced in 8 or 10 different places.

So I think that there is an opportunity to do it. But we have got to start almost from a blank piece of paper. And I think that the task force should do that. They should say OK, let's design a whole new system.

We have got information collected by the Bureau of Labor Statistics. We have got information collected by the Census Department. We have got information collected by the Internal Revenue Service. Three different systems that overlap, but do not exchange basic information.

There are a lot of reasons historically for it. But I will tell you that we have got to start with a whole new piece of paper and do it all over, if we expect to really reduce it.

Mr. MCINTOSH. Two other questions.

Is this proposed legislation consistent with President Clinton's and Vice President Gore's reinventing government initiative?

Mr. GLOVER. I think it certainly is. I am very comfortable with it as a good approach to those kinds of problems.

Mr. MCINTOSH. I guess I would ask you to put aside any inter-agency rivalry that may be there, but do you think that we housed the clearinghouse correctly in OMB's OIRA?

Mr. GLOVER. I think so. OIRA has done a good job. They work with those agencies every day, and I think that they have the clout necessary to make it happen. And certainly any place else would be duplicative. And I am comfortable. You need it in the White House. You need it in an inter-agency operation. I am very comfortable with OIRA. OIRA has been very successful.

And the panel process that we have with EPA, and OSHA, and OIRA, we have been able to get the agencies to pay attention and listen. I am comfortable that that is the right place.

Mr. MCINTOSH. Thank you very much.

Mr. Kucinich, do you have any questions for Mr. Glover?

Mr. KUCINICH. I would like to thank Mr. Glover for his testimony, and let you know that we look forward to working with you as we draft this bill. Thank you.

Mr. GLOVER. Thank you.

Mr. MCINTOSH. Thank you, Mr. Kucinich.

And thank you again for your leadership in making this a bipartisan effort.

I am going to take under consideration under the rules the request for an additional day of hearing. I think that we should be able to accommodate that in some fashion.

I would like to say that my goal is to gather information. You made a couple of suggestions today, Mr. Glover, such as making sure that it is a senior official in the agency, who is appointed to be the head of the paperwork effort. We will continue to work to improve this bill as we move it through the subcommittee and the

full committee markup. And I do appreciate you coming today, and look forward to working with you on this effort.

With that, the subcommittee will stand in adjournment. Thank you.

[Whereupon, at 3:30 p.m., the subcommittee was adjourned.]

H.R. 3310, SMALL BUSINESS PAPERWORK REDUCTION ACT AMENDMENTS OF 1998

TUESDAY, MARCH 17, 1998

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON NATIONAL ECONOMIC GROWTH,
NATURAL RESOURCES, AND REGULATORY AFFAIRS,
COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT,
Washington, DC.

The subcommittee met, pursuant to notice, at 4:20 p.m., in room 2247, Rayburn House Office Building, Hon. David McIntosh (chairman of the subcommittee) presiding.

Present: Representatives McIntosh, Sununu, Scarborough, LaTourette, Snowbarger, Sanders, Tierney, and Kucinich.

Ex officio present: Representative Waxman.

Staff present: Mildred Webber, staff director; Karen Barnes, professional staff member; Andrew Wilder, clerk; Phil Barnett, minority chief counsel; Elizabeth Mundinger, minority counsel; and Mark Stephenson, minority professional staff member.

Mr. MCINTOSH. The Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs will come to order.

Today, the subcommittee holds its second hearing on H.R. 3310, the Small Business Paperwork Reduction Act Amendments of 1998. The purpose of today's hearing is to receive comments from several Federal agencies on the bill. I particularly want to thank my colleagues, Mr. Tierney and Mr. Kucinich, who have worked with me from the start—Mr. Kucinich in developing the bill and Mr. Tierney in acquiring the witnesses for this hearing. I want to thank Mr. Kucinich for helping to promote this bipartisan bill to give small business owners relief from the Government paperwork and gottcha techniques to which the President often refers.

Mr. Kucinich and I are proposing to add some new provisions to the Paperwork Reduction Act to help small businesses. The Federal agencies have not met their goals for reducing paperwork set by the Paperwork Reduction Act of 1995. The Office of Management and Budget reports that instead of a 10 percent reduction in 1996, paperwork was reduced across the administration by only 2.6 percent. It's estimated that the reduction for 1997 is only 1.8 percent.

Now with the exception of the Securities and Exchange Commission, the agencies represented here today have not met the target set in law. The Department of Transportation was off to a good start in 1996, with a 27 percent reduction of paperwork, but more than made up for that in 1997, when it's estimated to have increased the paperwork burden by 33 percent. The Justice Depart-

ment only reduced its paperwork by 1 percent in 1996. It's estimated to have done a little better in 1997. It's up to 14.5 percent, but still fails to meet that 20 percent goal over the 2 years.

The Department of Labor didn't meet the 10 percent goal set in either year. It reduced paperwork by 9.5 percent in 1996, but only an estimated 8 percent in 1997.

Now frankly, I don't think the agencies which have failed to meet their current goals set in law by the Paperwork Reduction Act have a lot of credibility in opposing a measure to strengthen that act. Clearly the paperwork burden, nearly one-third of the regulatory burden or $225 billion a year, is still a problem. It needs to be addressed. Frankly these agencies continue to be part of the problem.

Our subcommittee held a hearing last week at which several small business owners spoke about their concerns and frustrations over Government paperwork. Teresa Gearhart, who owns a small trucking company with her husband, told us that her company has enough business to grow and create five new jobs in the next year. But they can't create those new jobs because of all the paperwork that would come with them. They simply can't afford the new, increased level of paperwork requirements set by the Federal Government. One of their greatest fears is that they will be fined for an innocent mistake or an oversight. This still happens in spite of the fact that some agencies have instituted policies to waive fines for unintentional violations.

Gary Roberts, the owner of a small company which installs pipelines in Sulfur Springs, IN, told us that he was fined $750 by OSHA last May for not having a hazardous communication program on a particular job site. The inspector was told that the program was in the main office, that it was part of the company's records there, and that all the workers had been trained to follow it. On top of that, one of the workers ran to the office, got the program, and brought it back to the job site during the inspection. But OSHA would not waive the fine.

The consensus among the witnesses was that small business owners genuinely want to comply with regulations but they are overwhelmed by the accompanying paperwork. As my colleague Congressman Kucinich said at the hearing, their biggest concern is not the paperwork requirements they know about, but those of which they don't know.

The legislation we are proposing to address these problems does so four ways. One, it would create a list of all the Federal paperwork requirements for small business. One of the amendments that we will be offering in our markup tonight will require that the list be computerized and put on the internet. Two, would offer small businesses compliance assistance instead of fines on first-time paperwork violations that don't present a threat to public health and safety. Three, would establish a paperwork czar in each agency who would be the point of contact for small businesses on paperwork requirements. Four, it would establish a task force, including representatives from all of the major regulatory agencies to study how to streamline reporting requirements for small business.

Now, I read the testimonies which our witnesses will give today. I want to clear up one thing, perhaps a big myth or apprehension which I believe they have. In the case of a paperwork violation that

presents an imminent threat to public health and safety, our bill does give the agency full discretion to impose a fine as under current law or to give the small businesses 24 hours, rather than 6 months, to fix the violation. Discretion on that point rests with the agency.

In my 3 years as subcommittee chairman, I have come to realize that the more things change, the more they stay the same. In 1995, the subcommittee was engaged in consideration of a bill that would have made us all pause and consider whether the existing regulatory framework and agenda made sense. The bill would have imposed a 6-month moratorium on new regulations. Now, like H.R. 3310, the bill expressly protected the health and safety of the public. It exempted health and safety rules from the moratorium. At that time, the agencies and the public interest groups opposed the bill, claiming that workers would be exposed to dangerous chemicals. They ignored the exception that would protect health and safety in making those claims.

Today, once again, the agencies oppose H.R. 3310, arguing that the bill would expose workers to dangerous conditions. Now the agencies again ignore the exception that would protect health and safety. By the way, I want to thank Representative Kucinich for helping us craft that exception as we drafted the original bill.

That same year in 1995, this subcommittee considered a requirement that all regulations must be reviewed periodically. The agencies opposed that bill because they were afraid that they would be so incompetent that they would allow regulations to terminate by accident or mistake. They ignored the fact that they were in a position to ensure that important programs would not terminate under the bill by simply completing the review requirements. Today the agencies are here again to tell horror stories. Again they have ignored the fact that they remain in a position to prevent these occurrences under the bill. The discretion lies with the agencies. They failed to exercise it. They failed to meet their duties under the law.

The more things change, the more things stay the same. The bill does not do a thing to threaten public health and safety. There are exceptions expressly to prevent this. It does nothing to strip the agencies of their enforcement powers other than to limit their authority to impose civil monetary penalties. They still have the other options available to them, including injunction and pursuit of criminal remedies, so that they can pursue problem areas.

Finally, the agencies represented here today oppose the very measure of the bill which mirrors the President's order to them in 1995, to waive fines for small businesses so that they could correct their mistakes. Our bill simply builds on the President's directive and would make it law. Frankly, I think it's an outrage that instead of offering constructive criticism on this bipartisan bill to help small businesses, the agencies have resorted to scare tactics in their testimony.

The statements they will give today are full of misleading statements and frankly untrue characterizations of this bill, which would lead people to believe that this paperwork relief was going to do great harm. None of that is accurate. Either the agencies did not read the bill or they willfully chose to ignore section 2, which

states that in the case that the paperwork violations would present an imminent threat to public health and safety, the agency is given discretion to impose a fine or give the small business 24 hours to correct the violation.

Paperwork violations that result in actual harm are indeed exempt from the bill entirely. Yet, the Department of Justice cites the example of a toddler strangling between the bars of a crib because the manufacturer didn't report problems with the crib to the CPSC. Again, the more things change, the more things stay the same. Under our bill, the Consumer Products Safety Commission would have full authority to issue a fine in that instance. It is irresponsible and totally inaccurate to depict any death as a consequence of this bill. First, our bill has an exemption for violations that cause actual harm. If our bill were the law, the head of the CPSC could impose the same fine on the crib manufacturer that it would today under current law.

Second, this tragedy occurred under current regulations, not under our bill. Frankly, where was the CPSC in looking at the review of the design of those cribs in the first place? There may be a problem, but it's not with our bill.

Finally, the fact that the agencies do not want to lose their ability to assess fines for first-time paperwork violations reveals that they are much like the traffic cop who prefers to write a speeding ticket rather than enforce real protections against criminal activity, frankly, because it's easier to cite people for traffic violations than to fight serious violent crime. The agencies need to redirect their efforts away from issuing fines on small businesses for harmless paperwork violations and toward stopping bad actors whose serious regulatory violations threaten our public health and safety.

I am absolutely floored that the agency representatives here today seem to be saying in their testimony that using every other tool in their arsenal against small business just won't do the job. We need to hit them in the pocketbook. Sure, they can file an injunction against that business, but that does not seem to be enough. Yes, they can do an inspection and warn the small business, but that doesn't seem to be enough. Right, they can prosecute criminally, but that doesn't seem to be enough. No, they have to on top of everything hit them with a civil monetary penalty. I find that incredible.

Members of this subcommittee, our bill would bring some sanity back to the process and go a long way toward helping small businesses deal with excessive paperwork and excessive fines, and truly, once and for all, eliminate "gottcha" from the vocabulary of the Federal agencies. Consistent with and building on President Clinton and Vice President Gore's Reinventing Government Initiative, it is the next step in small business relief.

With that, let me now turn to Ranking Member Tierney.

Mr. TIERNEY. Thank you, Mr. Chairman. Thank you for holding this hearing today. Small and family owned businesses spend a great deal of their resources learning about and complying with applicable laws. Most do work very hard to do so. I am pleased that we are looking at ways to simplify and streamline the resulting paperwork. Mr. Chairman, I also want to thank you for changing the schedule so that the hearing could be held this afternoon and so

that I could attend. It is important because hopefully this hearing is going to allow us to understand whether or not there might be some unintended negative consequences of the bill as proposed, and if there are how we could possibly fix them.

For example, Mr. Chairman, I have some concern with the impact of the legislation on pensions and health plan participants and beneficiaries under the Employee Retirement Income Security Act, otherwise known as ERISA covered plans. By creating a statutory grace period and requiring a waiver of penalties, the existing voluntary compliance incentives which have worked very well to encourage plan administrators to comply with ERISA without imposing large penalties would be eliminated. This could provide an incentive for plan administrators to ignore ERISA's reporting requirements that might put workers' benefits in serious jeopardy.

It is my understanding that you have worked closely with Representative Kucinich in drafting H.R. 3310. This cooperative effort has led to significant improvements in the bill. A number of serious concerns have still arisen about the provisions that limit agencies from assessing civil penalties for paperwork violations under certain circumstances such as consumer fraud, illegal immigration, and food safety protection. Mr. Chairman, efforts to streamline reporting must not undermine existing safeguards that protect the American people from safety, health, and environmental hazards. Hopefully these hearings here today will help us determine whether or not that is truly a danger.

As you are aware, paperwork violations include a variety of actions, such as providing information to third parties and the public. When a manufacturer does not provide warnings on how to use its product, this is a paperwork violation. When an employer fails to provide warnings to its employees about the proper way to handle hazardous materials, this is a paperwork violation. When a brokerage firm provides false information about the market, this is also a paperwork violation. When a landlord fails to tell his tenants that there is dangerous lead-based paint in the apartment, that is a paperwork violation. With all that said, the importance of accurately reported information from small businesses is evident.

Since the introduction of H.R. 3310, 2 weeks ago, some of the concerns about the bill have been brought to our attention. We hope that they will be addressed before we move forward. For example, we have learned that the bill may create a disincentive to comply by removing agency discretion from the process. You indicated in your opening remarks that that is not the case. I am hoping we can explore that today with these witnesses.

The bill may require the agency to provide actual serious harm or an imminent and substantial threat before it can assess penalties and violations that are corrected within 6 months of the date they are reported. Hopefully today we will explore the wisdom of that particular action and its impact.

The bill prohibits agencies from assessing penalties for violations that are corrected within 6 months, even if they pose a threat to the environment, the integrity of financial markets or pension plans. The bill could increase the burdens on small businesses because it would likely force agencies to conduct more onsite inspec-

tions, or at least that's one prospect that is likely to be raised today and we should explore that to its completion.

These possible unintentional negative consequences must be addressed. Therefore, Mr. Kucinich and I are offering an amendment and hope that that will in fact improve the bill and be considered by the rest of the committee.

Rather than rescind agency discretion, the amendment that we'll propose would require agencies to establish policies for reducing and eliminating civil penalties for first-time violators. It requires that the agency take into account the nature and seriousness of the violation, whether the small business made a good faith effort to comply with the law and rectify the violation, the small business's prior compliance history, whether the violation allowed the small business to obtain an economic advantage over its competitors, and other relevant factors.

The nature and seriousness of any violation includes whether it was technical, inadvertent, criminal, or caused serious harm to the health and safety of the public, consumer, worker, investor or pension protections or the environment. The amendment would provide relief to small businesses in appropriate circumstances, but would not have any of the serious problems which might have been identified in the current language. Furthermore, it will actually reduce the burden on small businesses because it should not encourage agencies to increase the number of inspections that are currently being performed.

Mr. Chairman, I look forward to hearing from the witnesses who have joined us here today. Hopefully they can shed some light on what the agency policies currently are in place to address first-time paperwork violations. As you may know, 2 years ago the Small Business Regulatory Enforcement Fairness Act, also known as SBREFA, was enacted into law. That bill provided some relief for small business violations and it's time now to learn how successful those changes have been. More importantly, the witnesses will be able to share their concerns about H.R. 3310 and hopefully recommend changes that would address those concerns so that we could have a bill that is satisfactory to everyone. I look forward to their testimony. Thank you.

Mr. MCINTOSH. Thank you, Mr. Tierney. Let me now ask if any of the other Members have opening statements they would like to make?

Mr. KUCINICH. Mr. Chairman.

Mr. MCINTOSH. Mr. Kucinich.

Mr. KUCINICH. I do. Thank you very much, Mr. Chairman, Mr. Tierney, members of the subcommittee and citizens. Back home I take a bipartisan approach toward the work that I do. I try to do the same thing here in the Congress. I would like to begin by saying that this bill has been a work in progress. I have been very grateful to have a chance to work with Mr. McIntosh. His staff and my staff have worked very closely together as we have been developing this bill. Along the way, we have had input from various agencies which I am very grateful for. As with any piece of legislation, as you move along the way, you discern that there are ways in which you can strengthen legislation. I appreciate the presence of the agencies today and their suggestions as to how to make that

possible. I have enjoyed the opportunity to work with Mr. Tierney and with the staff of the subcommittee. We have had ongoing discussions as to ways in which the bill can be improved.

Since the beginning of our bipartisan work on this bill, my efforts have focused on two goals. First, to help small business comply with paperwork requirements so that small business owners can devote more time to creating jobs for our people. Second, to make sure that the health and safety of the public, the integrity of environmental laws and consumer protection laws are protected. Those could actually be in reverse order, but they are both simultaneously true, that we want to help small business while at the same time not compromising health and safety.

I commend the chairman for agreeing to hold this hearing with Federal agencies, and also commend my colleague, Mr. Tierney, for his work on the issue. From the outset, we knew that the bill would go through improvements as we gained more and more information. I made that clear in every public and private statement about this bill. In fact, every time that we have consulted with the agencies about the impact of this bill, we have made changes which have improved the legislation. In turn, after hearing from some small business owners last week, we have come up with more improvements in the bill that are consistent with our goals. This has been a bipartisan process and I appreciate you, Mr. Chairman, for your flexibility and your commitment.

We now have the benefit of the experience of a wide range of executive agencies, including U.S. Department of Justice. All of these agencies to one extent or another, have implemented programs to help small businesses comply with the paperwork requirements. At the same time, all of them are required to enforce a number of statutes. Often times, the ability of the agencies to protect the public interest depends on the information they collect through paperwork documents. Based on the testimony we will hear today, after having reviewed the testimony, I can say that it's clear that one provision of the current draft of the bill, the compliance assistance provision, would in fact have the unintended consequence of making it more difficult to protect the health and safety of the public of workers, of consumers, and of those who are protected by law enforcement officials.

Mr. Chairman, that of course has not been our intent. It was not my intent in cosponsoring this legislation. I know it was not your intent. I am sensitive as to how this particular provision might interfere with crime fighting efforts. It is through information collected that law enforcement officials can detect drug trafficking and money laundering. In turn the DEA relies on written reports to ensure that controlled substances are not diverted illegally. These are very serious responsibilities. I am sure that Congress will not want to do anything to interfere with the ability of the Department of Justice to carry out its responsibilities. The Justice Department testimony reflects this concern, and I believe we must seek a modification in the current language in this bill.

In its current drafts, staff analysis of the bill indicates that it would grant automatic probation of first time offenders when they fail to comply with the law and create a safe harbor for some businesses to violate the law. It's the feeling of some that it might even

lead to investors being jeopardized, and would inhibit the ability of local communities to keep track of dangerous chemicals stored in industrial facilities. So in effect, according to the staff analysis, this provision could have the effect of rewarding the bad guys. I don't think that 99.9 percent of America's law abiding small businesses would support these unintended consequences.

So, Mr. Chairman, I believe that it will be necessary to change these provisions in the bill and that the bill be modified. We need to encourage agencies to continue to help small businesses comply with their paperwork requirements. At the same time, we must ensure that agencies have the tools they need to enforce many important statutes. I remain committed to the bipartisan process of reaching our mutual goals. I welcome our witnesses here today. I believe that despite the divergence that we may have right now on certain provisions of this bill, that after we hear the testimony and incorporate some of the concerns of the agency, I think that we will have a way to reach a concurrence that would be of benefit to the millions of small businesses who are looking for some relief from this Congress.

So again, I want to let the chairman know how grateful I am for his dedication to this process, to his reaching out to small business, his reaching out to the agencies here. Together I believe that in this process we still have the opportunity to get to a successful conclusion. I want to thank the Chair and thank the ranking member, Mr. Tierney and all the Members here. Thank you.

Mr. MCINTOSH. Thank you, Mr. Kucinich. Thank you again for your help on this bill.

Do any other Members have opening statements?

Mr. Waxman.

Mr. WAXMAN. Thank you very much, Mr. Chairman. First of all, I want to commend you for holding this hearing. I have been in Congress for 24 years. I believe that the essence of good legislation is giving everyone a chance to give us their views. It is important to provide that forum even if witnesses have statements with which we disagree, because sometimes they can shed light on aspects of legislation that are unintended problems and ought to be corrected. Even if we don't agree with them after they say what they have to say, it's just basically fair to give everybody a chance to come forward and give their point of view on a subject matter before us. So I appreciate that we are hearing from witnesses from the administration, and that we are doing it at a time when Members can be here. I am impressed with the number of Members that are here today. I don't think it would have been possible if the meeting was scheduled at 5 on a Friday or even 3 on a Friday, when the Congress was out of session.

Second, I want to commend you, Mr. Chairman and Mr. Kucinich, for what you are trying to accomplish, because it seems to me what you are trying to accomplish is something that will be helpful to small businessmen. Small business people ought not to be subjected to penalties if they are acting in good faith, if they didn't understand the situation, and they are not in any way really culpable.

But what we don't want to do in trying to help small businesses is to have unintended consequences that we're now hearing are

quite foreseeable. That is, to keep from important agencies the ability to deal with such matters as giving consumers warnings about negative side effects of drugs because we didn't require the first time offender to make that information available, or warnings to emergency personnel on how to handle hazardous materials, disclosing to tenants that there's a lead-based paint in an apartment, disclosing to investors about the stability of a company. I was impressed, just glancing at the written statement from the Department of Justice, that this legislation could hurt law enforcement in trying to track drug money laundering or making sure that we are really enforcing our immigration laws by making sure that employers disclose that information.

There are a number of these items. I think Mr. Kucinich has a common sense approach to dealing with these concerns in an amendment that I understand he is going to be offering. If we are saying that we should reduce or eliminate civil penalties for first-time violators, we have to take certain things into account: the nature and seriousness of the violation, the good faith effort to comply with the law and rectify the violation, the small business's prior compliance history, whether the violation allowed the small business to obtain an economic advantage over its competitors, and other relevant factors. It just seems to me to make a lot of sense to try to avoid the problems that we may well find if we have a one size fits all approach which says that there's no way in the world that a civil penalty can be imposed for a first violation.

So I hope we can work together in a bipartisan fashion to craft legislation that accomplishes the goals that you and Mr. Kucinich have set out. I appreciate that we are going to have this hearing today. I look forward, if it's possible, for us to be together on a bipartisan basis to support legislation which I think could go all the way and get the President's signature.

Mr. MCINTOSH. Thank you very much, Mr. Waxman. If there are no other opening statements, let us now turn to our witnesses. I would call forward our panel. Ms. Emily Sheketoff, I hope I am pronouncing that correctly, the Deputy Assistant Secretary, Occupational Safety and Health Administration; Mr. Joseph Onek, Principal Deputy Associate Attorney General, Department of Justice; Mr. Brian Lane, Director of the Division of Corporate Finance, the Securities and Exchange Commission; and Mr. Neil Eisner, Assistant General Counsel for Regulation and Enforcement at the Department of Transportation. I thank you for joining us today.

It is the policy of the full committee to ask us to swear in all of our witnesses, regardless of who they may be. So I would ask each of you to please rise.

[Witnesses sworn in.]

Mr. MCINTOSH. Let the record show that each of the witnesses answered in the affirmative.

Let's go through and what I would like to do is ask each of you—let me ask unanimous consent that the written statements they have prepared be put into the record—and ask each of you to summarize or pull from that salient points that you have. I am not sure who is operating the clock here, but we'll ask you to try to keep it to 5 minutes, but if you need extra time, we're not going to be too stringent.

Why don't we start with Ms. Sheketoff. Welcome, and thank you.

STATEMENTS OF EMILY SHEKETOFF, DEPUTY ASSISTANT SECRETARY, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION; JOSEPH ONEK, PRINCIPAL DEPUTY ASSOCIATE ATTORNEY GENERAL, DEPARTMENT OF JUSTICE; BRIAN J. LANE, DIRECTOR OF THE DIVISION OF CORPORATE FINANCE, SECURITIES AND EXCHANGE COMMISSION; AND NEIL EISNER, ASSISTANT GENERAL COUNSEL FOR REGULATION AND ENFORCEMENT, DEPARTMENT OF TRANSPORTATION

Ms. SHEKETOFF. Thank you. Mr. Chairman, members of the subcommittee, thank you very much for this opportunity to testify before you today. OSHA joins in the subcommittee's desire to reduce unnecessary paperwork. Today, the new OSHA concentrates more on preventing illnesses and injuries, and less on simply enforcing rules. As part of that effort, OSHA has significantly reduced its focus on mechanical paperwork violations. For example, in the past, OSHA cited employers who failed to display a required safety poster in their workplaces. Today, if employers fail to have the poster, our compliance officers give them one.

OSHA reduced its paperwork citations by 75 percent from 1992 through 1997. As a percentage of all OSHA violations, paperwork citations have fallen from 29 percent to 10 percent. OSHA is continuing to focus on real improvements in the health and safety of working people, rather than on the number of inspections, citations or penalties. However, it is critically important for any legislation Congress enacts on this subject to distinguish between traditional paperwork requirements and the information collection requirements and standards that directly impact worker safety and health.

SBPRA uses the collection of information definition from the PRA. Consequently, it affects standards that most people would not view as mere paperwork. I will try to use this testimony to illustrate these issues for the subcommittee.

SBPRA prohibits agencies from imposing fines for first time violations by a small business for information collection requirements, where the violations have not caused actual serious harm to the public health or safety, as long as the small business corrects the deficiency within 6 months. The bill provides an exception where the violation could imminently and substantially endanger public health or safety.

OSHA understands the desire to treat businesses that make good faith efforts at compliance differently from those that do not. In fact, OSHA's current policies already make such a distinction. OSHA already provides significant penalty reductions based on employer size, good faith, and history of violation. With the smallest employers eligible for the largest reductions. Our penalty reduction system is required both by the Occupational Safety and Health Act and the Small Business Regulatory Enforcement Act, and follows the President's directive of April 1995. As part of that system, where paperwork violations do not materially affect workplace health or safety, OSHA has directed its field compliance officers not to issue citations. Consequently, the proposal in SBPRA is duplica-

tive and unnecessary. Moreover, eliminating the potential for any penalties for first time violations removes the incentive for employers to voluntarily comply without intervention. This is particularly important where requirements have a true health and safety impact.

The bill attempts to guard against risks to safety and health by allowing employers 24 hours to correct violations that have an imminent or substantial danger to public health or safety. In such instances, the bill allows the agency to impose the fine immediately if it informs Congress. While we acknowledge the author's desire to protect safety and health risks, the bill fails to protect workers from very real dangers. Therefore, we strongly oppose this provision.

The bill should not hinder in any way an agency's ability to act immediately to eliminate an imminent or potential danger to health or safety of workers and the public. Furthermore, the definition of public health or safety within SBPRA is not clear, as the bill provides no context to determine what public health or safety means. We suggest that the language of section 2(b)(i)(1)(B) be amended to allow the agency to impose penalties not only when it believes the violation has caused actual serious harm to the public health and safety, but also when the violation appears likely to cause serious harm.

As drafted, section 2(b)(i)(1)(B) could place workers at risk of serious accident or injury. Many important collection of information requirements exist that significantly and directly protect workers from serious injury and illness. However, those requirements might not reach the bill's imminent and substantial danger threshold. For example, OSHA's worker right to know program in its hazard communications standard requires a certain amount of paperwork to ensure that the program is effective. If a worker is unaware that a hazardous chemical substance is present in the workplace, he or she may be at serious risk of illness or death. At the same time, this risk, while serious, may not be so great as to constitute an imminent and substantial danger to the public health or safety. Enforcement of OSHA standards concerning written lockout/tagout programs, analysis of hazard processes at chemical plants, hearing conservation and toxic exposure monitoring records, all of which have a direct and significant impact on employee safety and health would also be rendered ineffectual in most instances in this section of SBPRA.

There are countless examples of workers being killed or injured when employers failed to adhere to basic information sharing requirements. In one instance, an explosion ripped through a Phillips 66 company complex in Houston, TX, killing 23 people, in part because a small contractor failed to obtain the necessary permits to ensure that proper safety precautions were observed during maintenance operations. After this tragic incident, Congress directed OSHA to require all businesses using large quantities of potentially volatile chemicals to implement written procedures, minimizing the potential for catastrophic explosions, fires, or other events which can seriously harm workers and people living nearby. Under the resulting process safety management standard, written process hazard analysis and procedures covered as paperwork under the

PRA must be put in place to protect workers before a catastrophe occurs. The bill on the other hand, would send a message that employers can allow life threatening conditions to persist until and even after they are discovered by OSHA. To allow any additional time for a catastrophe to occur, whether it be 1 hour, 24 hours, or 6 months later, would seriously jeopardize employee safety and health, and undermine OSHA's statutory mission.

In another instance, two employees died from asphyxiation in a confined space while cleaning a tank. Failure to follow written procedures required in OSHA's confined space standard was a significant factor in their death. OSHA's confined space standard requires employers to monitor and record the level of contaminants in the atmosphere before employees enter work areas which may be deficient in oxygen or contain contaminants. Records of such monitoring is considered a collection of information under the PRA. If employers do not perform such monitoring, employees face the risk of being asphyxiated or overcome by radiation or toxic fumes. If this monitoring is to protect workers effectively, employers must monitor routinely whenever there is a possible danger, not just when OSHA can prove that a particular employee in a particular confined space is in imminent danger of death or injury.

The new OSHA uses a variety of tools to protect workers, including enforcement, partnership, compliance assistance, standards development, special emphasis programs at the national, regional, and local level, and other appropriate tools. This balance of approaches helped earn OSHA good reviews in the Small Business Administration ombudsman's recent report to Congress. According to that report, OSHA has positively influenced small businesses' perception of their regulatory enforcement efforts. The importance that OSHA places on working with businesses to improve safety and health led us to hire a small business liaison. Consistent with the intent of SBPRA, OSHA's liaison already works directly with small businesses, assisting them with every aspect of OSHA's program.

In conclusion, although OSHA agrees that legislation like SBPRA could be beneficial, we have serious concerns about the safety and health impact of the penalty-related provisions in section 2 of the bill. We urge the subcommittee to consider these concerns and modify the bill to guarantee that America's workers are protected.

[The prepared statement of Ms. Sheketoff follows:]

TESTIMONY OF EMILY SHEKETOFF
DEPUTY ASSISTANT SECRETARY FOR OCCUPATIONAL SAFETY AND HEALTH
US DEPARTMENT OF LABOR
Before the SUBCOMMITTEE ON NATIONAL ECONOMIC GROWTH, NATURAL RESOURCES AND REGULATORY AFFAIRS
on H.R. 3310, the Small Business Paperwork Reduction Act Amendments of 1998

Mr. Chairman, members of the subcommittee, thank you for this opportunity to testify before you today about H.R.3310, the Small Business Paperwork Reduction Act Amendments of 1998 (SBPRA).

OSHA joins in the subcommittee's desire to reduce unnecessary paperwork. Today, the New OSHA concentrates more on preventing illnesses and injuries, and less on simply enforcing rules. As part of that effort, OSHA has significantly reduced its focus on mechanical paperwork violations. For example, in the past, OSHA cited many employers who failed to display a required safety poster in their workplaces. Today, if employers fail to display the poster, our compliance officers give them one.

OSHA reduced its paperwork citations by 75 percent from 1992 through 1997. As a percentage of all OSHA violations, paperwork citations have fallen from 29 to 10 percent. OSHA is continuing to focus on real improvements in the health and safety of working people, rather than on the number of inspections, citations or penalties. However, it is critically important for any legislation Congress enacts on this subject to distinguish between traditional "paperwork" requirements and the information collection requirements in standards that directly impact worker safety and health.

Small Business Paperwork Reduction Act Amendments

SBPRA amends the Paperwork Reduction Act of 1995 (PRA) to require that federal agencies: (1) publish annually a list of Federal paperwork requirements applicable to small businesses; (2) waive any civil penalties for first time violations of paperwork requirements by small businesses; (3) establish one point of contact for small business; and (4) establish an inter-agency task force to study and identify actions to streamline reporting requirements for small business. While OSHA applauds the intent of this proposal, we are extremely concerned that waiving penalties for some so-called "paperwork" violations could cost some workers their health or their lives.

SBPRA uses the "collection of information" definition from the PRA. Consequently, it affects standards that most people would not view as mere paperwork. I will use my testimony to illustrate these issues to the subcommittee.

Suspension of Penalties

SBPRA prohibits agencies from imposing fines for first-time violations by a small business for information collection requirements, where the violations have not caused actual serious harm to the public health or safety, as long as the small business corrects the deficiency within six months. The bill provides an exception where the violation could imminently and substantially endanger public health or safety.

OSHA understands the desire to treat businesses that make good faith efforts at compliance differently from those that do not. In fact, OSHA's current policies already make such a distinction. OSHA already provides significant penalty reductions based on employer

size, good faith and history of violations, with the smallest employers eligible for the largest reductions. Our penalty reduction system is required both by the Occupational Safety and Health Act and the Small Business Regulatory Enforcement Fairness Act (SBREFA) and follows the President's directive of April 1995. As part of that system, where paperwork violations do not materially affect workplace health or safety, OSHA has directed its field compliance officers not to issue citations. Consequently, the proposal in SBPRA is duplicative and unnecessary. Moreover, eliminating the potential for any penalties for first time violations removes the incentive for employers to voluntarily comply without intervention. This is particularly important where requirements have a true health and safety impact. The bill attempts to guard against risks to safety and health by allowing employers 24 hours to correct violations that have an imminent and substantial danger to public health or safety. In such instances, the bill allows the agency to impose the fine immediately if it informs Congress. While we acknowledge the authors' desire to protect against safety and health risks, the bill fails to protect workers from very real dangers. Therefore, we strongly oppose this provision of SBPRA.

The bill should not hinder in any way an agency's ability to act immediately to eliminate an imminent or potential danger to the health or safety of workers and the public. Furthermore, the definition of "public health or safety" within SBPRA is not clear, as the bill provides no context to determine what "public health or safety" means. We suggest that the language of Section 2(b)(i)(1)(B) be amended to allow the agency to impose penalties not only when it believes the violation has "caused actual serious harm to the public health and safety" but also when the violation appears *likely to cause* serious harm.

As drafted, section 2(b)(i)(1)(B) could place workers at risk of serious accident or injury.

Many important "collection of information" requirements exist that significantly and directly protect workers from serious injury and illness. However, those requirements might not reach the bill's imminent and substantial danger threshold. For example, OSHA's worker right-to-know program in its Hazard Communication Standard requires a certain amount of paperwork to ensure that the program is effective. If a worker is unaware that a hazardous chemical substance is present in the workplace, he or she may be at serious risk of illness or death. At the same time, this risk, while serious, may not be so great as to constitute "an imminent and substantial danger to the public health or safety." Enforcement of OSHA standards concerning written lockout/tagout programs, analysis of hazard processes at chemical plants, hearing conservation and toxic exposure monitoring records, all of which have a direct and significant impact on employee safety and health, would also be rendered ineffectual in most instances by this section of SBPRA.

There are countless examples of workers being killed or injured when employers failed to adhere to basic information sharing requirements. In one instance, an explosion ripped through a Phillips 66 Company complex in Houston, Texas, killing 23 people, in part because a small subcontractor failed to obtain the necessary permits to ensure that proper safety precautions were observed during maintenance operations. After this tragic incident, Congress directed OSHA to require all businesses using large quantities of potentially volatile chemicals to implement written procedures minimizing the potential for catastrophic explosions, fires or other events which can seriously harm workers and people living nearby. Under the resulting Process Safety Management standard, written process hazard analyses and procedures, covered as paperwork under the PRA, must be put in place to protect workers before a catastrophe occurs. The bill, on

the other hand, would send a message that employers can allow life threatening conditions to persist until, and even after, they are discovered by OSHA. To allow any additional time for a catastrophe to occur, whether it be one hour, twenty-four hours, or six months later, would seriously jeopardize employee safety and health and undermine OSHA's statutory mission.

In another instance, two employees died from asphyxiation in a confined space while cleaning a tank. Failure to follow written procedures required in OSHA's confined space standard was a significant factor in their death. OSHA's confined space standard requires employers to monitor and record the level of contaminants in the atmosphere before employees enter work areas which may be deficient in oxygen or contain contaminants. Records of such monitoring is considered a "collection of information" under the PRA. If employers do not perform such monitoring, employees face the risk of being asphyxiated or overcome by radiation or toxic fumes. If this monitoring is to protect workers effectively, employers must monitor routinely whenever there is a possible danger, not just when OSHA can prove that a particular employee in a particular confined space is in "imminent danger" of death or serious injury.

Tragically, OSHA has many other examples where lack of compliance with the "paperwork" requirements of the confined space regulation led directly to a worker's death, including the recent accident at the Yorktown Naval Weapons Station. Four workers were asphyxiated after being exposed to raw sewage fumes because their employer had not developed proper rescue procedures or trained its employees in proper confined space entry practices and procedures. All these corrective measures are part of a confined spaces entry program which would be considered a "collection of information" under SBPRA.

Small Business Liaison

The New OSHA uses a variety of tools to protect workers, including enforcement, partnership, compliance assistance, standards development, special emphasis programs at the national, regional and local level, and other appropriate tools. This balance of approaches helped earn OSHA good reviews in the Small Business Administration ombudsman's recent report to Congress. According to the report, "OSHA has positively influenced small businesses' perception of their regulatory enforcement efforts." The importance that OSHA places on working with businesses to improve safety and health led us to hire a small business liaison. Consistent with the intent of SBPRA, OSHA's liaison already works directly with small businesses, assisting them with every aspect of OSHA's program.

In Conclusion

Although OSHA agrees that legislation like the SBPRA could be beneficial, we have serious concerns about the safety and health impact of the penalty-related provisions in section 2 of the bill. We urge the subcommittee to consider these concerns and modify the bill to guarantee that America's workers are protected.

Mr. MCINTOSH. Thank you for your testimony. I will have several questions for you when we get down to the question period.

Our next witness that we would like to hear from would be Mr. Joseph Onek from the Department of Justice.

Mr. Onek.

Mr. ONEK. Thank you, Mr. Chairman, members of the subcommittee. My name is Joseph Onek. I am the principal deputy associate attorney general of the Department of Justice. I am very pleased to provide the Department's views on H.R. 3310.

The Department of Justice strongly supports streamlining information collection requirements and helping small businesses to comply with reporting and recordkeeping obligations. This administration has made it a priority to help small businesses thrive in our growing economy. The Department would welcome an opportunity to work with you to reach your objectives in a common sense, effective manner that complements existing administration efforts.

I should also add that up until just 4 months ago, I was a lawyer in private practice representing many small businesses. I am fully aware of the enormous contribution that small businesses make to the American economy and to the regulatory enforcement problems they sometimes face.

While the Department supports this bill's goals, we have serious concerns with the provision that would waive civil penalties for first-time violations of reporting and recordkeeping obligations. Both the law and administration policy already recognized the special challenges that small businesses face, and believe in considering those challenges where appropriate in setting penalties. But the penalty waiver provision in this bill goes far beyond what Congress has previously thought wise without in fact reducing reporting requirements on small businesses.

I would like to emphasize that just 2 years ago, almost to the day, Congress enacted SBREFA. SBREFA requires agencies not only to provide compliance assistance to small businesses, but also to develop policies to provide for the reduction or waiver of civil penalties by small businesses under appropriate circumstances. I have here in my hand a report to the Congress entitled Regulatory Fairness by the National Ombudsman of the Small Business Administration. This position, the national ombudsman, was created by SBREFA. This report gives many examples of the efforts of Federal agencies from OSHA to EPA to NOAA to comply with SBREFA by developing policies to waive or reduce civil penalties in appropriate circumstances.

Mr. Chairman, the civil penalty waiver would have adverse consequences that I am confident neither you nor any of the bill's other sponsors intend. As set forth in greater detail in our written testimony, the provision could interfere with the war on drugs by making it easier for money laundering, hinder efforts to control illegal immigration, undermine food and safety protections, hamper programs to protect children and pregnant mothers from lead poisoning, and undercut controls on fraud against consumers, Medicare beneficiaries, employees, and the taxpayers of the United States.

Now it is true that there is an exception for actual harm to health and safety, but I think this exception misses the point. The

goal of Federal agencies is not to impose fines. Their goal is to protect the public. If a small business is encouraged not to file a report because of this legislation and harm then occurs, the fact that the agency can then impose a fine is largely irrelevant. The harm will already have been done. One of our concerns is that this provision will lull agencies into not filing reports in circumstances where they may think no harm can ensue, but then something will go wrong. The food or drug product that they were manufacturing a component of will turn out to be adulterated. The truck carrying the hazardous waste will be overturned. All of a sudden, what they may have thought was a harmless failure to file a report will have grave consequences. Sure, maybe, depending on how this law is interpreted, we will then be able to fine them. But that is not the point. It will be too late, far too late to protect the public.

This provision will not accomplish our shared goals of streamlining and simplifying information collection requirements. It's called paperwork reduction, but it doesn't reduce paperwork. The penalty waiver provision does not reduce reporting and recordkeeping burdens at all, except for those who violate the law, including those companies who willfully and deliberately violate the law. Furthermore, this result would put law-abiding businesses, the vast majority of course of our businesses, at an unfair competitive disadvantage as well as endangering the public.

These are results that I know none of us want to see happen. So we look forward to working with you to address these concerns as we work together to reduce unnecessary government reporting requirements. Thank you.

[The prepared statement of Mr. Onek follows:]

INTRODUCTION

Mr. Chairman and members of the Subcommittee. My name is Joseph N. Onek, and I am the Principal Deputy Associate Attorney General of the Department of Justice. I am pleased to provide the Department's views on H.R. 3310, the "Small Business Paperwork Reduction Act Amendments of 1998."

The Department of Justice strongly supports streamlining information collection requirements and helping small businesses to comply with reporting and recordkeeping obligations. This Administration has made it a priority to help small businesses thrive. The Department of Justice would welcome an opportunity to work with you to reach these goals in a common sense, effective manner that complements existing Administration efforts.

While we support this bill's goals, we have serious concerns with a provision that would waive civil penalties for certain first-time violations of reporting and recordkeeping obligations. Both the law and Administration policy already recognize the special challenges that small businesses face, and consider those challenges, where appropriate, in setting penalties. But the penalty waiver provision in this bill goes far beyond what Congress has previously thought wise -- without reducing reporting requirements on small businesses.

Mr. Chairman, the civil penalty waiver would have adverse effects that I am confident neither you nor any of the bill's other sponsors intend. As I will describe, this provision could interfere with the war on drugs, hinder efforts to control illegal immigration, undermine food safety protections, hamper programs to protect children and pregnant mothers from lead poisoning, and undercut controls on fraud against consumers and the United States. And those are just a few of the unintended consequences.

This provision will not accomplish our shared goal of streamlining and

simplifying information collection requirements. Simply put, the penalty waiver provision does not reduce reporting and recordkeeping burdens at all — except for those who violate the law. This result would put law abiding businesses at an unfair competitive disadvantage and could endanger the public. These are results that I know none of us want to see happen. The Department of Justice looks forward to working with you to address these concerns as we work together to reduce unnecessary government reporting requirements.

SMALL BUSINESS CONCERNS ARE RECOGNIZED IN EXISTING LAW

Let me briefly describe how federal statutes and Administration policies already recognize the unique challenges that small businesses face, and take those challenges into account, where appropriate, in setting penalties.

- The Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub. L. 104-121, Title II, §§ 201-224, 110 Stat. 857-862 (Mar. 29, 1996) (codified at 5 U.S.C. 601 note), requires agencies to provide compliance assistance to small businesses and to develop policies to provide for the reduction or waiver of civil penalties by a small entity under appropriate circumstances. SBREFA provides for these policies to apply where a small entity discovered a violation through a compliance assistance or audit program, has made a good faith effort to comply with the law, and has corrected the violation within a reasonable period. SBREFA provides that these policies do not apply where the violation involves willful or criminal conduct; poses serious health, safety or environmental threats; or where the small entity has been subject to multiple enforcement actions by the agency. See Pub. L. 104-121, § 223. SBREFA also provides for the appointment of a Small Business and Agriculture Regulatory Enforcement Ombudsman, who is charged with hearing small business concerns about agency compliance or enforcement activities, and who can refer the concerns to the agency's Inspector General in appropriate circumstances. See Pub. L. 104-121, § 222. Agencies have developed policies consistent with SBREFA.

- Other Statutes. In addition to SBREFA, other statutes specifically direct an agency to consider the size of a small business in obtaining information from them or in assessing penalties. The Occupational Safety and Health Act, for example, requires the Departments of Labor and of Health and Human Services to obtain information "with a minimum burden upon employers, especially those operating small businesses." 29 U.S.C. 657 (emphasis added). The Clean Air Act expressly requires appropriate

consideration of certain factors in assessing civil penalties, including, among other things, "the size of the business," and "the economic impact of the penalty on the business." See 42 U.S.C. 7413(e)(1). The Consumer Product Safety Act sets forth criteria to determine the size of penalties, including the size of the defendant's business. See 15 U.S.C. 2069(b).

- President's Memorandum. On April 21, 1995, President Clinton issued a memorandum asking all agencies to reduce small business reporting requirements and to develop policies to modify or waive penalties for small businesses when a violation is corrected within a time period appropriate to the violation in question. This policy applies where there has been a good faith effort to comply with applicable regulations and the violation does not involve criminal wrongdoing or significant threat to health, safety, or the environment. The memorandum also directs agencies to reduce the frequency of regularly scheduled reports by one-half in appropriate circumstances. See Memorandum, "Regulatory Reform — Waiver of Penalties and Reduction of Reports," 60 Fed. Reg. 20,621 (April 21, 1995).

- DOJ Policies. At DOJ, our components with regulatory functions provide for the waiver of civil penalties in appropriate circumstances. For example, the Immigration and Naturalization Service ("INS"), when considering the imposition of penalties for Form I-9 violations (forms employers use to verify employment eligibility), is required by law to give "due consideration" to mitigating factors such as the size of the business, the good faith of the employer, the seriousness of the violations, whether the violation involved an unauthorized alien, and the history of previous violations. See Immigration and Nationality Act, § 274A(e)(5), 8 U.S.C. 1324a(e)(5). As a matter of policy, INS applies these same factors when considering penalties in non-reporting cases involving knowing hires, or continued employment, of unauthorized aliens.

These statutes and policies appropriately recognize that good faith efforts to comply with the law, the impact of civil penalties on small businesses, and other factors may appropriately be considered in assessing civil penalties. These policies complement ongoing agency efforts specifically designed to help small businesses understand and comply with the law.

We must all continue our search for effective ways to streamline and simplify reporting and recordkeeping requirements that apply to small businesses. But efforts to streamline reporting need not undermine law enforcement or regulatory safeguards that protect

the public from safety, health, or environmental hazards. The rest of my testimony will focus on why information collection requirements are essential to a wide variety of protections on which we all rely, and on why a civil penalty waiver for first-time violators may put the health and safety of our families and communities at risk.

IMPORTANCE OF INFORMATION COLLECTION REQUIREMENTS

Congress has established information collection requirements for a very good reason. Good information is the backbone of sound decisionmaking. The government and the public need information to decide how to stop or remedy dangers ranging from contaminated food to illegal immigration. It is through information collected on a regular and timely basis that we can determine where dangers are, what protections are needed, and when action is necessary to remedy harms, deter future violations, and ensure a level economic playing field.

We rely on businesses to provide this information, because they often are the only source of that information. They know what they are doing, and how they are doing it. If businesses did not keep and report information important to law enforcement and public health and safety, the government would have to either make decisions without critical information or make much more frequent and intrusive inspections. Both alternatives are undesirable. So instead, we tell businesses to keep records on certain important activities and to report that information to the government, to the public, or both.

When considering legislation such as the bill before the Subcommittee today, it is important that we do not forget the fact that information collection violations can have serious on-the-ground effects. A company's failure to submit required information, or submission of inaccurate information, can mislead the public, regulators and law enforcement officials.

Reporting violations may make serious harms go undetected and unremedied. Let me give you a few examples:

- Information allows law enforcement to detect drug trafficking and money laundering. Under federal statutes and implementing regulations, financial institutions must report cash transactions exceeding $10,000 to the Secretary of Treasury. See 31 U.S.C. 5311 et seq. A significant purpose of this requirement is to aid the federal government in criminal investigations. Among other things, this requirement was intended to prevent individuals who obtained cash through illegal activities, such as cocaine trafficking, from "laundering" the cash by purchasing cashier's checks or other negotiable instruments.

- Information is needed to ensure compliance with immigration laws. In order to reduce the magnet of employment opportunities in the United States as an incentive to unauthorized immigration, the Immigration Reform and Control Act of 1986 ("IRCA"), 100 Stat. 3360-62 (codified at 8 U.S.C. 1324a), requires all United States employers to verify, through examining appropriate documents and completing the INS Form I-9, that their newly hired employees are eligible to work in the United States. Air carriers are required to provide INS officials with properly completed arrival and departure manifests, which are important not only to allow the INS to comply with Congressional immigration control requirements, but also to provide a nonimmigrant with evidence of his or her legal status in the United States.

- Information protects our food supply. The Department of Agriculture's Hazard Analysis and Critical Control Point (HACCP) Rule, 61 Fed. Reg. 38806 (July 25, 1996), requires food processors to retain records documenting their efforts to eliminate food safety hazards and prevent salmonella and fecal contamination. These recordkeeping requirements are essential to evaluating whether food processors are sufficiently safeguarding the food supply from dangerous bacteria.

- Information protects children from lead hazards. The Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. 4851, requires persons who sell or lease housing to let buyers or renters know about lead-based paint hazards. That information is especially important to pregnant mothers and to families with young children. At even low levels, lead poisoning can reduce a child's IQ, and can cause permanent developmental problems. Acute lead paint poisoning can send children to the hospital or even kill. By providing lead paint hazard information to families who lease or buy housing, we are helping American families decide where to live and raise their children in a safe environment.

- Information helps prevent illegal diversion of controlled substances. The Drug Enforcement Administration implements recordkeeping and reporting requirements to verify the legitimacy of controlled substance sales and to ensure that drug inventories are

not lost or improperly diverted. These requirements are critical to drug law enforcement, because these records enable DEA to identify sources of diversion and subsequently document criminal activity. For example, the records of a pharmacy were essential to DEA's identification and subsequent criminal prosecution of a physician who routinely wrote multiple prescriptions for the same patient for 120-150 doses of highly abused and trafficked controlled substances. Where pharmacies do not report, however, illicit diversions may be harder to detect and require more intrusive investigations. For example, a targeting effort identified a pharmacy suspected of selling commonly sought controlled drugs without prescriptions and of submitting fraudulent Medicare claims. An audit of the pharmacy revealed a shortage of over 85,000 dosage units of controlled drugs in a six month period. The lack of required records to account for those drugs supported the suspicion of criminal distribution but failed to provide definite proof. In that case, a civil complaint for recordkeeping violations was filed and a $35,000 fine resulted.

- Information helps local officials plan for emergency chemical releases and spills. In response to the disaster in Bhopal, India, Congress enacted a requirement that companies annually report hazardous chemicals inventories to local fire departments and local and State emergency planning officials. See Emergency Planning and Community Right-to-Know Act ("EPCRA"), 42 U.S.C. 11022(a), (d). Chemical inventory information helps local officials prepare for emergency spills, fires, releases, or other potential disasters. That information also helps neighbors make decisions about where to work, live, and play. If a facility fails to report hazardous chemical inventory information, local and State officials may never learn what chemicals are present and will not be able adequately to plan for or respond to fires or other disasters.

- Information helps ensure drug safety. The Food and Drug Administration requires manufacturers, packers, and distributors of marketed prescription drug products to report all serious unexpected adverse drug experiences associated with the use of their drug products, any significant increase in the frequency of a serious, expected adverse drug experience, and significant increase in frequency of therapeutic failure (lack of effect). See 21 C.F.R. § 310.305. These reports are required to enable the Administration to protect the public health by helping to monitor the safety of marketed drugs and to ensure that these drug products are not adulterated or misbranded.

- Information is needed to assess and address dangers posed by hazardous materials. Environmental statutes often require collection of information to ensure that the agency and the public are aware of and can address contaminants in drinking water, wastewater discharges, or the storage, transportation and disposal hazardous wastes. For example, in order to protect both workers and the public from the hazards of asbestos, regulations promulgated under the Clean Air Act require advance notice of demolition or renovation of facilities that contain asbestos. See 40 C.F.R. §§ 61.145(b)(1)-(5); see also 42 U.S.C. 7412. If an entity does not provide notice before demolition or renovation begins, the public and demolition workers may be exposed to airborne asbestos fibers without their

knowledge.

- Information prevents fraud against the taxpayer. Virtually all procurement contracts with the federal government and participation in federal loan and grant programs depend on submission of information. This is also true of Medicare, Medicaid, and federal health care programs, where this dependency is of particular concern. Without this information, the government could not pay its contractors, health care providers and other program participants and would be unable to detect fraud and collect damages under statutes such as the Program Fraud Civil Remedies Act, 31 U.S.C. 3801-3812, Section 1128A of the Social Security Act, 42 U.S.C. 1320a-7a, and the False Claims Act, 31 U.S.C. 3729 et seq. In just 210 referrals under the Program Fraud Civil Remedies Act, the Department has approved requests by agencies to use administrative procedures to recover over $ 7 million in civil penalties.

As these examples show, information collection requirements form the backbone of regulatory and law enforcement programs on which we all rely to protect ourselves, our families and our communities. Information collection violations can have real-world, harmful effects.

UNINTENDED CONSEQUENCES OF CIVIL PENALTY WAIVER

While we do not know how the courts would interpret the bill's language, we expect that the proposed waiver of civil penalties may cause grave consequences to public health, safety or the environment that could have been avoided. I am confident that no one in this room or in Congress would want to see the results that may come to pass.

Increased Noncompliance with Important Reporting Requirements by a Few Bad Actors

Most small businesses try hard to comply with the law. But there will always be some that take illegal shortcuts. This bill would reward those bad actors. It would provide small businesses that are first-time violators with one "free bite" at the information collection apple. It would waive any civil penalty as long as the business corrected the violation within six months after being notified of the violation. In the process, it would give bad actors an unfair advantage

over their law abiding competitors.

Civil penalties deter unlawful behavior and stop people who break the law from gaining an unfair competitive advantage over the majority of businesses that work hard to do the right thing and comply with the law. But under this bill, unscrupulous businesses would know that they could not be penalized until caught once, and then caught again. Such automatic probation for first time offenders would give bad actors little reason to comply until caught. And that would work to the economic detriment of those hardworking small business owners who work hard to comply with the law.

Providing a waiver of civil penalties for first-time violations also will reduce incentives for small businesses to become familiar with their legal obligations. After all, the worst consequence they would suffer would be an extra six months to comply. But ignorance of the law is not a valid excuse in our legal system — not where the health and safety of our families and communities is at stake.

The term "first-time violation" arguably could be interpreted as the first violation of any requirement regarding collection of information. Under that interpretation, a business that subsequently violates any such requirement would not be entitled to prior notice and a grace period before a fine could be imposed. However, if the term were interpreted to mean the first violation of any one particular information collection requirement, then subsequent violations of other, related requirements would continue to trigger the notification and grace period provisions of this bill. In such event, the statute would result in the unintended consequence of granting notification rights and lengthy grace periods to businesses that are in fact repeat offenders undeserving of leniency. A six-month grace period would simply be an invitation further to

delay complying with lawful reporting obligations.

Waiver would Impede Law Enforcement and Appropriate Remedies

We presume that the mandate that "no civil fine shall be imposed by the agency" during the six-month grace period is intended to apply only to penalties that are imposed directly by the agency in an administrative enforcement action, not where the penalty is imposed by a court in a judicial proceeding. However, some defendants will argue that the bill covers both administrative and civil penalties, including actions the Department of Justice brings on behalf of agencies such as the Federal Trade Commission ("FTC"), the Consumer Product Safety Commission ("CPSC"), the Food and Drug Administration ("FDA"), the National Highway Traffic Safety Administration ("NHTSA"), the Environmental Protection Agency ("EPA"), and the Health Care Financing Administration ("HCFA"). Broadly interpreted, the proposed civil penalty waiver arguably would prevent the Department from even instituting a civil penalty action unless and until the agency has notified the putative defendant of the violation and given the company six months to correct it. It may also invite unnecessary litigation about whether the Department can bring an injunctive action necessary to prevent harms to the public.

In our experience, companies that fail to comply with record keeping and reporting requirements are often found to be violating other legal requirements as well. Any delay in investigating or taking action against such companies would simply allow the company more time to reap the benefits of unlawful conduct and a greater opportunity to coverup and conceal evidence of wrongdoing. The legislation's written notification requirement and six-month grace period for civil fines could seriously impede this Department's ability to bring enforcement actions to address the potential or actual harms to the public.

Indeed, when a business fails to keep records or make reports required by law, we may have trouble detecting violations and addressing the dangers these information collection requirements are designed to prevent. The bill essentially shifts the burden of disclosing health, safety, or environmental risks from those in the best position to learn of actual or potential defects or risks to already overburdened regulatory agencies. This would rewrite consumer protection statutes such as the Consumer Product Safety Act, 15 U.S.C. 2051 et seq. ("CPSA") which recognize that companies endanger public safety when they do not report actual or potential defects. This approach would also rewrite environmental statutes that depend on accurate and timely reporting to prevent serious environmental and health risks, such as the Clean Water Act, 33 U.S.C. 1251 et seq., and the Safe Drinking Water Act, 42 U.S.C. 300f-300j-26,.

Let me offer you two examples. A couple of years ago, the Department brought a civil penalty action under the CPSA against a manufacturer of juvenile products such as cribs, strollers, and car seats. The product involved was a toddler bed with widely spaced rails in its headboards, footboards, and siderails. Within two months of marketing the bed, scores of consumers notified the company that children were getting their heads and limbs caught between the headboard and footboard metal railings. Contrary to law, the company did not notify the Consumer Product Safety Commission ("CPSC") of any of these incidents. One year later, the company marketed side rails for the bed. Parents again quickly told the company that their children often got trapped in the side rails. The company once again sat on these complaints. Tragically, a child strangled and died in a footboard. It was only at this point that the company reluctantly informed the CPSC of the death and the serious complaints that foreshadowed the

death. The CPSC determined that the company had violated a requirement that such product hazards be reported immediately. See 15 U.S.C. 2064(b).

The CPSC should not have had to wait until a child died to impose a penalty. If the CSPC had discovered the problem two weeks before that tragic loss, this bill would have required the CPSC to prove an imminent and substantial danger to public health or safety to assess a civil penalty. And even then the company might have avoided the penalty by filing its product hazard report within 24 hours of receiving the CPSC's written notice.

None of us want to see a repeat of this tragedy. But a repeat would be the likely, if unintended, result of this bill's penalty waiver. The bill would reduce incentives to timely report such hazards. Without timely notice of the danger, the CPSC would be unable to evaluate the need for a recall or to act in time to warn parent of the risk.

Let me provide another example. One small entity against which the Department brought a civil enforcement action operated for almost a decade with illegal and uncontrolled emissions of volatile organic compounds ("VOCs"). VOCs contribute to ground level ozone, or "smog." This business, which is one of the largest spray-painting operations for department store fixtures, was in an area of the country where ozone poses a severe pollution problem. Because the company had failed to provide information to the government before the building the plant or to obtain required permits to construct and operate, the government was unaware of its operation and could not address the resulting degradation of air quality and harm to public health. Indeed, the severe ozone pollution, to which this company illegally contributed, had already triggered restrictions on the ability of other companies to build facilities in that area. Although the company's failure to seek permits and to provide the government with information were

information collection violations, they had serious, real-world consequences — for the public and for other businesses. A civil penalty waiver would encourage such unlawful behavior, and inadequate record keeping and reporting during the period of violation would make it more difficult to discover and remedy the problem.

"Safety Net" Provisions Are Not Adequate

Our concerns are not solved by the bill's language allowing an agency to impose civil penalties where the agency head determines that a violation causes "actual, serious harm" to public health or safety. That provision, although well-intentioned, would not effectively protect the public from harm and could be hard to implement. Not only is "actual harm" undefined, but it may be difficult to discover, because agencies often rely on the very information that might not be reported under this bill to determine the nature, severity, and even existence of harm. Also, reporting and recordkeeping obligations often provide the information needed to prevent harm, but violations of these requirements may not appear to cause harm directly. For example, if a fertilizer facility does not keep required information on hazardous chemical inventories, local police and fire officials may not know how to respond when a fire starts at the facility and may unknowingly endanger themselves and the community. Fire fighters could waste valuable time trying to determine what chemicals are stored at the facility, or if they are not aware of the dangers, might enter the facility without proper equipment or protection. In such a case, the agency might find it difficult to prove that the information collection violation -- rather than the fire -- caused the harm.

The bill's drafters appear to have recognized some of these concerns because the bill allows for civil penalties where a violation "presents an imminent and substantial danger" to

public health or safety, unless the violation is corrected within 24 hours of the violator receiving written notice. Even this provision would make the public bear the burden of unacceptable risk to their lives, because in many circumstances, the dangers caused by reporting violations cannot be "corrected" by filing a tardy report. Having the information available promptly may be critical. For example, information reported under the Emergency Planning and Community Right-to-Know Act ("EPCRA") gave local governments detailed knowledge about hazardous chemicals stored in their communities that proved vital in responding to the 1993 floods in the Midwest. In Iowa, for example, officials were able to identify within minutes which of the state's 4000 hazardous materials facilities might be washed out, leak, or spill in rapidly rising flood waters. See "EPCRA Data Plays Major Role in Midwest Flood Response," 6 Right-to-Know Planning Guide (BNA) No. 24 (Aug. 12, 1993). Twenty-four hours later might have been twenty-four hours too late. Similarly, if a real estate agent does not provide notice of lead-based paint hazards before a family buys or rents a home, subsequent notice may do little to protect small children and pregnant women who have already been exposed to lead. Providing the information months or years later simply does not substitute for timely reporting.

The "imminent and substantial danger" standard in this bill also would be a much higher, and more difficult standard to prove, than the analogous standards that Congress has determined are appropriate to protect the public under many other statutes. For example, under the Resource Conservation Recovery Act ("RCRA") — which is the principal public protection against mismanagement of hazardous wastes — Congress authorized EPA to take action where handling, storage, treatment, transportation or disposal of solid or hazardous wastes "may present an imminent and substantial endangerment to health or the environment." See RCRA § 7003, 42

U.S.C. 6973. "May present" is the appropriate standard. Reporting requirements provide information for current and later decisions. In an action to enforce those necessary requirements, the government would find it difficult to prove that the failure to provide information itself actually endangered public health or safety.

These provisions respecting actual harm or imminent and substantial danger to public health and safety also do not recognize other harms, including harms to the environment, that may not currently affect public health or safety, but may do so in the future.

Nor are our concerns solved by the provision that requires a company to correct the violation within six months to avoid a civil penalty. Allowing an additional six months to comply after a company might do nothing to address the risk originally posed by the violation. For example, a simple failure to document cargo properly on a manifest can lead to grave consequences. If a truck carrying toxic materials crashes, and is not carrying a manifest that identifies the materials, emergency workers and others on the road may be unknowingly endangered. The fact that actual harm has not occurred before discovery of the information collection violation, does not mean that we should tolerate such risks. The bill's allowance of a six-month period or even a twenty-four-hour period to correct those violations would expose the public further to risks of harm and may allow a disaster to occur.

A "Trap" for Small Businesses

The proposed legislation may be a trap for the unwary because of confusion as to what it means. For example, the bill provides that, except in special circumstances, no civil penalty shall be imposed with respect to first-time violations. But, as discussed above, what precisely is a first-time violation? Suppose that there is a minor accident in a factory and the

company fails to write up or retain a record concerning it. That is a violation. Now suppose there is another minor accident a month later and the company again fails to create or retain a record. Is this a first-time violation or a second violation? A company which guesses wrong may face significant civil penalties.

The proposed legislation generally gives the small business concern six months to correct a violation. But, again, what precisely does it mean to correct a violation? It would appear that certain violations can never be corrected. If, for example, a company has failed to perform a required test on a food or drug sample that has left the premises, it can never do so. If it has failed to create a contemporaneous record concerning an accident, it may be unable to provide an accurate record several months later. There is a real danger that small businesses will be lulled into believing they are immune from civil penalties for certain conduct when in fact they are not.

A similar problem is posed by the provision in the bill that allows civil penalties to be imposed when the violation has caused actual serious harm to the public health or safety. A small business may believe that its failure to collect or retain certain records will cause no harm. But then an accident will occur, or a food or drug will be adulterated, and the business may suddenly find itself subject to significant civil penalties.

It would probably take years of litigation to resolve all the issues concerning the definition of first-time violation, correcting a violation and actual serious harm. Neither the uncertainty nor the costs of litigation will benefit America's small businesses.

OTHER CONCERNS

In addition to the problems discussed above, we also have concerns with the provision of the bill that requires a task force to study the feasibility of requiring small businesses to submit all reports on one date. This does not make sense in areas of regulation such as environmental monitoring and reporting that require timely and periodic submissions. Providing information on one date (presumably in a year) would be detrimental to both the environment and an agency's mandate to assure compliance, and would allow serious problems to escape notice for long periods of time. As drafted, the bill arguably includes forms which are covered by the Paperwork Reduction Act and which are submitted to the government, including forms to secure Government contracts, loans, grants or payments under various federal health care programs; as to these forms, the once-a-year approach would be unworkable for small businesses and the government alike.

CONCLUSION

The Department and the Administration remain committed to promoting small business and effectively implementing the President's guidance and the SBREFA requirements. We believe collection of information is vital to effective law enforcement and the protection of the public. We therefore do not support penalty amnesty beyond that provided in current law. The Department looks forward to working with the Subcommittee to find common sense ways to help small businesses by identifying and reducing unnecessary requirements.

Mr. MCINTOSH. Thank you for your testimony, Mr. Onek.

Our next witness will be Mr. Brian Lane of the Securities and Exchange Commission.

Mr. LANE. Thank you. Mr. Chairman, members of the subcommittee, my name is Brian Lane. Thank you for inviting me to testify on behalf of the Securities and Exchange Commission concerning H.R. 3310. As director of the Commission's Division of Corporation Finance, I take the staff lead in addressing small business issues. The Commission supports the goal of H.R. 3310 and is always interested in exploring ways to be more sensitive to small businesses. My written testimony details some of the Commission's small business credentials. These are credentials of which we at the SEC are especially proud. It is with this background that I have come to express some concerns and offer what I hope will be viewed as constructive suggestions.

Our primary concern is that automatic or broad approaches to a problem are less likely to be successful than tailored approaches. We have seen this in our own regulations. H.R. 3310 could preclude automatically a Federal agency from fining a small business if they fail to make a required filing or disclosure. The Commission's staff typically seeks to resolve inadvertent or technical first-time violations informally. We believe however, that deliberate or severe violations may warrant penalties without requiring us to prove a threat to public health and safety. This could be done, for example, by recognizing harm to innocent investors or market integrity as being sufficient.

In addition, we are worried that some small entities may abuse the safe harbor we assume was intended for small businesses that are acting in good faith, but ignorant of Federal disclosure requirements, that they could abuse the provision by using non-disclosure or incomplete disclosure to further a fraud. As another example, they could abuse the provision by destroying incriminating records prior to the arrival of our inspectors and claim that they have a safe harbor from fines and another 6 months to create some records.

It is not widely enough appreciated that the Paperwork Reduction Act covers required disclosures by a business to third parties. The proposed safe harbor is especially disturbing when we consider that it would apply to disclosures to customers and even to a broker's submission to stock exchanges with familiar stock quotes that are displayed on ticker tapes and the financial networks on TV. These are areas where absolute integrity and the fiduciary standard must govern. My written testimony has other examples.

In the end, we would urge you to consider four suggestions. One, expand the exception for offenses that threaten public health and safety to include investor protection or market integrity. Two, limit the safe harbor only to those small entities that are acting in good faith. Three, exclude from the safe harbor owners or operators that are repeat offenders. Just because a person can incorporate a new small entity overnight should not give the firm or its principal another bite at a one bite safe harbor. And four, the definition of small business should conform with the agency's definition adopted for purposes of regulatory flexibility.

In addition, should you be interested in considering further ways to assist small business under the auspices of the Paperwork Reduction Act, I have two suggestions. First, Congress has spoken clearly that it wants Federal agencies to apply a careful cost-benefit analysis to each of its regulatory initiatives. This benefits small businesses because costs are sometimes more heavily born by the very entities that can least afford it. The problem, which is with the statute rather than with OMB, is that the Paperwork Reduction Act makes it difficult to gather cost data from more than nine sources. To do so requires us to file papers and seek the approval of OMB.

Regardless of how flexible OMB is, we still have to jump another hurdle. This only encourages Federal agencies to rely on fewer anecdotal sources rather than seek broader feedback through use of a voluntary questionnaire, for example. I would suggest an exemption from the Paperwork Reduction Act to permit Federal agencies to solicit the views of persons as part of its cost-benefit analysis whenever it is conducting a proposed regulation.

The second suggestion—and again, that would only be for voluntary information about the costs of a proposed regulation. The second suggestion relates to the ironic situation where the Paperwork Reduction Act operates to slow down our attempts to reduce paperwork. If an agency wants to create a new form, for example, it must justify this new burden by preparing documents and projections to be submitted to the OMB for approval. Curiously, if an agency wants to eliminate a form that is no longer needed, or wants to streamline a disclosure requirement, it too must prepare the same type of documentation and seek OMB approval to comply with the act.

It would seem to me that you might want to encourage agencies to reduce burdens by exempting them from the scope of the act when they do so. Although the OMB approval process can be quick, it seems odd that an act entitled the Paperwork Reduction Act would impose a special paperwork requirement to reduce or eliminate a paperwork requirement.

The Commission would be happy to work with the subcommittee to address any concerns or suggestions contained in my testimony today. I'll conclude now and look forward to any questions you might have. Thank you.

[The prepared statement of Mr. Lane follows:]

Mr. Chairman, Members of the Subcommittee:

My name is Brian Lane. I am the director of the Division of Corporation Finance of the Securities and Exchange Commission ("SEC" or "Commission"). The Division of Corporation Finance, through its Small Business Office, is at the forefront of the Commission's efforts to promote small business capital formation. I am very pleased to have the opportunity today to testify on behalf of the Commission concerning H.R. 3310, the "Small Business Paperwork Reduction Act of 1998."

We support the goals of H.R. 3310 -- to limit the burdens that federal regulation imposes on small businesses. It is important that good faith, or inadvertent, first-time violations not be the basis for routine fines. The Commission is extremely sensitive to the needs of small business and is engaged in ongoing efforts to respond to small business concerns. Moreover, our examination program is geared towards resolving informally compliance problems that are technical, inadvertent, or do not threaten significant harm to investors or the markets. Thus, the theme and goals of H.R. 3310 strike a resonant chord with the Commission.

However, we are concerned that the broad sweep of H.R. 3310's penalty exception, as currently drafted, could inadvertently protect intentional or serious misconduct that would harm investors.

In our view, the bill could be improved by:

- expanding the existing exception for "public health and safety" to include fines for violations that involve investor protection or the integrity of the securities markets; and

- narrowing the penalty exception to apply only to "good faith" violations. This would permit fines (i) when the conduct involves fraud, intentional wrongdoing, or destruction of records, and (ii) when the owner or principal of the small business is a repeat offender.

THE COMMISSION'S SMALL BUSINESS INITIATIVES

Before commenting more fully on the specifics of H.R. 3310, I would like to describe the Commission's longstanding efforts to assist small business. The Commission understands the importance of small business to the U.S. economy, and is committed to addressing the special concerns of small business. Over the years, the SEC has worked to improve communications between the SEC and the small business community.

In its first Annual Report, in 1935, the Commission stated that it would provide informal guidance to the securities industry, both to foster improved compliance and to establish a spirit of cooperation with the public.[1] This spirit continues to play an important role in the Commission's programs. The SEC works in partnership with industry, self-regulatory organizations and the public to set standards that protect investor and market confidence while reflecting sensitivity to the realities of the business world.

- SEC Web Site: The Commission operates a web site with special pages targeted to small businesses. These pages provide access to proposed new regulations affecting small businesses, as well as information about specific issues of current interest.

- Public Inquiries: Each major office of the Commission has staff who are available to answer questions from members of the public, including small businesses, by telephone and e-mail.

Notably, because of programs like these, when the Small Business Regulatory Enforcement Fairness Act ("SBREFA")[2] was passed, Congress recognized the Commission as one of several agencies which "already have established successful programs to provide compliance assistance."[3]

REVIEWING EXISTING AND PROPOSED RULES FOR WAYS TO REDUCE BURDENS ON SMALL BUSINESSES.

- Plain English: Nothing is more frustrating than trying to comply with regulations that are difficult to understand because they are written in jargon or legalese. The Commission has made efforts to issue regulations and releases in "plain English" and has required registrants to use plain English in certain of their disclosures to investors. At the end of the day, plain English disclosure is shorter and less expensive and should be particularly helpful for small businesses.

- Small Business Initiatives: Beginning in 1992, the SEC launched a major regulatory initiative to make raising capital easier for small businesses. Rule changes arising out of this initiative simplified the process for registering securities of small business issuers for public sale; increased the dollar threshold for exemptions permitting unregistered public and private sales of securities; and simplified ongoing periodic reporting requirements of registered small issuers.

In 1996 Congress enacted SBREFA, which required agencies to publish small business compliance guides, to establish programs of informal guidance for small businesses, and to establish policies or programs to reduce or waive penalties for small entities. The Commission has undertaken these steps, and will soon report to Congress about its experience with these initiatives.

At the end of 1997, the National Ombudsman appointed under SBREFA singled out the SEC as one of a group of agencies which "deserve special commendation, as they are clearly moving toward a more cooperative regulatory environment for their small business customers." He stated in his 1997 Report to Congress on Regulatory Fairness that the Commission "deserve[s] high marks."[4]

LIMITING ENFORCEMENT ACTIONS TO THE MOST SERIOUS VIOLATIONS.

The Commission's examination and inspection staff attempts to exercise its discretion to resolve compliance problems informally, without enforcement action, when

deficiencies are technical, inadvertent or do not threaten significant harm to investors, markets or the public.

When SEC examiners identify deficiencies, they generally provide the registrant with a "deficiency letter" identifying the problems and requiring appropriate remedial steps. In instances where examiners identify compliance failures that appear numerous, more serious in nature, or systemic, but do not appear to warrant enforcement action, they may also hold a conference call or an in-person meeting with the registrant to discuss the problems and the remedial steps the registrant intends to take. Most SEC examinations are resolved through the deficiency letter process.[5]

When the registrant's compliance failures appear too serious for informal resolution, such as when fraud is discovered or when investor funds or securities are at risk, the examination staff will refer the matter to the Division of Enforcement.[6]

In addition, when the Division of Enforcement intends to recommend enforcement action, it is Commission policy generally to provide notice to the proposed respondents,[7] and to afford them an opportunity to present their side of the matter.[8] This process ensures that respondents have an opportunity to directly inform the Commission, which authorizes all enforcement matters, when they believe that a violation was inadvertent and that formal enforcement action is not warranted.

THE SEC'S INVESTOR PROTECTION AND MARKET REGULATION MANDATE

While the Commission has sought to address the needs of small businesses, our commitment to limiting burdensome regulation or unnecessary paperwork must be viewed in the context of the overall size and complexity of the securities markets and the goals of the federal securities laws.

The United States' securities markets involve securities and trades worth trillions of dollars. Thousands of businesses look to the capital markets for the funds needed to grow and to compete in a global economy. Millions of Americans invest in these markets in their own accounts, through mutual funds, or through employee pension funds and retirement accounts. These millions of investors and their families count on their investments to pay for education, to save for retirement or, for those already retired, to meet current expenses.

The federal securities laws mandate the protection of investors and the maintenance of fair, efficient and competitive securities markets. In enacting the federal securities laws, Congress rejected a scheme of direct federal regulation in favor of a system that provides information to investors and gives them the opportunity to make informed choices. The SEC implements that mandate and protects investors and markets by requiring full, fair and truthful disclosure of material information to investors. Companies that sell stock or other securities to the public are generally required to disclose information about their businesses as well as ongoing information about their results. Similarly, market professionals -- brokers, dealers, mutual funds, other

investment companies, investment advisers, and transfer agents -- are required to make truthful disclosures to clients or other market participants about their activities. They are also required to keep records necessary to account for client funds and their own activities in the market.

The Commission carefully weighs the impact of its rules on all entities, including small businesses. However, the Commission's primary considerations as to the adoption and enforcement of each rule must be the effects of the rule on investor protection and market integrity. As a general matter, uniform rules must be applied to firms that are part of a larger national market system to ensure fair, efficient markets and the same level of protection for all investors, regardless of the size of the firm to which they entrust their funds.

ANALYSIS OF H.R. 3310

As noted above, the Commission supports the goals of H.R. 3310, which are to reduce paperwork burdens on small business and to provide relief for inadvertent first-time paperwork violations. To summarize, H.R. 3310 has four central requirements with respect to collection of information by agencies. It would limit an agency's ability to enforce existing information collection requirements through the use of civil fines.[9] It would require agencies to publish annually a list of requirements applicable to small business concerns.[10] It would require each agency to establish one point of contact as a liaison to small business concerns.[11] And it would create a task force to study and report to Congress about ways to lessen paperwork burdens on small businesses.[12]

The Commission's main concern with H.R. 3310 is its provision to limit an agency's ability to impose civil fines. The language of the bill is so broad as to sweep within its "safe harbor" serious or deliberate violations that could harm investors or the securities markets. The bill would be strengthened in our view by amendments that distinguish between minor violations and those recordkeeping violations of a more serious nature -- which could harm investors or the markets more generally. We discuss this point in greater detail below.

LIMITATIONS ON CIVIL FINES FOR FIRST-TIME VIOLATORS.

H.R. 3310 would generally prohibit civil fines on a small business "in any case of a first-time violation regarding collection of information by the agency" if the small business corrects the violation within six months of notice by the agency. A fine could be imposed only if the head of the agency determines that the violation has caused actual serious harm to the public health or safety.

Although the Commission generally seeks to resolve technical recordkeeping violations informally (regardless of the size of the company), we believe there may be instances where no disclosure or partial disclosure was intentionally done to advance a fraud. The Commission would like the flexibility to continue to seek fines in egregious cases, and we fear that a "public health or safety" standard would be construed so narrowly as to exclude economic harm. Also, the six-month "grace period" could be too long in a marketplace that depends on immediate, accurate information. Finally, repeat violators (who relocate to open new firms) may abuse the first-time exception from penalties. Thus, this provision is troubling for a number of reasons.

(1) There are first-time recordkeeping violations which are serious, and should be subject to fines. As currently drafted, H.R. 3310 does not sufficiently distinguish inadvertent or trivial violations that should not be sanctioned with fines from more serious violations.

Under the Paperwork Reduction Act ("PRA"),[13] the term "collection of information" is defined to include not only recordkeeping and reporting requirements imposed on a business by a government agency, but also any disclosures that an agency requires a business to make to third parties, such as clients or prospective clients.[14] Thus, the reach of the PRA includes information provided to investors to protect them from fraud, as well as enable them to make informed investment choices. For example, a company's prospectus, annual reports, and customer confirmations of securities transactions are all "collections of information" under the PRA. Similarly, other important "collections of information" include items such as broker stock quotations -- which are required to be transmitted accurately and rapidly to make the markets work properly and fairly.

Under H.R. 3310, violations involving these important documents are exempted from civil fines as well as those more trivial "paperwork" violations that may be imposed for more bureaucratic purposes. Here are examples of some of the "important" SEC paperwork requirements that would be subject to penalty exemption under H.R. 3310.

- The Commission's penny stock rules, which were mandated by Congress, provide investor protections through both recordkeeping and disclosure requirements. These rules require that certain disclosures be given, and

that customers agree to certain types of transactions, before the transactions are effected. Violations of this type of rule harm investors by denying them information necessary to make an informed decision, and in many cases, lead to the purchase of disastrous investments in speculative issues.

- Another example is in the reporting of a public company's earnings. Virtually every accounting fraud by a public company involves a violation of the requirement to accurately keep the company's books and records. Protection for companies that make inadvertent or innocent mistakes is already built into the law by the requirement that violations be material.

- Another type of serious recordkeeping violations involves the deliberate falsification of records and record destruction. These kinds of violations can mask serious fraud. For example, the Commission recently sued eight floor brokers of the New York Stock Exchange for conducting what the Exchange's chairman has described as a "massive falsification of books and records" to conceal illegal trading for their own accounts.[15] The Commission believes that cases involving this type of illegal conduct should not be trivialized or treated with leniency. Often we find that misleading disclosure is used to draw investors into a fraud, and false recordkeeping conceals it from regulators long enough for wrongdoers to profit at the expense of innocent investors.

- Concerning a more time-sensitive matter, the Commission currently is engaging in a serious Year 2000 initiative which, in part, would require

certain issuers and market participants to disclose material deficiencies in their systems' Year 2000 readiness. Any six-month grace period would not seem appropriate for failure to make such disclosures.

The Commission believes that fines are an important enforcement tool. The threat of civil fines deters unlawful conduct by removing economic incentives to cut corners in recordkeeping or compliance. Congress recognized the importance of civil fines to upholding the federal securities laws when, in 1990, it gave the Commission new authority to assess penalties in administrative proceedings against regulated brokers, investment advisers and other regulated persons.[16] Congress also gave the Commission authority to seek civil penalties in court actions against any violator, whether or not registered with the Commission.

Notably, Congress created three tiers of possible Commission fines, which link the amount of fines that can be imposed to the type of violations found and the degree of harm caused or the wrongful gain obtained. Thus, the securities regulatory scheme already provides for a penalty scheme that distinguishes more serious violations from those that are less important. A case by case approach has many benefits over a flat prohibition against civil penalties for first-time violators.

(2) The six-month provision may become an excuse for delay in correcting mistakes. The securities markets rely on immediate, accurate information that moves at the speed of light. As described above, the Commission has an active inspections program. When violations are discovered, the staff works with registrants to resolve

recordkeeping violations with informal action. In most cases, however, violations should and can be remedied in 30 days or less.

The proposed amendments may inadvertently be subject to the interpretation that Congress created a presumption that wrongdoers have a six-month safe harbor to correct even the most serious mistakes. An individual investor may choose not to balance their checkbook each month. It is unacceptable, however, to think that a broker could ignore customer confirmation and other recordkeeping requirements, lose customer funds, and be allowed up to six months to correct its records and provide customers with relief.

(3) An exception for all first-time violators may be unintentionally broad. The grace period for first-time violators allows an unscrupulous operator to regain protection from civil fines each time he establishes a new entity. In our experience, when the SEC moves to shut down a broker-dealer engaged in manipulating penny stocks, the rogue brokers and scam artists from the firm named in our enforcement action will quickly form a new firm and start up operations again. Under H.R. 3310, the new firm would have another "free pass" for a first-time violation.

A related difficulty under the proposed amendments will be determining when there has been notice of a "first-time" violation that triggers the grace period. As described, the Commission has a vigorous inspections program and a longstanding policy of leaving to the staff to informally resolve minor, technical or inadvertent deficiencies. The success of this program lies in large measure with the understanding that continued inattention to the requirements of the securities laws could result in formal action. In the event that informal resolution does not cure a problem, violators should not automatically

have the benefit of a safe harbor. The bill does not address whether a "first-time" violation is established simply by agency notice, or whether there must be any additional process.

SUGGESTIONS FOR IMPROVEMENT.

Generally, the Commission believes that the concept of an automatic exemption from civil fines for first-time violators is not as effective as one tailored to prevent abuses. Whether such a provision should be included in the PRA may best be made a subject for study and consideration by the Task Force also proposed in H.R. 3310. If the provision is given detailed consideration, we suggest the following:

- The exception that permits fines for violations that are found to pose an imminent and substantial danger to the public health or safety should be expanded to include violations that involve investor protection or the integrity of the securities markets.

- The penalty exception should be limited to "good faith" violations. This would permit fines for violations (i) when the conduct involves fraud, intentional wrongdoing, or destruction of records, and (ii) when the owner or principal of the small business is a repeat offender.

- As a more technical point, we suggest that the bill's definition of "small business" conform to the definition of "small business" that is currently in the Regulatory Flexibility Act and used now by all federal agencies.

TASK FORCE TO STUDY STREAMLINING OF PAPERWORK REQUIREMENTS.

The Commission also would like to take this opportunity to comment on the proposed task force to study the PRA. The Commission agrees that a task force should be established for the purposes of studying the PRA, but believes that its mandate should be broader, and should include problems with the existing statute. In addition, provisions should be made for input by agencies such as the SEC.

Although the SEC has complied with the mandates of the PRA -- we have found it, in some situations, to be a roadblock to informed regulation, or even efforts to reduce regulatory burdens. For example, the PRA keeps us from informally surveying securities market participants regarding how our rules are working. To talk to more than nine firms, we must obtain OMB approval, a bureaucratic process that can constrain complete and timely discussion of regulatory issues. Similarly, we cannot even survey firms for cost-benefit analysis of proposed rules without going through an OMB clearance process. Even when a member of Congress asks us to study a proposal -- such as disclosure of charitable giving by public companies -- we have been constrained by the PRA in collecting information necessary to complete the inquiry.

Finally, we would like to suggest that the PRA be amended to reduce the OMB paperwork clearance process when forms are being eliminated or streamlined.

We would like issues such as these to be considered in any PRA study.

CONCLUSION

The SEC supports this Subcommittee's efforts to reduce paperwork burdens on small business. The securities laws mandate full and fair disclosure to investors and the public. Efforts to streamline paperwork burdens must distinguish with care between "collection of information" requirements that exist to verify regulatory compliance, but do not directly reach the public, and those requirements that involve direct communication by a business with the public or with other market participants. Great care must also be shown in distinguishing immaterial, inadvertent or technical mistakes from the deliberate falsification or destruction of records.

The nation's capital markets are a crown jewel. We must be cautious not to adopt changes that appear to weaken the integrity of those markets or diminish investor confidence in the safety of investing with or through any firm, whether large or small. The Commission has concerns that the "broad brush" approach of the proposed amendments will inadvertently diminish investor protection.

If small firms are to flourish, investors need to have confidence in the honesty of the firms. Small businesses have earned the confidence of investors, large and small. We must not let this confidence be eroded by appearing to tolerate intentional violations by small business.

The Commission looks forward to an opportunity to work further with the Committee on these important issues. The Commission staff is available to consult with

the Committee regarding alternatives that will protect investors and the securities markets.

ENDNOTES

1. SEC, 1 Annual Report 9-10 (1935).

2. Pub. L. No. 104-122, title II, 110 Stat. 857 to 874 (Mar. 29, 1996), codified at 15 U.S.C. § 657, 5 U.S.C. §§ 801-808.

3. "Small Business Regulatory Enforcement Act -- Joint Managers' Statement of Legislative History and Congressional Intent," 142 Cong. Rec. S3234, S3243 (daily ed. Mar. 29, 1996).

4. National Ombudsman, Report to Congress: Regulatory Fairness at 24 (December 31, 1997). See also id. at 5, 26, 34.

5. In 1997, the Commission staff conducted approximately 2300 examinations. Approximately 64% of investment adviser, 80% of investment company, and 47% of broker-dealer examinations were concluded by issuing a deficiency letter.

6. In 1997, approximately 5% of investment adviser, 7% of investment company, and 28% of broker-dealer examinations resulted in a referral to Enforcement.

7. "Respondent" is used generically in this testimony to refer either to respondents in an administrative proceeding or defendants in a civil court action.

8. See 17 C.F.R. § 203.7(d) (Wells submissions). Notice is not given, for example, when emergency relief is sought, or if warning to a proposed respondent could harm investors or the public through the dissipation of assets, destruction of records, flight or other such action.

9. Sec. 2(b) [(i)(1)(B)].

10. Sec. 2(a)(6).

11. Sec. 2(b) [(i)(1)(A)].

12. Sec. 3.

13. Codified at 44 U.S.C. §§ 3501-3520.

14. 44 U.S.C. § 3502(3).

15. See Dean Starkman and Patrick McGeehan, "Floor Brokers on Big Board Charged in Scheme," Wall Street Journal, Feb. 26, 1998, at C1.

The Commission's complaint alleges that the floor brokers concealed their personal trading by creating false order tickets and false monthly invoices, which showed that the trades were executed for a co-conspirator client broker. The Commission charged the floor brokers with violating the recordkeeping requirements of the Securities Exchange Act and its implementing regulations. The Commission alleges that, through this scheme, the floor brokers made almost $9 million in illegal profits. See Complaint of the Securities and Exchange Commission, SEC v. Oakford Corp. (S.D.N.Y.) (98 Civ. 1366).

This scheme, if proven, will be a first violation for all of the floor brokers charged. Three of the eight floor brokers involved in the scheme qualify as "small businesses" under definitions applicable to the SEC under the Regulatory Flexibility Act. If H.R. 3310 had been the law at the time, the Commission could have been forced to seek lesser penalties against the smaller floor brokers, although they were just as culpable as the other defendants.

16. Securities Enforcement and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, 104 Stat. 931 (Oct. 15, 1990), codified at 15 U.S.C. §§ 78u-2, 78u-3, 78q-2.

Mr. MCINTOSH. Thank you, Mr. Lane. Thank you in particular for those last two constructive suggestions. We will be contacting you on those as the bill moves forward in the process because they both sound intriguing and interesting.

Our final witness is Mr. Eisner.

Mr. EISNER. Thank you, Mr. Chairman. Mr. Chairman and members of the subcommittee, I am the assistant general counsel for regulation and enforcement at the Department of Transportation. I appreciate the opportunity to be here today to testify about this important bill.

The Department handles a broad range of matters that includes safety and the environment. We are quite proud of the excellent record of the industries that we regulate, but we are also constantly aware of the extraordinary risks faced in transportation industries that annually move millions of people, many tons of hazardous material, and millions of gallons of oil. At the same time, we are also always aware of the burdens that our rules can impose.

With this in mind, there are three main points that I want to make today. First, and this is very important, to the extent permitted by law when no harm has been done, it is the Department's existing policy to reduce or waive civil penalties for small business first-time violators for any violation, not just paperwork when they have acted in good faith and have quickly moved to correct the problem.

Second, although we also make a concerted effort to reduce—we are making a concerted effort to reduce paperwork burdens imposed on our regulated entities, recordkeeping and reporting requirements are an extremely effective method of encouraging compliance with our regulations.

Third, the provisions in H.R. 3310 prohibiting fines could seriously hamper our ability to carry out our responsibilities. Since we are already committed to helping those who make a good faith effort, the primary beneficiaries of the bill would be those whose violations are intentional or reckless. Indeed, it may create an incentive to not comply until caught.

Let me expand on these three points. First as I noted, it is our policy to waive or reduce civil penalties for first-time good faith violators. Both the President in his 1995 directive to the agencies and the Congress through the enactment of the Small Business Regulatory Enforcement Fairness Act, have shown support for this approach. But most importantly, they have both emphasized good faith efforts and they permit us to exclude from the coverage of the exception willful or criminal conduct.

Although we believe that intention or careless disregard of our requirements is rare, we believe that most of our regulated entities try to comply, when it does occur, it should not be ignored. Such action may delay the identification of important safety or environmental problems. It may prevent us from gathering information about a serious violation. It may cause other problems.

Let me give you some examples of our concerns with the mandate to waive first-time violations by small businesses. Let me stress that we believe that these are examples where there is no harm and where there would be no imminent or substantial danger evident. First, many of our agencies require transportation opera-

tors to report certain accidents to us. If a company fails to notify us immediately, accident investigation may be lost or destroyed. There may be significant incentives to delay notification since it may help cover up company negligence. Shipping papers are required to accompany all transportation of hazardous materials. They tell the carrier or any emergency responders, such as a fire department, what they need to know to handle the shipment for any emergency. There may not be imminent danger, but we don't know sometimes if the papers are not there. If they are missing, they are deficient, emergency personnel may have to be called unnecessarily or may waste time and resources trying to figure out how to handle the situation. Yet if there is no actual harm, no fine could be imposed for a first-time violation.

DOT requires drug testing of transportation industry employees in accordance with a statutory mandate. If someone involved in the drug testing process delays or deficiently reports the results of positive drug tests, it will delay the removal of employees from safety sensitive functions. We don't know whether there is a problem until we actually see the report.

In response to a statutory mandate, the Department has required passenger manifests for virtually all airline flights into and out of the United States to enhance the notification of families of victims if any accident occurs. The legislation was intended to shorten the notification time from 2 to 3 days to only a few hours. Yet H.R. 3310 would appear to waive any penalties and essentially give the airline at least another 24 hours after we notify it of the violation, essentially negating the purpose of the legislation. Since airline accidents are rare, the first-time waiver could cover many years of recordkeeping requirements for a carrier that wanted to save money.

Devices such as cockpit voice records and flight data recorders are subject to the Paperwork Reduction Act. Under H.R. 3310, it would appear that an aircraft operator could defer maintenance of these devices until such time as we uncovered the failure to fix them. If that were after an accident, fixing them within 24 hours would be useless.

We recognize that even the threat of fines will not stop some who are determined to violate regulations. We should not, however, create additional incentives for non-compliance. Although our main concerns are with the waiver of fine provisions, the other provisions of the bill raise several questions. We think they have good purpose and we would love to work with the committee to address some of those concerns, but we can even live with them as they are written. I have covered them in more detail in my written statement.

In conclusion, I want to note that we believe we are making a conscientious effort to address the concerns of small businesses. We do not believe that H.R. 3310 is necessary. In some ways, it could be harmful. But if the subcommittee decides to pursue this legislation, we would be pleased to work with you to help you make this into a more effective bill. Thank you for the opportunity to express our views on this important subject. I would be pleased to answer any of your questions at this time.

[The prepared statement of Mr. Eisner follows:]

Statement of Neil R. Eisner

Assistant General Counsel for Regulation and Enforcement

of the Department of Transportation

Before the

Subcommittee on National Economic Growth, Natural Resources and Regulatory

Affairs of the Committee on Government Reform and Oversight of the

United States House of Representatives

Friday, March 13, 1998

My name is Neil R. Eisner, and I am the Assistant General Counsel for Regulation and Enforcement of the Department of Transportation (DOT). I am pleased to have the opportunity to testify today about H. R. 3310, the "Small Business Paperwork Reduction Act Amendments of 1998." With respect to small-business concerns, the bill would require that civil fines not be imposed on them for first-time violations of agency information collection requirements under certain circumstances; it would establish a task force to study streamlining information collection requirements for them; it would require an annual publication of a list of paperwork requirements applicable to them; and it would establish one point of contact to act as liaison between them and the agency concerning the collection of information and the control of paperwork. While we support the general objectives of the bill, we have serious concerns about its effect.

Background

Before I get into the substance of the bill, I believe that it would be valuable to provide some brief background about the Department of Transportation. DOT has, by some measures, the largest rulemaking responsibility in the federal government. Our nine

operating administrations, our Bureau of Transportation Statistics, and the Office of the Secretary are responsible for a broad range of matters that include safety, security, and the environment. We are quite proud of the excellent safety record of the industries that we regulate, but we are also constantly aware of the extraordinary risks faced in industries that annually transport millions of people, tons of hazardous material, and millions of gallons of oil. We are also aware of our responsibility for ensuring that the billions of dollars that we provide in financial assistance is used in accordance with statutory objectives and mandates. At the same time, we are also aware of the burdens our rules can impose, and in all our rulemakings we consider the costs and the benefits and determine whether those benefits justify the costs.

Overview

With this in mind, there are three main points that I want to make concerning H. R. 3310.

- First, to the extent permitted by law, when no harm has been done, the Department's existing policy is to waive or reduce civil penalties for small-business, first-time violators – for any violation, not just paperwork – who have acted in good faith and who move quickly to correct the problem. We are also making a concerted effort to reduce paperwork burdens imposed on our regulated entities.

- Second, recordkeeping and reporting requirements are an extremely effective method of encouraging compliance with regulations in general, especially safety and environmental regulations. We prefer to assume that everyone will want to comply, but the paperwork helps us identify those who are making unintentional mistakes and work with them to fix the problem; and realistically, we also recognize that some will

not comply unless forced to, and the paperwork also helps us to identify those businesses, hopefully before they do harm.

• Third, the provisions of H. R. 3310 prohibiting the imposition of fines could seriously hamper our ability to ensure safety, protect the environment, and carry out our other statutory responsibilities. Since we already are committed to helping first-time violators who make a good faith effort to comply, the primary beneficiaries of the bill would be those who do not act in good faith, those who intentionally or carelessly and recklessly violate the regulations. Indeed, it may create an incentive to not comply until caught, which would be especially troubling in competitive industries where others may feel that they, too, then have to take advantage of the bill's provisions. Again, let me stress that we believe the large majority of our regulated entities want to comply with our rules, but we and they recognize that there are many who do not. Moreover, other regulated entities, including small businesses, may be hurt by those who fail to comply. Although our main concerns are with the waiver of fines provisions, the other provisions of the bill raise several questions.

Let me expand on these three points:

Good Faith, First-Time Violators

We have long been concerned with the effects of our regulations on small entities. We take very seriously our responsibilities under the Regulatory Flexibility Act and the Paperwork Reduction Act. We believe that we have done a very good job implementing their requirements. Indeed, we often exceed those requirements. For example, the Department requires a written economic analysis for all of its proposed and final rulemakings, even if not required by the Regulatory Flexibility Act or an

executive order. We also stress compliance rather than penalties. We would rather encourage compliance than detect and penalize a violator. For example, when we issued drug and alcohol testing requirements a number of years ago, we held a series of conferences around the country to help businesses learn how to comply with our regulations. At these conferences, we stressed that we were not looking to catch people in violation of our rules. We said that, if we found violations the first time we checked on a company but thought that they were making a good faith effort to comply, we would not fine them but would help them correct the problem.

President Clinton has emphasized his support for this approach. In a memorandum dated April 21, 1995, the President directed agencies to use their enforcement discretion to waive all or part of a penalty on a small business when the problem can be corrected within an appropriate time period or the amount waived is used to bring the small business into compliance. For the waiver to apply, there has to be a good faith effort to comply and the violation cannot involve criminal wrongdoing or a significant threat to health, safety, or the environment. The Department of Transportation continues to believe that this represents the best approach.

As you know, in 1996 Congress enacted the Small Business Regulatory Enforcement Fairness Act (SBREFA), which required a similar program for the reduction or waiver of civil penalties for statutory or regulatory violations by small entities. The statute authorized agencies to establish conditions or exclusions for the program and provided a list that the agency could include; the list contained valuable guidance on Congressional intent, such as requiring a good faith effort to comply and excluding violations that involve willful or criminal conduct.

We believe that we are in full compliance with the President's directive and SBREFA. Moreover, to the extent you may believe that there are some agencies that may not take their responsibilities seriously, I would note that SBREFA also creates an ombudsman, who has responsibilities for encouraging appropriate agency responses and for reporting to Congress on agency responses. Thus, Congress has mechanisms that would allow it to take action directly aimed at problems. We also have mechanisms within DOT to facilitate our response to these directives. For example, a small entity just contacted our Office of Small and Disadvantaged Business Utilization about what it apparently perceived to be an unfair enforcement action against them; we immediately began an investigation into the matter.

One example that I believe illustrates how, in practice, we implement both our policy and the Clinton and SBREFA directives involves a routine compliance inspection conducted by our Research and Special Programs Administration (RSPA). During the inspection, RSPA discovered violations of its hazardous materials regulations, including violations of recordkeeping requirements concerning training. During consultations, the company provided evidence of corrective action for some of the violations; convinced the agency that there was legitimate confusion over another violation and that, therefore, the violation was not committed "knowingly"; and produced records that were not provided to RSPA at the initial inspection. Based on this, RSPA decided to waive any civil penalties for these violations and for the training violation for which the agency believed it had sufficient evidence.

Paperwork Requirements Are Important Tools

We recognize that paperwork requirements can impose a significant burden, especially on small entities. But paperwork requirements are also a valuable and effective tool for

helping to ensure compliance. When records indicate compliance problems, we can work with the company to fix the problem. When there is an unwillingness to comply, we can take necessary action. The government's resources are limited, however, and when records are deficient or lacking, it takes additional government resources to identify problems. For example, in the RSPA enforcement action I mentioned earlier, the agency had to spend considerable additional resources because records were missing at the time of the initial inspection. Because of the company's overall compliance disposition, the agency was willing to waive its penalty. If the violation is intentional or results from an extremely careless disregard for safety, it is not clear to us why the agency should waive fines; not only must the agency incur additional expense reviewing the records after the correction is made, but the evidence of intentional or careless disregard should not be ignored when we are dealing with such things as the transportation of passengers or the carriage of hazardous materials. More importantly, deficient or missing records may delay the identification of an important safety or environmental problem or it may prevent us from gathering information about a serious violation. Or it may delay notification of third parties -- some of whom may be small businesses -- of such things as defective parts in their aircraft or other mode of transportation. Specific examples of these problems can be seen from our description of our concerns with H. R. 3310.

Concerns With the Waiver of Fines Provisions

We have had a limited time to review the provisions of H. R. 3310 with Departmental personnel who are responsible for enforcing our regulations, many of whom are in regional offices. Our quick review has, however, identified a number of potential concerns. For example:

• Transportation operators in the various modes of transportation are required to report certain accidents to us. This reporting requirement may serve various purposes. For example, if the company fails to immediately notify us, data important to any accident investigation may be lost or destroyed. Since the failure to report would not appear to have caused "actual serious harm to the public health or safety," we could not fine a company if it subsequently notifies us after we advise them of their violation. There may be significant incentives to delay notification if it may help cover up company negligence.

• The Federal Highway Administration (FHWA) regulates over 400,000 companies. If first-time violations are waived, some may find little incentive to keep any records because their chances of being audited are rare. If they do get audited, some may only then correct the violation; but it may be worth it to others to simply go out of business and open up under a new name. Then, the next violation, by the new corporation, would arguably be yet another first-time violation.

• Shipping papers are required to accompany all transportation of hazardous materials. They alert the carrier and any emergency responder (e.g., a fire department) about what the materials are so that they know how to handle the shipment and any emergency. If the papers are missing or deficient, and since the shipper would have 24 hours to correct the problem and goods are generally shipped within that time frame, emergency personnel may have to be called unnecessarily or may waste time and resources figuring out what to do if there is some problem or concern raised with the materials. Yet, if there is no actual harm, no fine can be imposed on the shipper for the violation, even if intentional or careless and reckless.

• DOT requires drug testing of safety-sensitive employees in the various modes of transportation. If some entity involved in the drug testing process delays or deficiently reports the results of drug tests, it will delay the removal of employees from performing important safety functions. Again, we could impose no fines for first-time violations, even if the violation was intentional or careless and reckless.

• If a repair station fails to keep the necessary records showing that a required repair has been made to an aircraft, the Federal Aviation Administration generally will have to ground the aircraft for up to five days or longer, until it can be shown that the aircraft was correctly repaired. Grounding an aircraft could be extremely expensive for the airline as well as being disruptive for any passengers who had reservations on the flight for which that aircraft was to be used. Although the repair station may suffer contractually, we could not fine it for a first-time violation.

• Congress has enacted legislation -- and DOT has issued implementing regulations -- requiring passenger manifests for virtually all airline flights into and out of the U.S. to enhance the notification of families of victims if an accident occurs. The legislation was intended to shorten the notification time from two or three days to a few hours. Yet H. R. 3310 would appear to waive any penalties and essentially give the airline at least another 24 hours after we notify it of the violation, essentially negating the purpose of the legislation. Since, based on past experience, there are few covered accidents, the first-time waiver could cover many years of recordkeeping requirements for a carrier that wanted to save money. Moreover, if the carrier did not properly collect the passenger manifest information before the accident, it will be difficult if not impossible to get the information afterwards, defeating the purpose of the legislation.

• Devices such as cockpit voice recorders and flight data recorders are subject to the Paperwork Reduction Act. Under H. R. 3310, it would appear that an aircraft operator could refuse to install these devices (or to maintain them properly) until such time as we uncovered their absence. If that were after an accident, putting it in within 24 hours would be useless. Since these are accident investigation tools and their absence would not directly cause harm to safety, it might be argued that we could not fine the operator for failure to have the equipment.

• Coast Guard requires vessels to provide advance notice of arrival in port. This enables Coast Guard to use its limited resources to identify those vessels most in need of inspection. If a business only provides notice 24 hours after Coast Guard notifies if of its failure, generally this will do no good. Although a company can get away with this only once, they may save that one time for a vessel carrying goods they do not want to subject to Coast Guard inspection.

We recognize that, in some instances, even the potential for fines for paperwork violations may not deter noncompliance. We should not, however, create incentives for additional noncompliance by statutorily eliminating fines, especially where the violations may be intentional or careless and reckless.

Other Provisions of H. R. 3310

We do not object to the provisions in H. R. 3310 for publishing an annual list of paperwork requirements imposed on small businesses. However, it is not clear to us that it will provide a benefit worthy of the cost involved in doing so, considering the amount of guidance material we already put out that should make regulated entities

aware of these requirements. To the extent that the executive branch is required to do this, it would be helpful if the Subcommittee made it clear what problem this provision is addressing, so that we specifically could address the publication to those problems.

We would also not have a problem identifying one point of contact for each agency. However, the bill would require one point of contact for the entire Department. We are not sure that this would prove helpful to small businesses because of the very different kinds of businesses that are subject to our requirements. For example, the FAA, alone, regulates such small businesses as air carriers, airports, training schools, maintenance facilities, and security firms. It might make more sense to give us the discretion to set up different contacts for different types of businesses or even in some of our regional offices.

Finally, with respect to the requirement for a task force to study the feasibility for streamlining, let me stress that we are constantly striving to cut paperwork. Our Office of the Chief Information Officer is working with offices throughout DOT to implement the reductions mandated in the Paperwork Reduction Act and the Deputy Secretary is personally involved in these efforts. We do not object if you believe that further study is warranted, but we think that our resources might be better spent on our continuing efforts, and we welcome any suggestions for reductions.

Conclusion

The Department of Transportation is proud of its efforts in the regulatory compliance area, especially with respect to small businesses. We carefully consider the burdens that we impose and the methods we use to achieve compliance. We know that there is always room for improvement, and we strive to keep making progress. We welcome

the opportunity to comment on H. R. 3310. We do not believe that it is necessary and in some regards could be harmful. We believe that we are making a conscientious effort to address the concerns of small businesses. If the Subcommittee decides to continue to pursue additional legislation to address these important concerns, we would be pleased to work with you to help you develop an effective bill.

Thank you for the opportunity to express the Department's views on this important subject. I would be pleased to answer any questions that you may have.

Mr. MCINTOSH. Thank you, Mr. Eisner. We will now go into a questioning period. What I would like to do is just alternate back and forth on questions. I have several. Let me start with you, Mr. Eisner, just because you finished your testimony last.

You indicated that you thought the beneficiaries of this bill would be those people under your agency, those entities that are intentionally trying to avoid the paperwork requirements. Could you name one of the companies that you regulate who you feel is intentionally trying to violate these regulations?

Mr. EISNER. I cannot now name companies here. I can tell you for example, that inspectors have told us that when they have gone through paperwork and they have found violations of regulations and they have said to companies, "Why are you doing this?" The companies have responded they have goods to deliver or whatever. They know they are in violation.

I am not saying that most of our entities want to violate them. Indeed, it is just the opposite. We think most of the entities want to comply.

Mr. MCINTOSH. And you can't name one that you know has a history of intentionally violating these regulations?

Mr. EISNER. I cannot name one. I would not want to name one here. But I am saying——

Mr. MCINTOSH. OK. That's what I thought. That's what we are finding—is that almost no small business wants to violate these regulations. So you are saying that on all the others that you regulate, it won't hinder your ability to enforce these regulations because you have a good faith exception already?

Mr. EISNER. We already have a good faith exception. I am concerned about the ones who are——

Mr. MCINTOSH. Let me ask you a question on the international airlines. You cited an example there. How many international carriers would fit the definition of small business?

Mr. EISNER. I don't know the exact number, but I am told that there are some that would fit that definition.

Mr. MCINTOSH. Could you please submit those to the committee? I'll keep the record open in order to do that.

Let me turn to Ms. Sheketoff?

Ms. SHEKETOFF. Sheketoff.

Mr. MCINTOSH. Sheketoff. I do apologize. I am not very good with—is it a Russian name?

Ms. SHEKETOFF. Yes. It is.

Mr. MCINTOSH. You indicated to us that you had a concern about the workers right to know on hazardous communications. Those are chiefly affected through the material data safety sheets. Is that correct?

Ms. SHEKETOFF. Well the standard for hazard communication is much more broad than that. It requires an employer to make sure that his employees are trained for the process that they are working on, to do that process safely, and that for any hazardous chemical that is in the workplace that a worker could be exposed to, there is information so that the worker knows what he or she must do if exposed to that chemical.

Now manufacturers supply material safety data sheets to employers who use specific chemicals. There are some chemical com-

panies who ship employers just their whole—all of their MSDSs, whether that employer is using all of those or not. But it is——

Mr. MCINTOSH. That's right. But the requirement for the employer to train its employees isn't a paperwork requirement.

Ms. SHEKETOFF. Yes.

Mr. MCINTOSH. So that wouldn't be subject to this bill.

Ms. SHEKETOFF. Yes, sir. It is.

Mr. MCINTOSH. It's a paperwork requirement that you train your employees? I don't think so. I think that's an affirmative mandate to engage in training.

Ms. SHEKETOFF. The program for training includes paperwork requirements. Yes, sir.

Mr. MCINTOSH. What type of paperwork requirements?

Ms. SHEKETOFF. The written program that the training comes from, the written process that is in place for the processes that——

Mr. MCINTOSH. So you are saying that someone could conceivably comply and have a training program without any written materials? No. They would be in violation of not having a sufficient training program, which is not a paperwork violation. See the absurdity of some of this testimony is that when there are serious problems, there is always an underlying offense that's not a paperwork offense that frankly there is no exemption or 6-month time period for.

Let me mention to you a case that came before our subcommittee in one of our field hearings. Mr. Pat Cattin, who is the owner of a restaurant in Tacoma, WA, was fined $1,000 for failing to have a material safety data sheet for hand soap that he had in the laboratory of his restaurant. Now that's precisely the type of paperwork violation and fine, and this is a real case in which OSHA extracted a fine out of this man, that this bill is attempting to eliminate. He would have the opportunity to get that MSDS while the inspector is there—in fact, in this case I think he got a copy of it faxed to him while the person was there—and avoid having the fine.

Ms. SHEKETOFF. Congressman, Washington State as Indiana, is a State-plan State so that Federal OSHA does not have primary jurisdiction. In the 21 State-plan States, the State is the first line of responsibility for enforcing safety and health. As long as those State plans are as protective as the Federal law, the Federal OSHA does not interfere. So no matter what our policy is to our inspectors about when they should or should not cite, the State has their own rules.

Mr. MCINTOSH. So to be effective, we need to apply this provision to the State plans?

Ms. SHEKETOFF. If you can pass regulations that will compel State law, we don't have any place in that.

Mr. MCINTOSH. OK. Thank you. My questioning period is over, although I may have some in addition.

Mr. Tierney.

Mr. TIERNEY. Thank you.

Mr. Onek, in your testimony you indicated that in some instances you thought that the civil penalty provisions in the bill could harm the integrity of the current reporting system and require the Government to conduct more thorough inspections or

greater number of inspections. It sounds to me that the net effect of the provision would actually then increase the burden on small businesses. Is that your reading?

Mr. ONEK. Well, it could well. A lot depends on the definitions that are in this bill as to what is a first-time violation. Is a first-time—I'll give an example. Suppose that a small business has an accident, a minor accident this month in March, and doesn't report it. Then it has another accident in April and doesn't report it. Is that a first-time violation because it's a report about an accident or is that a second violation? If that is regarded as a first-time violation, the second accident, and then the third accident and the fourth accident, several things follow. First, the dangers of the bill are obviously greatly increased because you are giving a waiver from large-scale reporting of accidents or drug adverse incidents or food safety adverse incidents.

But second, under those circumstances, you are giving the Government agency an incentive to go back and check whether the so-called first-time violation, if it's not that, then of course you are giving the incentive of the agency to go back and say now what really was the first violation here, March, April, May and June. So yes, it could lead to more inspections. It could also have the perverse effect in some instances of urging an agency to use criminal penalties instead of civil penalties, which wouldn't benefit small business.

I really do think that this bill not only has unintended consequences negative for the public, it has unintended consequences for small business. For one thing, the definition of first-time violation, as I have said, is not clear. The definition of how you correct the violation is not clear. I really do not understand that at all. I gave some examples in my testimony.

Suppose, for example, I know a lot about drugs and biotech companies, suppose I had a drug company that's supposed to test each batch of drugs before they send them out. Now they don't test it, the drug goes out. They can't correct that. It's gone.

Mr. MCINTOSH. Mr. Tierney, could I—Mr. Onek, I tried to develop with Mr. Eisner this difference that I think is important here. If they failed to test, that is a different violation than failing to keep the paperwork demonstrating that they have done the test.

Mr. ONEK. If they fail to test——

Mr. MCINTOSH. That would be a violation of the regulations that would not be covered by this bill.

Mr. ONEK. Well, if they don't have the records, you don't know if they test. It is the record that is the evidence of the test. That is how I have spent a lot of my time, helping small companies get what is called GMP, good manufacturing practices approval from the FDA. Of course in order to do it, you have to have these paperwork requirements because if there's no paper to show that the test took place, how do you know even a day later that the test took place.

Mr. MCINTOSH. And it's my understanding that they have an affirmative obligation to conduct the tests and that they can't market their products and that FDA can shut them down using injunctive relief.

Mr. ONEK. But how is FDA going to know any of this if it doesn't see the tests?

Mr. MCINTOSH. If they don't keep the records, they can say we are going to shut you down until you do.

Mr. TIERNEY. Assuming that we are having a free for all with the time here, and I don't mind——

Mr. SUNUNU. No. I was going to ask you to yield.

Mr. TIERNEY. But assuming that, and we are all going to be a little loose with the time, I have no problem with yielding.

Mr. SUNUNU. You brought up GMP practices and I think that's somewhat irrelevant. I'll give you a chance to clarify. In GMP practices they specify what kind of regulations, paperwork, training processes, training procedures, cleaning procedures you need for the manufacturer of drugs. This doesn't affect those procedures at all. If you want GMP, you have to abide by those regulations to get GMP. You are either certified or not certified.

In a similar way on an independent basis, people certify you for ISO 9001 or ISO 9002. Either you have the paperwork in place or you don't. Either you get certified or you don't. Those are manufacturing procedures that are in place and will remain in place if anybody wants to be certified by the FDA. That is not what this legislation deals with. Again, I think we need to keep focused on the issue of paperwork violations in cases where they might cause the kinds of problems you describe and failure to do certain things like training or failure to do testing or criminal issues, which I think are very distinct from what this legislation deals with.

Mr. ONEK. Well let me ask a question which perhaps can clarify it. Let's take a very important example of the obligation of drug and device manufacturers to report adverse incidents. Now are you suggesting that if they fail to report, that isn't covered by this bill? I would have thought that that is an example of something which would be regarded as a collection of information and the reporting of information to a third party and that they would get a waiver. To me that is very very dangerous because as you know, many drugs and many devices have been pulled off the market because of adverse incident reports.

Mr. SUNUNU. I would think that situation would clearly fall under the risk to personal safety or public safety category. I would hope that you or whoever the responsible agency is would understand that, would take action under that waiver, and would impose the most severe penalty and appropriate penalty that you possibly could in that case. If you would fail to do so, fail to inform Congress that you were going to do so, or fail to take appropriate action under the 24-hour notification, you would be irresponsible.

Mr. ONEK. But the problem is a company may be encouraged not to report a very minor incident because they say well this isn't imminent harm to the public safety, this hasn't caused any actual harm, and so we won't report it. Then another little thing, say we're not going to report that either. Then a serious accident will occur. Sure, when the serious accident occurs we'll be able to impose a fine, but that wasn't our goal. The goal of the FDA is not to impose fines. The goal of the FDA is to prevent people from being killed. If the company had in my hypothetical, if the company had reported the very minor accident, just like the crib example,

if the company had reported the minor accident, we might have fixed it. Nobody might have been killed. That is the key point. Sure after somebody dies, we can do criminal penalties, we can do civil penalties. But that is not the goal of Federal agencies.

Mr. TIERNEY. I am going to reclaim my time here if I might. John, I'll go back and forth with you.

Mr. SUNUNU. I have plenty of time.

Mr. TIERNEY. One of the things that I want to make sure in that what we're doing here, is we don't create a disincentive to report or reward those people that don't report at the expense of those that diligently do that.

There were several of you that testified that you thought that there were incidents where violation of a paperwork requirement doesn't necessarily cause an accident or oppose a threat of harm, but that it could save lives, that the actual filing of the paperwork is something we should encourage and not give people an incentive to avoid by virtue of the fact that when they get the first violation that's the only time they are going to get fined.

Mr. Onek, you had examples of that. I think Mr. Lane, you talked about fraud and the market, the impacts there. Maybe starting with Mr. Lane, could you tell me a little bit more, expand a little bit more on the types of incidents you envision where the actual non-filing could create a problem that wouldn't fit the threshold that's set forth in the bill?

Mr. LANE. Well, of course the SEC's regulatory system is one built on disclosure as opposed to merit regulation typically. You can sell securities as long as you provide adequate disclosure. If you mis-state something or you omit something that is material, that could be fraud depending on whether you did it intentionally and that sort of thing.

So you could omit to disclose, oh yes by the way the CEO is embezzling money or oh by the way, we're in violation of our loan covenants and the creditors are going to come and seize our factories, so we are going to have to stop producing widgets, that sort of thing, which is all disclosure based. It could be intentionally done to defraud investors. Same with investment advisors or broker dealers, they have to keep customer accounts. You know, they may intentionally destroy records or not maintain records that might show commingling of funds or something that would facilitate investors getting their money.

Mr. TIERNEY. Thank you. Mr. Onek, if I could just address you again on the burden of proof issue here. Your read of the bill as it is currently proposed, does that give you any concern that there's been a shifting of the burden of proof with respect to this type of filing requirement?

Mr. ONEK. Well I think it does. As I think we have set forth in our testimony, one of our concerns is that there is going to be endless litigation about what these provisions mean. What is a first-time violation, the point I just raised. What does it mean to correct a violation, a point I already made. What does it mean to cause actual harm? What is the imminent and substantial danger to the public health? So I think that another way in which this is not really going to benefit businessmen and women is that it's going to lead to litigation, uncertainty, additional litigation costs. It will be

good for my former colleagues in the private bar. I'm not sure that it's going to do much benefit for businesses.

Mr. TIERNEY. Are the folks at the table going to receive a copy of the proposed amendment?

Ms. SHEKETOFF. Yes.

Mr. TIERNEY. Quickly then, before my time expires, can each of you tell me whether or not you think that that clearly addresses what you perceive to be the goal of the original legislation, but still provides some of the safeguards to the concerns that you have raised?

Ms. SHEKETOFF. OSHA took a look at this. We feel that it does answer many of the problems that we saw in the original language.

Mr. TIERNEY. Thank you. Mr. Onek.

Mr. ONEK. We haven't had the full time to review it with all our components, but I would say the same. Yes, that it does appear to address many or most of our concerns.

Mr. TIERNEY. Mr. Lane.

Mr. LANE. I have not had an opportunity to have the actual five commissioners vote on this as such, but it does seem to respond to our testimony. The only one of the four suggestions I just gave you in my testimony was whether we use the definition in the Regulatory Flexibility Act. But otherwise, it seems to be addressing many of the concerns.

Mr. TIERNEY. Mr. Eisner.

Mr. EISNER. Same thing. It addresses our concerns. We have not had a chance obviously to have some of our enforcement personnel look at it, but it would appear to address the concerns they have expressed in the past.

Mr. TIERNEY. Thank you. Thank you, Mr. Chairman.

Mr. MCINTOSH. Thank you, Mr. Tierney. Let me now turn to Mr. Snowbarger. What I would like to do—actually, Henry, if I can ask your advice. How long should I leave for us to go and vote? Five minutes before the vote from this building? Let's try to take one more round of questioning then, and we can head off.

Mr. Snowbarger.

Mr. SNOWBARGER. Let me first followup on Mr. Tierney's question about the amendment. I just had a chance to glance through it quickly. How does this amendment differ from current law and policy other than spelling out in black and white what you I think told us you already do?

Mr. EISNER. From our perspective at the Department of Transportation, it is quite similar to what we are required to do under SBREFA and under the President's directive. There is a lot more in here and I would have to look at it more carefully. For example, the language on consumer, investor, workers, that sort of thing. But it would be very, very similar.

Ms. SHEKETOFF. It does seem to spell out exactly the items that should be taken into account when establishing this policy of eliminating, delaying, or reducing civil fines.

Mr. ONEK. I do think it does add elements, particularly the consumer, investor, worker pension protection and the environment, which I believe are not in SBREFA. Otherwise, I think it largely checks, tracks SBREFA. But then I think SBREFA was an excellent effort by the Congress which should be given a chance to work.

Mr. LANE. I think my preliminary review was consistent with my colleagues. It does seem to be consistent with SBREFA and just good practices, a codification of trying to take into account——

Mr. SNOWBARGER. And isn't this what the President has already indicated in his Executive order that you are supposed to do?

Mr. ONEK. In his memorandum of 1995, that is correct.

Mr. SNOWBARGER. So what does this add? An improvement that moves the bill from any change in current law to current law, which makes the bill kind of irrelevant.

Let me ask this question of Mr. Onek. On page 2 of your testimony, you are talking about an interpretation of SBREFA or giving us an overview of that. You indicated that—first of all, you talk about the reduction or waiver of civil penalties. Then a little further down in the paragraph you talk about that those SBREFA policies do not apply where the violation involves willful or criminal conduct, and then goes in to impose a serious health threat? I want to look at the willful and criminal conduct. Are you trying to suggest to us that H.R. 3310 is inconsistent with that part of SBREFA?

Mr. ONEK. Absolutely. H.R. 3310 doesn't say anything about willful or criminal conduct. It is true we could prosecute that conduct criminally if it's criminal. But after all, agencies do not want to bring and do not want to be forced to bring criminal actions for fairly minor violations. But at least the way the act is written, even if it is a willful, let's start with willful. Even if a small business deliberately and intentionally doesn't file a report or has another violation of the paperwork act, this bill says that it can't have a civil fine.

Mr. SUNUNU. But they can also have a civil prosecution, not just criminal prosecution, but they could also have a civil prosection under this bill. Correct?

Mr. ONEK. That would probably depend on the individual statute, whether it provides for injunctive relief.

Mr. SUNUNU. Are fines the only remedies that you have in these cases?

Mr. ONEK. It would go agency by agency I'm sure. In many cases——

Mr. SNOWBARGER. Well we've got three agencies here.

Mr. MCINTOSH. Actually specifically, are there any in the ones you listed in your testimony in which a civil penalty is the only remedy?

Mr. ONEK. I really couldn't answer that without doing further research. There may be——

Mr. MCINTOSH. Let me ask you to do that.

Mr. SNOWBARGER. I was going to say, it seems pretty important that we know that because you are giving us examples where there may be other remedies other than the fine and all we are dealing with here is the fine.

One of the other questions that would help me is what kind of level of fine are we talking about for Paperwork Reduction violations or paperwork violations?

Ms. SHEKETOFF. Well, for OSHA, the fine for a first-time offense, the fine could be a maximum of $7,000 depending on the serious-

ness. At the discretion of our penalty reduction policy, could go down to zero.

Mr. SNOWBARGER. How many have gone down to zero?

Ms. SHEKETOFF. In the matter of posters, almost all. Every poster for a first-time violation has gone down to zero.

Mr. SNOWBARGER. Are you still having those reported back as violations?

Ms. SHEKETOFF. Yes they are because if the employer on a second visit still does not display the poster, then there is a civil money penalty. But for a first time violation, an OSHA compliance officer gives him a copy of the poster and educates him as to the law which requires that he display it.

Mr. SNOWBARGER. Mr. Chairman, my time has expired. I think our time is up.

Mr. MCINTOSH. Yes. Let's stand in recess for 10 minutes. I believe there is only one vote, or 15 minutes to get there and back. We'll come back and finish up questions. If I could ask the panelists to remain for us while we go vote, we'll be back. Thank you.

[Recess.]

Mr. MCINTOSH. The subcommittee will come to order. My apologies to the panel. We had more than one vote and a swearing in of the newest Member of Congress, Mrs. Capps, from California.

Let's continue now with the questions from the Members. I believe it would be Mr. Kucinich's round at this point.

Mr. KUCINICH. In the interest of time, I think that most of the questions that I have had have been answered. But in the interest of time, I am willing to waive my questions.

Mr. MCINTOSH. Great. Let me ask the rest of the members of the subcommittee. Does anybody else have questions that they would like to ask of this panel? Again, I do apologize.

Mr. Onek, if you would please followup with us on the examples you have given to tell us whether there are other remedies that would be available.

Mr. ONEK. I would like to just if I could ask one question about that. We have discussed the issue of an injunction. But what exactly are you going to enjoin? Are you going to enjoin the business from doing their next violation? The law already says they were supposed to file the paperwork. So what are you going to do, go in and ask for an injunction saying file your paperwork?

Mr. MCINTOSH. I would look at the analysis of the underlying activity. For example, FDA has various injunctive type remedies where they can issue a cease and desist order. They can close down an entire business. So the question would be in each of the scenarios, are they completely without remedy to prevent them from moving forward with their business or continuing with the activity that they are doing?

Mr. ONEK. But surely you don't want an agency to use a bazooka instead of a rifle shot. Sure, I have represented small businesses. But if you want me to say this is wonderful, a new bill has just been enacted which will cause the FDA to shut you down, that's not helpful.

Mr. MCINTOSH. If you present a serious danger. So if you could get back to us with that answer, that would be helpful.

In that case, if there are no other questions for this panel, the panel is dismissed.

Mr. KUCINICH. If I could ask, Mr. Chairman, can we submit further questions in writing if we so desire?

Mr. MCINTOSH. Yes. Let's hold open the record for 5 days.

Mr. KUCINICH. OK, thank you.

Mr. MCINTOSH. To be able to do that, more if you need it. Come see us and we'll work with you on that.

Thank you very much for coming. I do appreciate it. With that, that was the only panel for today's hearing, the committee will stand in recess for the purpose of taking testimony.

[Whereupon, at 6:50 p.m., the subcommittee was adjourned, subject to the call of the Chair.]

[Additional information submitted for the hearing record follows:]

U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

March 26, 1998

The Honorable David McIntosh
Chairman
Subcommittee on National Economic Growth,
Natural Resources, and Regulatory Affairs
Committee on Government Reform and Oversight
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter responds to the question you posed to Deputy Associate Attorney General Joseph Onek at the hearing on March 17, 1998 before the Subcommittee on National Economic Growth, Natural Resources and Regulatory Affairs, on H.R. 3310, the "Small Business Paperwork Reduction Act Amendments of 1998." You asked why other civil remedies, including injunctive relief, were not sufficient to address violations of information collection requirements and, in the alternative, why agencies could not address the underlying substantive requirements directly.

The Department of Justice agrees that H.R. 3310 would not bar agencies from obtaining civil remedies, including penalties, to address underlying substantive violations related to reporting or record keeping violations. But if companies do not comply with their reporting or record keeping obligations, it is much more difficult for agencies to find out about dangerous products or illegal activities. The ability to bring an action for injunctive or other relief does little good if the agency has no means to learn of the violation.

In some situations, civil penalties will not be available and injunctive relief will not be effective, because the only substantive obligation is the information collection requirement. For example, the requirement that financial institutions report cash transactions exceeding $10,000 to the Secretary of Treasury, see 31 U.S.C. 5311, the requirement to notify buyers and renters of lead-based paint hazards before selling or renting certain housing, see 42 U.S.C. 4851, and the requirement to report

annually hazardous chemical inventories to local fire departments and emergency planning officials, see 42 U.S.C. 11022(a), (d), all have no underlying substantive violations. These statutes recognize that the information is valuable for its own sake and they do not impose any obligations beyond providing the information. Injunctive relief in these situations may mean only that the violator is ordered to comply with the disclosure requirements, which the law already mandates.

In other situations, agencies may have available civil remedies other than civil penalties, but those remedies may be quite harsh. For instance, the Food and Drug Administration ("FDA") can request court authorization to seize an adulterated or misbranded drug. See 21 U.S.C. 334. If a company failed to keep records that allowed the FDA to determine whether a drug was adulterated, the FDA might be justified in seizing all of that company's supply of the drug, a draconian result. The ability to impose an administrative or civil penalty allows an agency to tailor its response to the nature and severity of the violation.

The Department of Justice reiterates its strong support for streamlining information collection requirements and helping small businesses comply with reporting and record keeping obligations. The Department also supports discretionary waivers of civil penalties in appropriate circumstances. However, we do not support a blanket waiver of civil penalties. Civil penalties help prevent violations of the law and therefore, the harm that may result.

Please do not hesitate to contact us if you have further questions. The Office of Management and Budget has advised that there is no objection from the standpoint of the Administration's program to the submission of this letter.

Sincerely,

Ann M. Harkins
Acting Assistant Attorney General

cc: The Honorable John F. Tierney
Ranking Minority Member

GAO

United States
General Accounting Office
Washington, D.C. 20548

Office of the General Counsel

March 10, 1998

The Honorable John Tierney
Subcommittee on National Economic Growth,
Natural Resources, and Regulatory Affairs
Committee on Government Reform and Oversight

Dear Representative Tierney:

During today's hearing on the congressional review provisions in the Small Business Regulatory Enforcement Fairness Act, you asked that I provide for the record answers to several questions regarding the cost of conducting regulatory impact analyses and other matters. Attached are my answers to those questions.

If you have any further questions, please call me on (202) 512-5400, or Curtis Copeland of GAO's General Government Division on (202) 512-8101.

Sincerely,

Robert P. Murphy
General Counsel

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QUESTIONS FOR THE RECORD

Q. Has GAO, or anyone else to your knowledge, conducted any studies to determine how costly or time consuming it is to perform a regulatory impact analysis (RIA)?

A. Yes, there have been a number of such studies. First, though, it is important to point out that there is no such thing as a "typical" RIA. The analyses vary substantially depending on the issues involved, the amount of information already available, and other factors. Therefore, the cost of conducting RIAs varies just as dramatically. Also, determining the cost of these studies is not easy. Agencies may not have systematic data on RIA costs, and the factors included in cost estimates may vary considerably.

Nevertheless, several studies that both we and others have done bear noting.

- In March 1997, the Congressional Budget Office (CBO) published a report that examined the costs of 85 RIAs from six offices in four agencies--the Environmental Protection Agency (EPA), the Coast Guard, the Federal Aviation Administration, and the National Highway Traffic Safety Administration.[1] The average cost per RIA was about $570,000, with a range of $14,000 to more than $6 million per analysis. The RIAs also varied considerably in the amount of time they took to complete. The average length of time was 3 years, but the individual analyses ranged from 6 weeks to 12 years.

- The CBO report also summarized five other studies that we and others had done to determine the costs of preparing RIAs. CBO said that the average cost of the RIAs in those studies ranged from 367,000 to $5.6 million in constant 1995 dollars. Again, the average numbers represented a wide range of costs of conducting the RIAs. For example, one of the studies that CBO presented was a 1987 EPA study of 15 RIAs conducted between 1981 and 1986. Of the 12 RIAs with cost data, the average cost was about $675,000 (about $1 million in 1995 dollars). However, actual costs ranged from a low of $212,000 to a high of $2.3 million.

- In December 1996, we reported that the 27 RIAs that EPA had issued after enactment of the Clean Air Act Amendments of 1990

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[1]Regulatory Impact Analysis: Costs at Selected Agencies and Implications for the Legislative Process, Congressional Budget Office, March 1997.

cost an estimated $13 million--or an average of about $480,000 each.[2] The costs to prepare individual RIAs ranged from $46,000 to $3.8 million.

Q. About how many "major" rules are agencies submitting to GAO per year pursuant to the congressional review provisions in SBREFA?

A. As of today, we have received 115 major rules since the congressional review provisions were enacted at the end of March 1996. That is about 1.1 major rules per week, or about 60 per year.

Q. The Congressional Office of Regulatory Analysis or "CORA" contemplated in H.R. 1704 would have to do a completely new RIA for each such major rule, and any "nonmajor" rules that Congress requested. Assuming for a moment that Congress doesn't request RIAs for any nonmajors, how many RIAs would you estimate CORA would have to do each year?

A. Because H.R. 1704 requires CORA to do an RIA for each major rule, and because agencies are submitting about 60 major rules each year, CORA would have to do about 60 RIAs each year. Therefore, CORA would have to complete a new RIA every 4 or 5 days.

Q. If we take the number of RIAs that, on average, have to be done each year and multiply that times the average cost of conducting an RIA, would we not get a reasonable idea of how costly the RIA function in H.R. 1704 would be?

A. You could get a rough idea, yes. For example, using the $480,000 figure in our December 1996 report and multiplying it times the 60 major rules we have received each year, the annual cost of conducting the RIAs would be a little less than $29 million. Because the 60 rules are, by definition, "major" in some respect, the RIAs for those rules could be somewhat complicated. Therefore, RIAs for those rules would probably be more than minimums cited in some of the previous studies. However, I would again like to emphasize that there is no such thing as a "typical" RIA.

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[2] EPA's Costs of Preparing Regulatory Impact Analyses (GAO/RCED-97-15R, Dec. 6, 1996).

ATTACHMENT ATTACHMENT

Q. In 1995, when Congress originally was debating the congressional review provisions that ended up in SBREFA, why was GAO tasked with conducting a procedural review of agencies major rules and not a more substantive analysis, including a separate RIA?

A. Because of concerns that requiring us to do more than just a procedural analysis within the specified reporting period would be extremely difficult and resource intensive. On March 28, 1995, Senator Glenn and Senator Domenici made it very clear that GAO was to perform "an assessment of the agency's compliance with procedural steps...." For example, in response to Senator Domenici's suggestion that GAO be used to provide information to Congress about significant rules, Senator Glenn said

> "I certainly do not object to the GAO proposal so long as we understand, when the Senator proposes it, that it will be on the basis of making sure that the processes have all been gone through that are requested. That would be what GAO would be certifying. GAO would not be required to do their own, independent, cost analysis, cost-benefit ratio and risk assessment, as a completely independent action, which would tie up several times the number of people we have in GAO."

Senator Domenici agreed that the provision was limited to a procedural analysis "because I do not think in 12 or 15 days the GAO can do a thorough substantive review, but they can do a procedural review as prescribed." However, what was being discussed in 1995 was that the reviews would be done of "significant" final rules, which could be several hundred each year. Also, both Senators Glenn and Domenici noted that GAO could do a more substantive analysis of an agency's rule upon request.

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