

**Testimony of**

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**U.S. House of Representatives  
Committee on Education and the Workforce  
Subcommittee on Workforce Protections**

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**Investigating OSHA's Regulatory Agenda  
and Its Impact on Job Creation**

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Mr. Chairman and Members of the Committee, I am pleased to present this testimony on how the Occupational Safety and Health Administration (OSHA) considers the impact on small entities when developing regulatory proposals. My name is Tom Sullivan. I am an attorney with the law firm of Nelson Mullins Riley & Scarborough, LLP and I run the Small Business Coalition for Regulatory Relief.<sup>1</sup> This testimony is not being presented on behalf of any specific clients. Rather, my advice to the Committee today is drawn from my two decades of work on small business regulatory issues.

My first job in Washington was with the U.S. Environmental Protection Agency (EPA). I served under both Administrator Bill Reilly and Administrator Carol Browner. After learning about regulatory policy development from within government, I joined the Washington office of the National Federation of Independent Business (NFIB). In February 2002, I was unanimously confirmed to head the Office of Advocacy at the U.S. Small Business Administration (SBA).<sup>2</sup> The Office of Advocacy is responsible for overseeing the Regulatory Flexibility Act.<sup>3</sup> I served as Chief Counsel for Advocacy until October 2008.

### **OSHA must consider the impact on small entities prior to issuing a new regulation**

The Regulatory Flexibility Act requires federal agencies to satisfy certain procedural requirements when they plan new regulations, including: (1) identifying the small entities that will be affected, (2) analyzing and understanding the economic impacts that will be imposed on those entities, and (3) considering alternative ways to achieve their regulatory goal while reducing the economic burden on those entities.<sup>4</sup> The Regulatory Flexibility Act was amended in 1996 by the Small Business Regulatory Enforcement Fairness Act (SBREFA).<sup>5</sup> SBREFA requires OSHA, EPA, and the Consumer Financial Protection Bureau (CFPB) to convene small business review panels (I refer to the panels as “SBREFA panels”) whenever their planned rules are likely to have a significant economic impact on a substantial number of small entities. SBREFA panels include representatives from SBA’s Office of Advocacy, the Office of Management and Budget’s Office on Information and Regulatory Affairs (OIRA) and the agency proposing the rule. The panel prepares a report containing constructive recommendations for the agency planning the rule and that report is published with the proposed rule.

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<sup>1</sup> See <http://www.SBCRR.com>.

<sup>2</sup> See <http://www.sba.gov/advocacy>.

<sup>3</sup> *Regulatory Flexibility Act*, Pub. L. No. 96-354, 94 Stat. 1164 (1980), amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 857 (1996) (codified as amended at 5 U.S.C. §§ 601-612), also amended by § 1100 G of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 2112 (July 21, 2010).

<sup>4</sup> Keith W. Holman, *The Regulatory Flexibility Act at 25: Is the Law Achieving Its Goal?*, 33 *Fordham Urban Law Journal* 1119 (2006).

<sup>5</sup> *Small Business Regulatory Enforcement Fairness Act of 1996*, Pub. L. No. 104-121, 110 Stat. 857 (1996).

## **The need for small business protections in the federal rulemaking system**

There are three basic reasons for the Regulatory Flexibility Act.

- one-size-fits-all federal mandates do not work when applied to small business; and
- small businesses face higher costs per employee to comply with federal regulation; and
- small businesses are critically important to the American economy.

### **Prevention of one-size-fits-all federal mandates**

Many times federal regulations that may work for large corporations simply do not work for small firms. I remember working with Brian Landon on the ergonomics regulation when it was being developed in the late 1990's. Brian owned and operated a carwash in Canton, Pennsylvania. Parts of the ergonomics regulation distinguished between the employees who worked on equipment and employees who were in charge of paperwork and accounting. As is the case in many small businesses, Brian did all the jobs. And, his most trusted employees also performed multiple tasks, some clerical and some operational. The ergonomics regulation spelled out duties for equipment maintenance employees that were very different from those responsibilities for employees in charge of paperwork. Brian continually asked OSHA for help to figure out which classification would apply to him – and never really got an answer. Sometimes we forget that our country has millions of small enterprises that are at various stages of automation. For instance, when there is a new labeling requirement, a tendency is to naively think that compliance with a regulation mandating changes to labels can be accomplished with little effort through a computer program. The Regulatory Flexibility Act is supposed to force federal regulators to think about how a small operation would actually comply, realizing that it may not be as simple as entering information into a computer.

### **The disproportionate impact federal regulations have on small business**

Research published in September by Nicole Crain and W. Mark Crain of Lafayette College updates three previous studies on the impact of federal regulations on small business.<sup>6</sup> The report is entitled, "*The Impact of Regulatory Costs on Small Firms*," and it provides a look at the regulatory burden in 2008. The total cost of complying with federal regulations was over \$1.75 trillion. The burden amounts to a cost of \$15,586 per household which is more than 1 ½ times what households pay for medical care. Most alarming, is the fact that in the four years studied, the cost of complying with federal regulations rose faster than the per-household cost of medical care.

The Crain study found that small businesses shoulder costs that are 36% more than their larger business competitors. Firms with fewer than 20 employees pay \$10,585 per employee per year and firms with 500 or more employees pay \$7,755 per employee to comply with federal

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<sup>6</sup> Nicole V. Crain and W. Mark Crain, *The Impact of Regulatory Costs on Small Firms*, written for the Office of Advocacy, U.S. Small Business Administration (September 2010), available at <http://www.sba.gov/advocacy/853/2016>.

regulations. The cost difference is most severe when looking at compliance with environmental regulations, with the smallest firms paying 4 times the amount per employee than the largest businesses.

The research provides data for a common sense reality in a small business owner's world. Small businesses generally do not have vice presidents for safety and health to figure out OSHA rules. They do not have accounting departments to navigate changes to the tax code. Even if small businesses hire accountants to prepare their taxes, the owners take hours sweating the details because it is their signature on the IRS forms. Nor do small firms usually employ occupational health experts and safety engineers to keep up with OSHA rules and the more than 22,000 national consensus standards that exist in the United States. The task of figuring out volumes of federal requirements often falls on the small business owners themselves, taking more time for them than it would for regulatory experts. Since time is money - it costs the small businesses more.

The intention of the Regulatory Flexibility Act and, in particular the SBREFA panel process, is to bring small entities directly into an advisory role with agencies so that final regulations reflect an accurate understanding of how compliance can cost small firms more.

### **The importance of small business to the U.S. economy**

Recent figures show there are more than 27.3 million small businesses in the United States.<sup>7</sup> They represent over 99% of the employer firms in the United States, employ half of the private sector employees, and produce 13 times more patents per employee than large research & development firms.<sup>8</sup> Of particular importance is the job-creation aspect of entrepreneurship. Small firms accounted for 65% of the 15 million net new jobs created between 1993 and 2009. Data show that since the 1970's small businesses hire two out of every three jobs and the Ewing Marion Kauffman Foundation likes to point out that in the last 30 years, literally all net job creation in the United States took place in firms less than five years old.<sup>9</sup>

### **History of the Regulatory Flexibility Act**

One of the top five recommendations from the 1980 White House Conference on Small Business was for a law requiring regulatory impact analysis and a regular review of regulations. That recommendation became reality when President Jimmy Carter signed the Regulatory Flexibility Act into law on September 19, 1980. The Regulatory Flexibility Act directed all agencies that use notice and comment rulemaking to publicly disclose the impact of their regulatory actions on

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<sup>7</sup> Office of Advocacy, U.S. Small Business Administration, *Frequently Asked Questions* (January 2011), available at <http://www.sba.gov/advocacy/7495>.

<sup>8</sup> *Id.*

<sup>9</sup> John Haltiwanger, *Business Dynamics Statistics Briefing: Jobs Created from Business Startups in the United States*, Ewing Marion Kauffman Foundation (January 2009), available at: <http://www.kauffman.org/research-and-policy/bds-jobs-created.aspx>.

small entities and to consider less burdensome alternatives if a proposal was likely to impose a significant impact. The law authorized SBA's Chief Counsel for Advocacy to appear as amicus curiae in Regulatory Flexibility Act challenges to rulemakings and it required SBA's Office of Advocacy to report annually on agencies' compliance with the Regulatory Flexibility Act.

In 1996, Congress considered changes to the Regulatory Flexibility Act. Again, there was a White House Conference – and that conference's top recommendation was to strengthen the Regulatory Flexibility Act by directing small business participation in rulemakings and to allow for judicial review of agency compliance. President Clinton signed SBREFA in March of 1996.<sup>10</sup> Those amendments to the Regulatory Flexibility Act established formal procedures for the EPA and for OSHA to receive input from small entities prior to the agencies proposing rules.<sup>11</sup>

In August of 2002, President Bush signed Executive Order 13272, *Proper Consideration of Small Entities in Agency Rulemaking*.<sup>12</sup> The Executive Order directed SBA's Office of Advocacy to train regulatory agencies on how to comply with the RFA and further instructed agencies to consider the Office of Advocacy's comments on proposed rules. The Small Business Jobs Act signed five months ago codified the Executive Order's requirements for agencies to respond to the Office of Advocacy's comments in final rules.<sup>13</sup>

There was one recent additional amendment to the Regulatory Flexibility Act. An amendment authored by Senators Olympia Snowe and Mark Pryor was adopted as part of the Dodd-Frank financial regulatory reform law. That amendment requires the newly created Consumer Financial Protection Bureau (CFPB) to undergo a SBREFA panel process when issuing rules, the same requirement that has applied to EPA and OSHA since 1996.<sup>14</sup>

### **What is required by the Regulatory Flexibility Act**

The basic spirit of the RFA is for government agencies to analyze the effects of their regulatory actions on small entities and for those agencies to consider alternatives that would allow agencies to achieve their regulatory objectives without unduly burdening small entities.

The RFA covers all agencies that issue rules subject to the Administrative Procedure Act (APA). The RFA requires agencies to publish an initial regulatory flexibility analysis (IRFA) unless the promulgating agency certifies that the rule will not have a significant impact on a substantial number of small entities.<sup>15</sup> The IRFA is supposed to be a transparent small business impact analysis that includes discussion of alternatives that can accomplish the stated objectives of the

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<sup>10</sup> *Small Business Regulatory Enforcement Fairness Act of 1996*, Pub. L. No. 104-121, 110 Stat. 857 (1996).

<sup>11</sup> *See*, 5 U.S.C. §609.

<sup>12</sup> Executive Order 13272, *Proper Consideration of Small Entities in Agency Rulemaking*, 67 Fed. Reg. 53461 (August 16, 2002).

<sup>13</sup> *Small Business Jobs Act of 2010*, Pub. L. No. 111-240, §1601 (September 27, 2010).

<sup>14</sup> *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub. L. No. 111-203, §1100G (July 21, 2010).

<sup>15</sup> *See*, 5 U.S.C. §605(b).

rule while minimizing impact on small entities. In the case of EPA, OSHA, and the CFPB, a SBREFA panel aids the agency's analysis and discussion of alternatives. This transparent analysis and exchange of information with small entities is published with the agency's proposed rule, educating stakeholders who participate in the notice and comment process.

The availability of an IRFA allows for a more informed notice and comment process that can guide an agency's formulation of its final rule. Under the RFA, an agency's final rule must contain a final regulatory flexibility analysis (FRFA) if it published an IRFA with its proposal. The FRFA is basically a public response to issues raised in the IRFA.

### **Implementation of the Regulatory Flexibility Act at OSHA**

Under the Regulatory Flexibility Act, an agency either certifies that a proposed rule has no significant economic impact on a substantial number of small entities or the agency prepares an IRFA on the proposal. When OSHA decides to prepare an IRFA, the agency convenes a SBREFA panel to obtain pre-proposal input from small entities. In three recent regulatory actions, OSHA appears to be ignoring both the spirit and the legal requirements of the Regulatory Flexibility Act. Even if OSHA is able to certify that a regulation will not have sufficient impact to warrant a SBREFA panel, the agency always has the option to voluntarily use the SBREFA panel process to gain insight from the small business community.

#### **1. Proposed Occupational Injury and Illness Recording and Reporting Requirements Rule (MSD Reporting Rule):<sup>16</sup>**

In January of last year, OSHA proposed that businesses record work-related musculoskeletal disorders (MSDs) in a new column on their OSHA 300 Log. When OSHA proposed the rule, it certified under the Regulatory Flexibility Act that the rule, if promulgated, would not have a significant economic impact on a substantial number of small entities.<sup>17</sup> OSHA estimated that the proposed rule would require employers to spend roughly 5 minutes to become familiar with the new rule and one minute pre MSD injury or illness to record the MSD in the new column on the OSHA 300 Log. This burden estimate is what OSHA used to justify its decision to move forward with the rule without a SBREFA panel.

Small businesses strongly disagreed with OSHA on its estimate of how much the rule would cost. Recording an MSD in a column is not as simple as just transcribing a number. Under the rule, employers would be required to diagnose whether the injury or illness is a MSD and whether it is work-related. Keep in mind that after several years of study and research, experts are unable to reach consensus over the definition of an MSD, yet small business owners would be expected to make a diagnosis of the injury or illness and determine whether it is work related – in less than 5 minutes. That burden estimate

<sup>16</sup> 75 Fed. Reg. 4728 (January 29, 2010).

<sup>17</sup> 75 Fed. 4736.

reflected a clear misunderstanding of how small employers work and the pressure of legal liability employers feel when writing down a number on a form required by the federal government.

The purpose of SBREFA panels is for OSHA to better understand the impacts its regulations will have and how its cost estimates play out in the real small business world. OSHA missed that opportunity by deciding to bypass the SBREFA panel process.

## **2. Proposed changes to On-Site Consultation Procedures rule:<sup>18</sup>**

Last September, OSHA proposed changes to the criteria under which participants in the agency's On-site Consultation program could be subject to enforcement action by OSHA inspectors. The On-site Consultation program is a shining example of how OSHA can evolve from "gotcha" to "help ya." Under the program, small businesses can request a free consultation with a state-certified consultant. The consultant identifies hazards and provides advice on how to address them.

Part of the program's success is derived from the understanding that information uncovered by the voluntary inspection is not shared with OSHA enforcement if the identified hazards are corrected. OSHA's proposal last September threatened to break down the barrier between the On-site Consultation program and OSHA's enforcement program. I doubt OSHA wanted to push small firms out of its On-Site Consultation program, but the agency lacked an appreciation for how the changes would impact small business's willingness to participate. OSHA did not convene a SBREFA panel prior to proposing the changes to its consultation agreements program despite the On-site Consultation program's focus on small business. OSHA, therefore, missed an opportunity to learn directly from small businesses about how changes would affect their participation in the program. Through a SBREFA panel, OSHA would have heard how the agency could achieve its goal, without scaring away small businesses from a program that has improved workplace safety in thousands of small businesses.

## **3. Proposed Interpretation of OSHA's Provisions for Feasible Administrative or Engineering Controls of Occupational Noise:<sup>19</sup>**

In October, OSHA proposed to change the requirements for employers to control noise exposures. Currently, OSHA requires engineering and administrative controls to prevent hearing loss if personal protective equipment (PPE) such as earplugs is ineffective in reducing workplace noise to acceptable levels or if such controls can be implemented for less cost than PPE. OSHA's proposal last year was to reverse the preference for PPE and

<sup>18</sup> 75 Fed. Reg. 54064 (September 3, 2010).

<sup>19</sup> 75 Fed. Reg. 64216 (October 19, 2010).

require engineering controls without consideration of cost unless it would threaten a company's "ability to remain in business."<sup>20</sup>

OSHA circumvented the SBREFA panel requirement by declaring its proposal was just revising an interpretation and, therefore, was not a new rulemaking subject to normal rulemaking procedures, including the SBREFA panel requirement. That type of rationale was unfortunate because it ignored the value of SBREFA panels. A SBREFA panel could have informed OSHA that PPE has proven effective in reducing harmful exposure to noise in the workplace and that driving employers away from the preference for PPE could actually increase danger. Also, a SBREFA panel could have informed OSHA about the cost considerations of engineering controls. Maybe OSHA wanted to see what engineering controls were "feasible" for small manufacturers. The way to find out was to convene a SBREFA panel, not to declare that "feasible" is anything short of causing a business to close its doors and go out of business.

## Conclusion

In the examples of OSHA's proposed MSD reporting rule and OSHA's proposed changes to its On-site Consultation program, SBA's Office of Advocacy wrote to the agency and shared the concerns voiced by the small business community.<sup>21</sup> In both letters, the Office of Advocacy publicly criticized the failure by OSHA to incorporate flexibility for small business in their proposals. Even though OSHA recently pulled back its plans to go ahead with the noise rule and the MSD reporting rule, the Committee is justified in its concern that OSHA is moving forward with regulatory policy that will impact the small business community in a way that ignores their input. OSHA's policy apparatus suffers when the agency treats the SBREFA process as a legal barrier. The purpose of the Regulatory Flexibility Act and the SBREFA amendments is for OSHA to benefit from small business input so the agency can fulfill its mission to ensure safe workplaces without unduly burdening small employers. Constructive input by small firms provides OSHA with valuable insight that allows for the agency to draft proposals that will work on Main Street. OSHA benefits when it embraces the SBREFA process as a constructive dialogue.

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<sup>20</sup> 75 Fed. Reg. at 64217.

<sup>21</sup> Susan M. Walthall, Acting Chief Counsel for Advocacy, *letter to OSHA Assistant Secretary David Michaels*, (March 30, 2010). Available at: <http://www.sba.gov/content/letter-dated-033010-department-labor-occupational-safety-and-health-administration>.

Winslow Sargeant, Chief Counsel for Advocacy, *letter to OSHA Assistant Secretary David Michaels*, (November 2, 2010). Available at: <http://www.sba.gov/content/letter-dated-110210-department-labor-occupational-safety-and-health-administration>.