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Statement of the U.S. Chamber of Commerce

ON: REGULATORY FLEXIBILITY ACT COMPLIANCE: IS EPA FAILING SMALL BUSINESSES?

TO: HOUSE COMMITTEE ON SMALL BUSINESS

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BEFORE THE COMMITTEE ON SMALL BUSINESS
OF THE U.S. HOUSE OF REPRESENTATIVES

"Regulatory Flexibility Act Compliance: Is EPA Failing Small Businesses?"

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Good morning, Chairman Graves, Ranking Member Velasquez, and members of the Committee. My name is Keith W. Holman and I am Legal Policy Counsel for the Environment, Technology and Regulatory Affairs Division at the U.S. Chamber of Commerce. The Chamber is the world's largest business federation, representing the interests of more than three million businesses and organizations of every size, sector, and region. More than 96% of U.S. Chamber members are small businesses with 100 employees or fewer. Small businesses are vital to the U.S. economy, comprising 99.7% of all employer firms and generating two-thirds of the net new U.S. jobs over the past 17 years.[1] You have asked me to come before the Committee today to offer the Chamber's view on whether the U.S. Environmental Protection Agency (EPA) is complying with the Regulatory Flexibility Act (RFA).[2] On behalf of the Chamber and our small business members, who benefit from agencies' RFA compliance when they write rules, I thank you for the opportunity to testify here today.

I bring some personal perspective to this question. From 2002 to 2010, I served as an Assistant Chief Counsel in the Office of Advocacy of the Small Business Administration. In that position, I was responsible for ensuring that EPA followed the RFA in its various rulemakings.[3] I worked on many rulemakings where EPA did a good job of complying with the RFA, and several where they did not. My testimony, in part, reflects those experiences.

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[1] Office of Advocacy, U.S. Small Business Administration, *Frequently Asked Questions* (January 2011), available at www.sba.gov/sites/default/files/sbfaq.pdf. Small businesses must often bear a disproportionate burden from federal regulations. In the case of environmental regulations, for example, a business with fewer than 20 employees must bear a per-employee cost burden that is almost five times higher than a business with 500 or more employees. See The Impact of Regulatory Costs on Small Firms, an Office of Advocacy funded study by Nicole Crain and Mark Crain (2010), available at www.sba.gov/advo/research/rs371tot.pdf.

[2] Pub. L. No. 96-354, 94 Stat. 1164 (1981). (codified as amended at 5 U.S.C. §§ 601- 612).

[3] During this time period, I personally served as Advocacy's representative on nine Small Business Advocacy Review Panels convened by EPA. SBAR Panels are discussed in detail below.

I. The Regulatory Flexibility Act

Congress passed the RFA in 1980 to give small entities a voice in the federal rulemaking process. The premise of the Regulatory Flexibility Act is relatively simple: to require federal agencies to assess the economic impact of planned regulations on small entities[4] and to consider alternatives that would lessen those impacts. Prior to passage of the RFA, small businesses often were unaware of new regulations coming out of Washington and powerless to meaningfully affect the design of those rules after they had been proposed. One account of this situation, written in 1964, describes the frustration of small business owners:

> Often businessmen come down to Washington when they are almost purple with apoplexy. A particular piece of legislation or an administrative ruling has been either passed or under consideration for weeks, months, or perhaps even a year. When it is about to be finalized—or even after it has been passed—the businessman shows up in Washington for a 'last-ditch effort.' He must necessarily be aggressive and antagonistic in conflict with a policy or program whose cement had virtually hardened.[5]

Even today, it is true that unless the concerns of a small business can be brought before a regulatory agency **early** in the rulemaking process, the regulatory 'cement will harden' and the rule will be finalized without addressing the concerns. Small businesses typically also must vie against larger businesses for the attention of regulators.

To address this situation, the RFA requires each federal agency to review its proposed and final rules that are subject to notice and comment rulemaking under section 553 of the Administrative Procedure Act[6] to determine if the rule in question will have a "significant economic impact on a substantial number of small entities (SEISNOSE)."[7] Unless the head of the agency can certify that a proposed rule will not, if promulgated, have a SEISNOSE, the agency must prepare an initial regulatory flexibility analysis (IRFA) and make it available for public review and comment. The IRFA must describe the anticipated economic impacts of the rule and evaluate whether alternative actions that would minimize the rule's impact would still achieve the rule's purpose. When the agency issues the final rule, if it cannot certify that the rule will not have a significant

[4] The RFA applies to three types of small entities: small businesses, small organizations, and small communities. Small businesses are defined by the Small Business Administration at 13 C.F.R. § 121.201. Small organizations are not-for-profit enterprises that are independently owned and operated and are not dominant in their field.(e.g., private hospitals, private schools). Small governments are the governments of cities, towns, villages, school districts or special districts having a population of less than 50,000.
[5] William Ruder & Raymond Nathan, *The Businessman's Guide to Washington*, at 3 (1964).
[6] 5 U.S.C. § 553.
[7] 5 U.S.C. § 605(b). EPA has prepared guidance on how it interprets the terms "significant economic impact" and "substantial number". *See* EPA, *Final Guidance for EPA Rulewriters: Regulatory Flexibility Act* (November 2006).

economic impact, the agency must prepare a final regulatory flexibility analysis (FRFA). The FRFA must summarize any issues raised by the public, describe the steps taken by the agency to minimize burdens on small entities, and explain why the agency took the final action it did. Importantly, the agency must explain why other alternatives were rejected. The objective of these procedures is to ensure that the agency has had the opportunity to hear and understand the specific issues small entities will have when they must comply with a new regulatory mandate.

II. EPA and the RFA

EPA is one of the most prolific rule-writing agencies in the Federal government. In 2011, for example, the agency completed or was actively developing 257 regulations; only the Departments of Treasury, Commerce, and Interior wrote more rules.[8] Moreover, not only does EPA issue a significant number of rules, but many of the rules the agency writes are big, costly rules that affect large sectors of the U.S. economy.[9] In part, because Congress recognized that EPA writes a large number of high-impact rules, EPA became subject to an additional small entity impact analysis requirement in 1996 when the RFA was amended. The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)[10] requires EPA (as well as the Occupational Safety and Health Administration (OSHA)) to convene a Small Business Advocacy Review (SBAR) Panel whenever one of their planned rules is likely to have a SEISNOSE.[11] As a practical matter, the vast majority of EPA rules are certified by the agency as not having a SEISNOSE, and accordingly are not required to go through the SBAR Panel process. In any given year EPA might write more than three hundred proposed rules, but only two to eight rules might actually require a SBAR Panel.

III. The SBAR Panel Process

The Panel process generally adds a total of six to twelve months to EPA's rulemaking process, most of which is preparation time. Panel members include representatives from the SBA Office of Advocacy, the Office of Management and

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[8] Clyde Wayne Crews Jr., Competitive Enterprise Institute, *Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State*, 2012 Edition, at 22 (Treasury – 495 rules, Commerce – 324 rules, Interior – 318 rules, EPA – 257 rules).

[9] For example, when President Obama identified seven proposed or planned rules in August 2011 that were anticipated to have ***annual*** compliance costs of $1 billion or more, four of the seven rules were EPA rules. Letter from President Barack Obama to Speaker John Boehner, August 30, 2011, available from www.whitehouse.gov. The EPA rules were: Reconsideration of the 2008 Ozone NAAQS Standard, Utility MACT Rule, Boiler MACT Rule, and the Coal Ash Rule).

[10] Pub. L. No. 104-121, 110 Stat. 847 (1996) (current version at 5 U.S.C. §§ 601-612).

[11] 5 U.S.C. §§ 609(b), (d).

Budget's Office of Information and Regulatory Affairs (OIRA), the EPA program office planning to issue the rule, and EPA's Office of Policy, Economics and Innovation (OPEI). Small entity representatives (SERs)—who speak for the sectors that are likely to be affected by the planned rule—advise the Panel members on the probable real-world impacts of the rule and potential regulatory alternatives. Generally, the Panel members meet with SERs well before formal convening of the Panel. These early meetings are intended to give SERs a sense of the design of the planned rule, the underlying data and legal authority supporting the rule, and early estimates of its economic impacts. SERs have several opportunities to ask the agency questions, and to submit written and oral comments to the Panel members. Within 60 days after the Panel formally convenes, Panel members must prepare a report to the agency containing recommended alternatives for the planned rule. These alternatives have often been incorporated by EPA into the proposed rule. The Panel process is the best opportunity for EPA to get face-to-face interaction with small entities and get a sense of the ways that small entities differ from their larger counterparts in their ability to comply with regulatory mandates. Because the Panel occurs early, before the planned rule is publicly proposed, it also represents the best opportunity for small entities to have real input into the final design of a rule.

IV. Has EPA's SBAR Panel Process Worked Well?

In some cases, EPA ***has*** done a good job of meeting both the letter and the spirit of the SBAR Panel requirement. Examples of Panels where the exchange of information and regulatory alternatives was particularly robust include the Lime MACT Panel (January 2002-March 2002), the Cooling Water Intake Structures Panel (February 2004-April 2004) and the Mobile Source Air Toxics Panel (September 2005-November 2005).

- **Lime MACT Panel**. This Panel involved the setting of a Maximum Achievable Control Technology standard for lime kilns under the Clean Air Act. The industry was very engaged with EPA, and provided detailed information to the agency that allowed alternatives to be adopted to benefit the small companies in the industry. The detailed exchange of data and face-to-face discussions paved the way for a final rule that met the regulatory objective and that the industry could live with.

- **Cooling Water Intake Structures Panel**. This Panel dealt with a Clean Water Act regulation designed to prevent aquatic organisms from being killed when they are trapped in cooling water intake structures at existing small utilities and other facilities. SERs provided extremely accurate mitigation cost data to EPA, and the Panel was able to recommend an intake flow threshold to the agency that met the

objective of the rule while addressing the cost feasibility concerns of the SERs. EPA adopted the Panel's recommendation.

- **Mobile Source Air Toxics Panel**. This Panel involved a Clean Air Act rule to lower benzene emissions from gasoline and reduce evaporative emissions from vehicles, boats, and portable gas containers. SERs from the small refining, boatbuilding, and gasoline container manufacturing industries provided detailed information about the technical and cost feasibility of EPA's rule. Valuable regulatory alternatives were recommended by the Panel and adopted by EPA.

In each of the cases, both the SERs and EPA came away from the Panel process with something valuable. By putting its cards on the table up front and honestly exchanging information with the SERs, EPA learned where the weaknesses in its planned rule were. EPA also was able to find alternatives that still met its goals without needlessly damaging small businesses. The small entities got a rule that they could live with, that took their particular concerns into account. EPA got a rule that was more likely to be accepted and complied with by small entities, instead of a rule that would be fought in the courts for years.

V. When Has EPA's SBAR Panel Process Worked Poorly?

While EPA is highly experienced in dealing with the RFA and conducting SBAR Panels, there has occasionally been tension between the Office of Advocacy and EPA over how Panels have been conducted. Going back to 1997, there have at times been disagreements over issues such as how much supporting data EPA should provide to SERs before the formal convening of the Panel and how detailed the description of the planned rule and its impacts needs to be. While EPA has been concerned that premature public release of details about planned rules will damage the overall rulemaking effort, Advocacy has always sought to ensure that SERs have sufficient information about the rule and its expected costs to be able to make knowledgeable contributions to the Panel discussions.

In 2009, far more serious issues began to arise concerning EPA's administration of Panels. In general, these issues fall under the following three categories:

- **EPA Declines to Hold A Panel When A Panel Should Be Convened**. There have been a number of situations where EPA was asked to convene a Panel and declined to do so, despite clear evidence that a Panel was warranted under the RFA. In 2008 and 2009, Advocacy asked EPA repeatedly to convene a Panel or Panels on its planned greenhouse gas (GHG) endangerment finding for vehicles

and resulting GHG rules.[12] Because of the magnitude of the potential economic impact of these GHG rules on literally millions of small entities, it was important that EPA make the effort to reach out to small entities and understand how they would be affected. Instead, EPA determined that a Panel was not needed, and that informal consultation and public outreach meetings would suffice.

Also in 2009, EPA was asked to convene a Panel to consider the planned Coal Ash Rule, which the Obama Administration later estimated would cost between $600 million and $1.5 billion to comply with,[13] for the rule's impact on small municipal utilities and rural cooperatives. EPA asserted, with very limited data, that potential new coal ash disposal costs for small utilities would not be significant. Clearly EPA would have been better served to conduct a Panel and learn for itself what the true compliance cost for small utilities would be under the Coal Ash Rule.

- **EPA Agrees to A Judicial Or Other Deadline That Provides Insufficient Time To Conduct A Panel.** In recent years, EPA has more frequently engaged in out-of-court settlements with environmental advocacy groups that result in agreements to issue particular rules on a specific timetable. Very often, these timetables do not allow sufficient time for EPA to properly go through the SBAR Panel process. In extreme cases, there may not be enough time to conduct a Panel at all. This has happened in a few situations where EPA agreed to deadlines to issue multiple revisions of MACT standards; when the agency later discovers that a rule will in fact have a SEISNOSE, there is no time for a Panel. In other situations, EPA may not have adequate time to prepare itself, other Panel members, or SERs for the Panel. A Panel's utility is greatly diminished when the agency does not have sufficient information about the rule, the anticipated impact of the rule, and potential regulatory alternatives.

  On January 19, 2011, Advocacy submitted a comment letter to EPA regarding proposed settlement agreements that would require rulemakings under the Clean Air Act to establish New Source Performance Standards for greenhouse gases (GHGs) for utilities and refineries.[14] The letter notes that "Advocacy believes the most productive Panels occur after EPA has done preliminary

[12] *See, e.g.*, Comments of the Office of Advocacy to EPA on the proposed rule "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule" (December 23, 2009), available at www.sba.gov/sites/default/files/reg%201223%20EPA.pdf.

[13] *See* Letter from President Barack Obama to Speaker John Boehner (August 30, 2011), available from www.whitehouse.gov.

[14] Comments of the Office of Advocacy to EPA on the proposed rule "Proposed Settlement Agreements for Petroleum Refineries and Electric Utility Generating Units" (January 19, 2011), available at www.sba.gov/sites/default/files/epa11_0119.pdf.

development and analysis of regulatory options before the initial outreach to Advocacy and the Small Entity Representatives . . . Advocacy is therefore concerned that the proposed settlement agreements do not provide sufficient time for a full Panel process . . . ."[15] Subsequently, when EPA notified Advocacy that it was convening a Panel on the GHG New Source Performance Standards, Advocacy responded that "SERs have not been provided enough information to project how EPA will structure this regulation or establish the relevant standards. In the absence of information sufficient for SERs to appreciate the impact of the proposed rule and to identify regulatory options that would fulfill EPA's statutory objectives, Advocacy believes that convening this panel is premature."[16] Advocacy made similar objections to EPA's management of Panel for the Utility MACT, another multibillion dollar rulemaking.[17] In a comment letter Advocacy sent to EPA on August 4, 2011, serious concerns were raised that EPA failed to provide adequate information to SERs before convening the Panel, did not identify regulatory alternatives, did not provide deliberative materials to other Panel members, and failed to recommend any regulatory alternatives. Advocacy noted that "EPA advised that preparation for this panel would be abbreviated because of negotiated settlement agreement deadlines . . . The SERs commented that the lack of pre-panel consultation harmed their ability to participate meaningfully and that this was inconsistent with EPA's prior practice."[18]

- **EPA Ignores the Recommendations of A Panel**. Even where EPA takes the time to properly conduct a Panel, occasionally the agency will simply choose to ignore the recommendations of the Panel members. For example, the Boiler MACT Panel strongly recommended that EPA (1) include a health-based compliance alternative in the rule, or provide the legal rationale for excluding such an alternative, and (2) identify additional boiler subcategories, such as limited-use and seasonal units. EPA declined to adopt either recommendation, with no adequate explanation.[19] Both of these regulatory alternatives would have saved regulated small entities considerable amounts without compromising the environmental objective of the Boiler MACT rule. Although it is unusual for

[15] *Id*. at 3.
[16] Comments of the Office of Advocacy to EPA on the convening of the Panel on "Greenhouse Gas New Source Performance Standard for Electric Utility Steam Generating Units" (June 13, 2011), available at www.sba.gov/sites/default/files/files/epa11_0613.pdf.
[17] EPA estimated the cost of the Utility MACT rule at $10 billion. *See* Letter from President Barack Obama to Speaker John Boehner (August 30, 2011), available from www.whitehouse.gov.
[18] Comments of the Office of Advocacy to EPA on the proposed rule Utility MACT Standard for Electric Utility Steam Generating Units" (August 4, 2011) at 4, available at www.sba.gov/sites/default/files/files/epa11_0804.pdf.
[19] Comments of the Office of Advocacy to EPA on the proposed Boiler MACT Standards (August 23, 2010), available at www.sba.gov/advocacy/816/12752.

> EPA to simply ignore the recommendations of Panel members, it has happened in recent years.

Together, these serious lapses point to a disturbing trend: EPA now seems to be indifferent to the quality of the Panels it conducts. In the Office of Advocacy's most recent annual report to Congress, it was noted that:

> Advocacy had concerns with a number of panels . . . and, for the first time, expressed some of these concerns in public letters . . . Advocacy's major concern with the panels was the lack of information provided to the small entity representatives (SERs) about the potential effects of the proposed rule and the lack of significant regulatory alternatives to be discussed with the SERs.[20]

This recent trend is quite unfortunate, because Panels are extremely valuable tools in the rulemaking process when they are conducted properly. When EPA receives high-quality, detailed information from SERs about how a rule will impact them, particularly at that early stage in the rule's development, it results in a far better final rule. While it is clear that conducting Panels requires an investment of additional time and other agency resources, Panels are investments that yield improved rulemakings. In a regulatory environment where multi-billion dollar rules are more and more common, it should not be asking too much of EPA to approach the Panel process as a valuable learning experience, not a check-box exercise that merely slows down the process of issuing rules.

VI. How Could EPA's Compliance with the RFA Be Improved?

EPA needs to build the time and resources into the rulemaking process so that it can conduct thorough, meaningful Panels. The agency must ensure that the regulatory deadlines it agrees to in settlements actually allow sufficient time for RFA compliance. The agency should also give more prominence to the office within EPA that manages Panels and RFA compliance. If EPA's current leadership treated RFA compliance and Panels as the important priorities they should be, the agency as a whole would follow suit. The RFA and the SBAR Panel process will not be the vital tools to ensure a level playing field for small entities that Congress intended them to be if EPA does not take these requirements seriously.

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[20] Office of Advocacy, *Annual Report of the Chief Counsel for Advocacy on Implementation of the Regulatory Flexibility* Act and Executive Order 13272 (February 2012) at 26, available at www.sba.gov/sites/default/files/11regflx_0.pdf.

Again, thank you for giving me the opportunity to testify today. I look forward to answering any questions you may have.