

Congress of the United States
U.S. House of Representatives
Committee on Small Business
2361 Rayburn House Office Building
Washington, DC 20515-6315

May 1, 2009

The Honorable Peter R. Orszag
Director
Office of Management and Budget
Eisenhower Executive Office Building
1650 Pennsylvania Avenue, NW
Washington, DC 20503

RE: Recommendations to the President for a New Executive Order on Federal Regulatory Review

Dear Director Orszag:

On January 30, 2009, President Obama directed you to produce a set of recommendations for a new executive order on Federal regulatory review. As Chairwoman of the House Small Business Committee, I urge you to strengthen the voice of the small businesses in the Federal rulemaking process as you formulate your recommendations.

Small businesses are the engine of our economy, creating most of our nation's new jobs and more than half of GDP.¹ As we face economic challenges of historic proportions, it is small firms that will lead us on the path to economic growth. To create an environment that fosters entrepreneurship, the Federal regulatory system must be responsive to the needs of small businesses. Unnecessarily burdensome regulations place small businesses on an unlevel playing field, making it more difficult for them to succeed. Small businesses bear a disproportionate share of the Federal regulatory burden. A study conducted by SBA in 2005 found that regulatory costs for small businesses are 45 percent greater than for larger firms.²

All too often Federal agencies overlook the impact of their regulations on small entities. That is why Congress, nearly 30 years ago, enacted the Regulatory Flexibility Act (RegFlex).³ RegFlex was enacted to respond to concerns that the uniform application of Federal regulations imposed disproportionate burdens on small businesses. In order to

¹ SBA Office of Advocacy, Frequently Asked Questions, (Sept. 2008), <http://www.sba.gov/advo/stats/sbfaq.pdf>.

² W. Mark Crain, The Impact of Regulatory Costs on Small Firms 56 (Sept. 2005).

³ 5 U.S.C. § 601 et. seq.

minimize the burden of rules on entrepreneurs, RegFlex mandates that Federal agencies consider the potential economic impact of regulations on small entities and assess less onerous alternatives. The House Small Business Committee was instrumental in creating RegFlex and has jurisdiction over this important law.

Despite the fact that RegFlex has been on the books for nearly 30 years, agency compliance with the law is often inadequate. To make certain that agencies abide by RegFlex, I encourage you to consider the following in crafting your recommendations for a new executive order:

OIRA RegFlex Oversight Authority

The Office of Information and Regulatory Affairs (OIRA) plays a key role in ensuring that agencies meet their obligations to small firms pursuant to RegFlex. This role should be maintained in any new regulatory review system. When agencies are in a rush to promulgate a regulation, it is often the concerns of small businesses that are the first to be brushed aside. In the scramble to meet a deadline, an agency may have an incentive to avoid analyzing the impact of a regulation on small firms or examining less burdensome alternatives. Absent OIRA's oversight authority to make certain that regulatory actions are consistent with RegFlex, I am concerned that violations of this important law would increase substantially. Not only does OIRA's oversight role impart key protections to small businesses, it also results in more efficient and effective regulation. By reviewing regulations for compliance with RegFlex and other applicable laws before they are made final, agencies are less likely to face litigation which consumes scarce resources and can derail entire rulemakings.

OIRA and the Office of Advocacy

The Small Business Administration Office of Advocacy plays an important part in the rulemaking process by working with OIRA to ensure that agencies comply with RegFlex. It is essential that any new regulatory review system maintains this relationship. In 1994, to improve agency compliance with RegFlex, the Government Accountability Office (GAO) recommended that the Office of Management and Budget (OMB) work together with SBA to "establish procedures OMB can use to determine agencies' compliance with the RFA."⁴ GAO stated that: "These procedures should be incorporated into OMB's processes for reviewing regulations before they are published for notice and comment."⁵ In response to the GAO recommendations, the OIRA Administrator and the SBA Chief Counsel for Advocacy exchanged letters committing the two offices to work together more closely in ensuring agency compliance with RegFlex.⁶

⁴ U.S. General Accounting Office, *Regulatory Flexibility Act: Status of Agencies' Compliance*, GAO/GGD-94-105, Apr. 27, 1994.

⁵ Id.

⁶ "In our prepublication review of an agency's Notice of Proposed Rulemaking (NPRM), we will consider whether the agency should have prepared an initial regulatory flexibility analysis. If it appears to us—in light of your RFA guidance—that you may have a concern in this regard, we will provide you. . . with a

In 2002 this relationship was formally structured through Executive Order 13272. E.O. 13272 requires agencies to notify Advocacy of any draft rule that may have a significant economic impact on a substantial number of small entities before the rule is published in the Federal Register. The Executive Order also requires agencies to give every appropriate consideration to any comments provided by Advocacy regarding a draft rule.

To ensure that small businesses have a voice in the rulemaking process, I encourage you to provide for significant coordination between OIRA and the Office of Advocacy. Keeping Advocacy informed earlier in the rulemaking process will provide them with a greater opportunity to assist agencies in RegFlex compliance.

Periodic Review of Existing Rules

Section 610 of the Regulatory Flexibility Act requires agencies to review within 10 years of their adoption as final rules, all regulations that have a significant economic impact on a substantial number of small entities. Although the requirement has been in place since 1981, it appears that agencies are carrying out relatively few Section 610 reviews.

In 1991, the Government Accountability Office (GAO) reported that each of the four Federal agencies it reviewed had a different interpretation of key RegFlex provisions.⁷ In 1994, GAO again reported that agencies' compliance with RegFlex varied widely from one agency to another and that agencies were interpreting the statute differently.⁸ Reviewing existing rules periodically has great potential to reduce burdens on small firms. By eliminating redundant or obsolete rules or updating others to reflect changes in technology or industry practices, much relief can be provided to America's entrepreneurs. I urge OMB to create a clear framework—and conduct proper oversight—to make certain that agencies are properly reviewing existing rules to minimize unnecessary burdens on small firms.

Section 5 of E.O. 12866 ordered agencies to submit a plan for periodically review regulations. Many of these plans are now in need of updating. As such, I believe that any new executive order on regulatory review should direct agencies to formulate new plans for periodic review to make regulatory programs more effective and less burdensome for small businesses.

copy of the draft NPRM. . .if after an agency provides you an initial regulatory flexibility analysis that you find inadequate or a rule with an inadequate certification. . .we ask that you let us know." Letter from Hon. Sally Katzen, OIRA Administrator, to Hon. Jere Glover, Chief Counsel for Advocacy, January 11, 1995. "If our discussions with the issuing agency do not result in an acceptable accommodation, we will seek your assistance. If appropriate, we will recommend that you raise these concerns with the proposing agency." Letter from Hon. Jere Glover, Chief Counsel for Advocacy, to Hon. Sally Katzen, OIRA Administrator, January 11, 1995.

⁷ U.S. General Accounting Office, *Regulatory Flexibility Act: Inherent Weaknesses May Limit Its Usefulness for Small Governments*, GAO/HRD-91-16, Jan. 11, 1991.

⁸ U.S. General Accounting Office, *Regulatory Flexibility Act: Status of Agencies' Compliance*, GAO/GGD-94-105, Apr. 27, 1994.

Hon. Orszag

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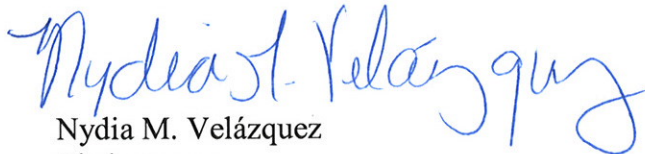
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Ensuring the Input of Entrepreneurs

It is essential that any regulatory review process be transparent and accessible to small businesses. One of the key requirements of RegFlex is the solicitation of ideas and comments of small businesses, so regulating agencies can properly examine the impact of rules on such entrepreneurs. RegFlex requires agencies to assure that small entities are given an opportunity to participate in rulemakings that have a significant economic impact on them.⁹ It is critical that any new regulatory review system ensures that the small businesses are afforded the opportunity to participate and that their views be given proper consideration.

In conclusion, small businesses are the engine of our nation's economic growth. By crafting a regulatory review process which properly considers their needs, we can create an environment in which entrepreneurship can flourish.

Sincerely,



Nydia M. Velázquez
Chairwoman

⁹ "When any rule is promulgated which will have a significant economic impact on a substantial number of small entities, the head of the agency promulgating the rule . . . shall assure that small entities have been given an opportunity to participate in the rulemaking." 5 U.S.C. § 609.