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The Regulatory Flexibility Act Improvements Hearing

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Committee on Small Business

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Chairman Graves, Ranking Member Velázquez, and Members of the Committee—thank you for the opportunity to testify on this important topic. I am an environmental health scientist and former government regulator, who currently helps to direct a university-wide program on regulatory law and policy at the University of Pennsylvania. These views are my own and not necessarily those of Penn or Penn Law.

For the past 25 years, I have been immersed in the study of the costs and benefits of regulations and other interventions to protect human health, safety, and the environment. I am a strong supporter of, and a pioneer in developing improved methods for, cost-benefit analysis as an organizing principle to make these regulations as efficient and equitable as possible. From 1995-2000, I directed the health rulemaking divisions at the U.S. Occupational Safety and Health Administration (OSHA), and for several years thereafter was OSHA's Regional Administrator in the six-state Rocky Mountain region—so I have helped write and enforce the kinds of standards we gather to discuss today. In particular, I co-chaired the very first SBREFA panel—for OSHA's ill-fated tuberculosis proposal in late 1996. On a personal note, I owe my educational opportunities to a small business—my father worked for 47 years as a sales rep for Crawford Furniture of Jamestown (N.Y.), which currently has about 160 employees—so my interest in this issue is in finding regulatory solutions that accommodate the special concerns of small businesses, of their workers, and the citizens affected by their products and their environmental footprints.

I hope we can do better than clash about subjective, and hopelessly overbroad, accusations about the entire regulatory system as it affects small business. In this hearing, and certainly in the testimony from your previous hearing on March 30, the familiar litany of complaints is front-and-center: (1) small business is "groaning under the weight of too many regulations;" (2) the regulations are too stringent because risk assessors are determined to exaggerate the dangers we face; (3) small business operators have too little access to the regulatory process; and (4) agencies hold their noses and listen to small-business input, only to go their merry ways and dismiss their concerns or say they can't possibly be accommodated.

Given enough time and open-minded listeners, I think I could convince you that the opposite of each of these four premises is more correct. According to the most reliable estimates of costs and benefits (produced by the agencies with substantial input from scholars, industry, and public-interest groups, and scrutinized carefully by OIRA), most individual regulations, and certainly all regulations aggregated together, yield benefits far in excess of their costs. If there is any legitimate "groaning," these are the groans of those who bear some of the costs that are returned to our society in the form of even larger benefits. Next, substantial research over several decades has demonstrated that risk assessments at EPA, OSHA, and elsewhere certainly do not systematically exaggerate risk, but often underestimate it (references 1, 2, 3)—the complaint about risk "conservatism" is in large part a hoax invented by scholars with little or no training in risk science. This is mainstream expert opinion—in 1994 and again in 2009, for example, consensus committees of the National Academy of Sciences (4, 5) recommended that EPA *increase* all its carcinogen risk assessment estimates by a factor of at least ten-fold, to correctly account for the half of the human population whose genetic makeup and environmental histories make them more susceptible than the average person implicitly modeled in all such assessments to date. Equally important, the track record of regulatory economics is clearly one of exaggeration—*ex post* accounting of regulatory costs running systematically (much) lower then the dire pre-regulatory estimates thereof (6, 7, 8). Together, these biases mean that when an agency says that benefits exceed costs, it is probably understating that case, and that we may often reject welfare-increasing rules that only *seem* to be close to the line.

The adequacy of small-business access and the sincerity of agency receptiveness to small-business concerns are of course highly subjective, but in my experience, OSHA and EPA (on their own and with enthusiastic prodding from OIRA) take *very* seriously any suggestions that can reduce small-business costs without foregoing even more societal benefits in the effort to provide targeted relief, as I will elaborate below. We know how important small business is to our overall economy and to our local communities, but the difference between "a needless, job-killing mandate" and a life-saving "wise restraint that makes us free" is partly subjective, and partly what cost-benefit analysis exists to distinguish between. Are automobile drivers "groaning under the weight" of speed limits? Should local, state, and federal agencies provide "small driver compliance guides" to help us get the most from our cars while obeying the law? The answers to questions like these might suggest that the clash between small business and regulatory agencies is becoming one-sided, and could use a dose of perspective.

Indeed, I think the evidence is fairly compelling that providing more small-business access and demanding more obeisance from the agencies is a solution in search of a problem. Let me illustrate with two examples from OSHA. The 2006 hexavalent chromium standard contains a report from the SBREFA panel. By my count, small business made 38 different recommendations to OSHA, and the agency adopted 34 of them. This comports with my recollection of the SBREFA panel for the tuberculosis proposal, which occurred under the Clinton Administration. But I hasten to add that although I think the SBREFA panels serve a useful function, we were quite able to fully accommodate the special concerns of small business *before* SBREFA came into effect. In 1997, we amended the new methylene chloride standard at the request of small business; we provided longer start-up dates for all establishments with fewer than 20 employees (and for establishments in selected industrial sectors with fewer than 150 employees), and made a very important concession where the realities of small-business and the biophysics of methylene chloride came into

conflict.[1] After I left OSHA, the agency did a Section 610 lookback on this standard, and I think there were no complaints from small business, who realized the need for, and the relative ease of, modernizing their controls to waste less product and improve the health of their workforce.

Fortunately, I think there are constructive alternatives to this black-and-white view of whether agencies should be told to "do more to help small businesses." *My basic message today is that there are other more pressing needs in regulatory analysis and risk management than these Congressional attempts, however well-meaning they might be, to do yet more for the most favored constituency in the process.* I will offer in turn: one general observation about how to make regulations more cost-effective; two analytic points about the relationship between costs and benefits in small businesses; three specific suggestions for improving the small-business regulatory process; and a final important concern.

1. Putting Small Business Analyses in Context:

As someone interested in reducing the needless toll of environmental damage and worker injury and illness caused by too few regulations and too much non-compliance with regulations on the books, I am disappointed that Members of the Committee are advocating for more roadblocks in the way of sensible standards. As an analyst, though, I appreciate that the RFA and SBREFA instruct the agencies to look carefully at the tail of the cost distribution (an issue of equity), rather than just at the total cost. Anything that helps agencies shine a light on those most affected by regulation is in my view a possible high priority as we seek to improve the regulatory process. So then why do I conclude that HR 527 and HR 585 are not credible attempts to improve? For two reasons, one obvious and one perhaps less so:

[1] Respirators with filters and cartridges are largely ineffective against methylene chloride; employers who needed extra time to install engineering controls would have had to install expensive air-supplying equipment to protect their workers, only to abandon this equipment after the permanent controls were in place. OSHA amended the standard to allow small businesses to move directly into engineering controls, increasing worker risk temporarily but funneling all expenditures into permanent controls.

- Analyses cost money – far less than the money we waste by not knowing enough, but they can't be done for free. I testified before House committees five or six times in the 1990s about the opportunities to put hundreds of thousands of dollars into doing better scientific and economic analyses at the agencies, and thereby save billions of dollars in needless private-sector control expenditures and needless illness and environmental damage. Since then, the number of required analyses has proliferated substantially, while agency analytic budgets and staff continue to fall. Pardon my bluntness, but a bill like HR 527, which requires agencies to conduct intricate and highly speculative analyses of specific indirect effects of regulation, while providing no resources to do so, is a set-up.

- Any good idea can be ruined by fixating on the wrong piece of it. Through statutes and Executive Orders, the agencies are now supposed to think in each rulemaking about nearly 30 different ways in which over-regulation or under-regulation can disproportionately affect individuals' economic productivity or their health and safety. Small businesses are not the only constituency in the tail of the cost distribution (there are required analyses of impacts on local governments, on property holders, on energy suppliers), and the agencies are also supposed to care about the tail of the risk distribution (children's health, environmental justice, etc.). *Small business analysis **already** dominates all these other considerations.* A recent GAO report (9) documented convincingly that agencies spend *far* more effort analyzing small-business impacts than any other special aspect of risk or cost. My colleague Stuart Shapiro (10) has suggested that Congress and the White House might eliminate all ancillary analyses so that agencies can concentrate on doing better cost-benefit analyses. I would prefer the agencies be encouraged (and adequately funded!) to do better analyses of all the forgotten impacts. But no matter what, in the face of all the disparate impacts we ignore, the *last* thing we need is more study of the (small-business) impacts we already know best.

2. ***Costs and Benefits in Small Business:***

Even if for some reason small business deserves much more attention than any other constituency affected by regulation, it is important to analyze those affects even-handedly and in context. As an expert in cost-benefit analysis, let me offer two constructive criticisms of the RFA and SBREFA, which HR 527 only worsens:

- "Costs" come in both positive and negative forms, but Congress has instructed agencies to look at one and not the other. Economists understand that the "general equilibrium" after a rule would come into place is the correct measure of the rule's net economic impact (11); looking only at the "partial equilibrium" of first-order (negative) economic effects to those businesses that have to incur compliance costs is at best only half the story. The existing small businesses that will profit due to regulatory changes, and the new businesses that will only get off the ground if a regulation creates a new market, are voiceless in the current process – but if we care about entrepreneurship, agencies should seek the whole answer, not just half of it (12).

- Different risks created by small business deserve different treatment. The best case for easing the burden on small business relative to larger firms occurs when the harm is proportional to firm size and can be "pooled." For example, a ton of carbon dioxide will have the same radiative-forcing effect regardless of who emits it, and so a rule that reduces all 100-ton sources by 90 percent and all 1-ton sources by only 50 percent is better for the environment, and cheaper for the small sources, than one that requires all to reduce by 80 percent.[2] But other risks are "up close and personal," and when we trade them, real people can suffer. Substitute mercury for CO_2, and I hope it will be clear that the residents near the small sources of mercury should not be expected on principle to face the full brunt of risk so that larger sources somewhere else can take more of the

[2] This strategy will backfire, however, when there are so many small sources that collectively they become the lion's share of the problem, as cogently demonstrated in a forthcoming paper by Stack and Vandenbergh (13).

responsibility for control. I am particularly concerned about the premise that workers employed by small businesses are less important because there are fewer of them in each facility. Many small businesses are exceedingly dangerous places to work. A 2006 RAND Corp. study (14) found that fatality rates in very small establishments averaged eight times higher than in larger establishments in the same industrial sector. Are there ways to slightly decrease protections for these workers in the name of great economic savings to their employers? There often are, and in my experience OSHA is very receptive to good ideas (whether first aired in SBREFA panels or in regular notice-and-comment) of this type. But let's not persist in the illusion that we can make up for regulatory rollbacks to small business by focusing attention on big business – often, the harms are irreversible, and the "efficient" approach of discriminating by firm size leaves us with the kind of statistics that are in fact "people with the tears wiped away."

3. ***Suggestions for Improving Regulations Affecting Small Businesses:***

In contrast to many of the provisions of HR 527, which I think are unnecessary, gratuitous, and will result in regulations with slightly lower costs but tragically greater risks, let me offer three ideas for constructive change:

- I read the 46-page memorandum dated June 8, 2011, from Chairman Graves explaining HR 527. It paints a picture of the SBREFA panel process as much more adversarial than I remember. But to the extent that regulations do pit the costs to small business against the health and safety of those affected by their operations, why does Congress insist on requiring the agencies to hear only from one side and not the other? I sense no enthusiasm here for eliminating the panels in the name of avoiding delay, so why not add a bit more time and balance the input? EPA could convene panels of citizens who live next door to small businesses, and OSHA could convene panels of workers at small companies, to get *their* suggestions for creative regulatory modification. If the response to this

idea is that "those groups can freely express their views during notice and comment," one might ask why that same dismissal didn't apply to small business itself when Congress enacted SBREFA.

- In my experience, both at OSHA and recently as a consultant to a large city trying to accommodate small-business concerns while restricting the use of toxic dry-cleaning solvents, small entity representatives do themselves a disservice by focusing on attacking the science base for regulatory action, rather than concentrating on creative ideas to reduce small-business cost burden without unduly squandering regulatory benefits. These comments are often chock-full of misinterpretations of the science. I don't think it calls for legislative intervention, but it does dilute the purpose of the RFA to make the agencies explain their risk assessments to the general public, to OIRA, and to SBREFA panelists, especially when any scientific uncertainties do not affect small businesses any differently than they do large ones.

- I realize this is a hearing about regulation, but I'd still like to take the opportunity to encourage more *non-regulatory* solutions of a particular type. When I was at OSHA, we developed several "product stewardship partnerships" involving government, large manufacturers, and small businesses who purchase a hazardous product and expose their workers to it. These arrangements allowed creative groups of manufacturers to in effect pay for, and monitor the effectiveness of, behavioral and technological changes among their small-business customers, and allowed OSHA to monitor voluntary codes of practice rather than having to promulgate a rule. For example, the leading manufacturers of fiberglass insulation material (through their trade association, the North American Insulation Manufacturers Association) provided free training videos, respirators, and industrial hygiene sampling to thousands of installing contractors through the "Health and Safety Partnership Program" (see http://www.naima.org/about-naima/product-stewardship.html). The regulatory agencies have put enormous resources into compliance assistance information for small businesses, but there would be less need for such

materials if manufacturers would work more directly with their customers and users in the spirit of product stewardship.

4. ***Small Business Relief—for Small Businesses:***

Nothing squanders life-saving benefits any faster than a regulation that is weakened for the wrong reasons. Delay is frustrating, but in many ways a regulation that fails to decrease risks (or worse, one that increases risks) is more disappointing. I believe if Congress insists on amending a statute (the RFA) that already gives ample access and ample deference to small business, it should above all amend it to make clear that agencies should not (with rare exceptions they can explain) routinely extend to all businesses exemptions and shortcuts that small businesses argue they need for reasons of their size. For example, the 2006 OSHA chromium standard features a Permissible Exposure Limit that in my view was shamefully weak. At the new legal limit, by the risk assessment calculations of a well-respected industry consulting firm, workers face an increased chance of roughly 3 in 100 of developing lung cancer over a working lifetime. This extremely high level of risk clearly violates the instructions the Supreme Court gave OSHA in 1980 to strive to lower grave risks to 1 in 1000 or far below, but in the chromium rule OSHA said it could do no better than this, because some firms would have to spend up to 2.7 percent of their revenues to control to a less horrific exposure level (and arguably couldn't raise their prices to cover this cost). But more than 75 percent of all firms clearly could have achieved the lower level (1 $\mu g/m^3$ instead of 5 $\mu g/m^3$), because sampling showed they were already there! It was only concern for a few small establishments that drove the level higher. More than 558,000 entities were affected by the chromium standard, but the most-affected subsector (electroplating job shops) involved only 2,630 firms (all but 32 of them small entities as defined by the SBA size standard). While OSHA did express concern for a few other subsectors' economic feasibility problems, it may in fact have allowed five-fold more risk to half a million workers because of economic issues affecting only *half a percent* of all firms. A "two sizes fit all" standard that gave small businesses the relief they claim they needed would have saved many more lives at essentially no greater cost. *This* is the kind of

regulatory lapse Congress should, in my opinion, be more worried about than reports, exaggerated or not, of too few special accommodations for one favored constituency.

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