

STATEMENT OF JANE C. LUXTON
BEFORE THE COMMITTEE ON SMALL BUSINESS
U.S. HOUSE OF REPRESENTATIVES

“Lifting the Weight of Regulations: Growing Jobs by Reducing Regulatory Burdens”

June 15, 2011

Good afternoon, and thank you for the opportunity to testify regarding H.R. 527 and 585. I am Jane Luxton, a partner in the environmental law practice of the law firm of Pepper Hamilton LLP, resident in its Washington, DC, office. My legal career has included both public and private sector experience, and over the course of that time, I have had considerable exposure to small business issues, the Office of Advocacy of the Small Business Administration, and the workings of the Regulatory Flexibility Act (RFA). My testimony is given on my own behalf as a private citizen, but it is based on my years of practice and experience with these issues.

Although my government service does not include working for the Office of Advocacy, I am one of its biggest fans and support the proposed bills’ efforts to strengthen the role and ability of that Office in protecting small business in the regulatory arena. In particular, H.R. 527 addresses some of the major concerns that have gotten in the way of effective help to small business entities.

In discussion after discussion on the RFA, including the amendments added in the Small Business Regulatory Enforcement Fairness Act (SBREFA), the one problem that comes up most often is the lack of consideration of the impact of indirect effects in rulemaking efforts. It is probably no accident that H.R. 527 tackles this issue in the first substantive section of the bill. The clear statement that indirect effects must be taken into account is necessary to overcome an interpretation in the case law that unfortunately cut this type of real-world,

substantial impacts on small business out of the equation. To get an accurate gauge of the actual effects of regulation, indirect impacts must be restored to the analysis.

Similarly, in today's difficult economic times, many have spoken out strongly about the unacknowledged cost of cumulative regulatory burden. Small businesses are most likely to feel and least able to afford these extra burdens. Section 3 of the bill requires rulemaking agencies to conduct more detailed analysis of several important factors, but among the most needed are the requirements for greater consideration of other rules that may overlap or conflict with a proposed rule and add cumulative economic impact to small entities.

Section 5 of the bill would expand the SBREFA panel process to all agencies when they are proposing rules that will have a significant economic impact on a substantial number of small entities or trip the threshold of a major rule under the Congressional Review Act. In my experience, SBREFA panels have proven time and again that they improve rules, making them more cost-effective and substantively stronger and lessening adverse impacts on small business. They provide a unique opportunity for small business representatives to become involved at the formative stage of a rule, before positions harden. I have seen the positive contribution of SBREFA panels in numerous EPA rules. I have also been engaged in discussions relating to the development of the SBREFA panel process for the Consumer Financial Protection Bureau created under last year's Dodd-Frank Act and am aware that bringing a new agency within the SBREFA panel process can be a large undertaking. From what I have observed, the Office of Advocacy's training programs and assistance can greatly assist in this kind of transition, and I strongly believe there are significant benefits to bringing more of the big-impact rules within the SBREFA panel process.

Section 5 also would require agencies that are subject to the SBREFA process to do a better job of making available as much information as possible about a proposed rule, as early as possible, for use by SBREFA panelists and small entity representatives (SERs). This change would address problems with inadequate information that have arisen in some rules, which have undermined the ability of SERs to offer effective suggestions to the rulemaking agency for minimizing burden on small business while still achieving the agency's goals.

The final section I would like to highlight today is the bill's requirement in Section 6 for periodic review of rules. As I have previously said, the cumulative impact of each new rule adds heavy burdens to small businesses, which are ill-equipped to absorb an unending flow of extra costs. Requiring agencies to review existing regulation is one idea on which the Administration and Congress seem to agree. This legislation would ensure that this beneficial process continues in periodic reviews of impacts on small business, by imposing mechanisms to ensure the job gets done.

These bills serve the important purpose of addressing some shortcomings of previous legislation that have come into focus over time. They will strengthen the ability of the Office of Advocacy to fulfill its mission of serving as the voice of small business in the regulatory process in ways that are particularly needed in our current era of serious economic challenge. The RFA and SBREFA offer a strong foundation for protecting small business against excessive regulatory burden, but as the title of this hearing indicates, they could still use a little improvement.

I appreciate the opportunity to offer these comments. I look forward to your questions.