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"REGULATORY FLEXIBILITY IMPROVEMENTS ACT OF 2011"—UNLEASHING SMALL BUSINESSES TO CREATE JOBS

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

ON

H.R. 527

FEBRUARY 10, 2011

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"REGULATORY FLEXIBILITY IMPROVEMENTS ACT OF 2011"—UNLEASHING SMALL BUSINESSES TO CREATE JOBS

THURSDAY, FEBRUARY 10, 2011

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS,
COMMERCIAL AND ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 1:33 p.m., in room 2141, Rayburn House Office Building, the Honorable Howard Coble (Chairman of the Subcommittee) presiding.

Present: Representatives Coble, Cohen, Conyers, Gowdy, Quigley, Reed, and Ross.

Staff present: (Majority) Daniel Flores, Subcommittee Chief Counsel; Allison Rose, Professional Staff Member; Ashley Lewis, Clerk; and James Park, Minority Counsel.

Mr. COBLE. Good afternoon. The Subcommittee on Courts, Commercial and Administrative Law will come to order. Good to have the panel with us. I'll give my opening statement and recognize Mr. Cohen and also Mr. Conyers, I think he's with us, as well.

Most economic experts who argue that small businesses have small business trends drive and shape our economy which, in my view, is probably the most important issue confronting our country today. Small businesses are the source of almost half of our workforce and while I'm concerned about many economic factors, it's also my view that the government regulations have an inordinate impact on small businesses particularly.

While all businesses have to comply with municipal codes and permitting, county codes and permitting, state codes and permitting, Federal regulations can impose an even greater burden because most small businesses simply don't have the resources or the time to dispute or participate in the Federal regulatory process.

According to the Small Business Administration, businesses with fewer than 20 employees spent on average 36 percent more per employee than do larger firms to comply with Federal regulations. The SBA also claimed that these small employers represent 99.7 percent of all businesses that have created 65 percent of all new jobs over the past 50 years.

Although it's clear that our economy may be showing signs of improvement, we're still suffering from job losses. Lack of job creation or however you like to describe it, it makes sense that we look to

small businesses and work to create an environment that will help them prosper or should I say try to improve the environment in which they're currently struggling to survive?

I know that everyone here today supports small businesses and that everyone in this hearing room also wants to enact something that will help create jobs and economic growth. I sponsored H.R. 527 because I believe that improving the Small Business Regulatory Enforcement Fairness Act and the Regulatory Flexibility Act will have a lasting impact on small businesses that help support long-term small business growth.

Small businesses want and need our help and it's our responsibility, it seems to me, to ensure that our regulations are appropriate and in order and that our regulatory process is effective. Admittedly, I don't claim to be an expert on regulatory law and am anxiously awaiting the testimony of today's witnesses.

Of the many questions I have for the witnesses, I want to know most whether this legislation will help or empower small businesses enough in the regulatory process. If it does not, I'd be interested to know what needs to be done to change the bill to make it more effective.

I'm also very interested to hear about any concerns that the witnesses have about this legislation. Look forward to hearing from our panel and reserve the balance of my time.

[The prepared statement of Mr. Coble follows:]

Opening Statement of Subcommittee Chairman Howard Coble at Hearing on H.R. 527, the "Regulatory Flexibility Improvements Act of 2011" Thursday, February 10, 2011 1:30 p.m., 2141 RHOB

Most economic experts argue that small businesses and small business trends drive and shape our economy, which in my view is the most important issue confronting our country. Small businesses are the source for almost half of our workforce and while I'm concerned about many economic factors, it's also my view that government regulations have an inordinate impact on small businesses. While all businesses have to comply with municipal codes and permitting, county codes and permitting and state codes and permitting, federal

regulations can impose an even greater burden because most small businesses simply do not have the resources or the time to dispute or participate in the federal regulatory process.

According to the Small Business Administration, businesses with fewer than 20 employees spend on average 36 percent more per employee than larger firms to comply with federal regulations. The SBA also claims that these small employers represent 99.7 percent of all businesses and have created 65 percent of all new jobs over the past 15 years.

Although it's clear that our economy may be showing signs of improvement, we are still suffering from job loss,

lack of job creation, or however you'd like to describe it. It only makes sense that we look to small businesses and work to create an environment that will help them prosper. Or should I say, try to improve the environment in which they are currently struggling to survive.

I know that everyone here today supports small business and that everyone in this room also wants to enact something that will help create jobs and economic growth. I sponsored H.R. 527 because I believe that improving the Small Business Regulatory Enforcement Fairness Act and the Regulatory Flexibility Act will have a lasting impact on small business and help support long-term small business growth.

Small businesses want and need our help and it's our responsibility to ensure that our regulations are appropriate and in order and that our regulatory process is effective. Admittedly, I am not an expert on regulatory law and am anxiously awaiting the testimony of today's witnesses.

Of the many questions I have for the witnesses, I want to know most whether this legislation will help or empower small business enough in the regulatory process. If it does not, I'm interested to know what needs to be changed to make the bill still more effective. I'm also very interested to hear about any concerns that the witnesses have about this legislation.

I look forward to hearing from all of our witnesses today and reserve the balance of my time.

# # #

Mr. COBLE. I'm pleased to recognize the distinguished gentleman from Tennessee, the Ranking Member, Mr. Cohen.

[The bill, H.R. 527, follows:]

I

112TH CONGRESS
1ST SESSION

H. R. 527

To amend chapter 6 of title 5, United States Code (commonly known as the Regulatory Flexibility Act), to ensure complete analysis of potential impacts on small entities of rules, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 8, 2011

Mr. SMITH of Texas (for himself, Mr. GRAVES of Missouri, and Mr. COBLE) introduced the following bill; which was referred to the Committee on the Judiciary, and in addition to the Committee on Small Business, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

---

A BILL

To amend chapter 6 of title 5, United States Code (commonly known as the Regulatory Flexibility Act), to ensure complete analysis of potential impacts on small entities of rules, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Regulatory Flexibility Improvements Act of 2011".

(b) TABLE OF CONTENTS.—The table of contents of this Act is as follows:

Sec. 1. Short title; table of contents.
Sec. 2. Clarification and expansion of rules covered by the Regulatory Flexibility Act.
Sec. 3. Requirements providing for more detailed analyses.
Sec. 4. Repeal of waiver and delay authority; additional powers of the Chief Counsel for Advocacy.
Sec. 5. Procedures for gathering comments.
Sec. 6. Periodic review of rules.
Sec. 7. Judicial review of compliance with the requirements of the Regulatory Flexibility Act available after publication of the final rule.
Sec. 8. Jurisdiction of court of appeals over rules implementing the Regulatory Flexibility Act.
Sec. 9. Clerical amendments.

SEC. 2. CLARIFICATION AND EXPANSION OF RULES COVERED BY THE REGULATORY FLEXIBILITY ACT.

(a) IN GENERAL.—Paragraph (2) of section 601 of title 5, United States Code, is amended to read as follows:

"(2) RULE.—The term 'rule' has the meaning given such term in section 551(4) of this title, except that such term does not include a rule of particular (and not general) applicability relating to rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services, or allowances therefor or to valuations, costs or accounting, or practices relating to such rates, wages, structures, prices, appliances, services, or allowances.".

(b) INCLUSION OF RULES WITH INDIRECT EFFECTS.—Section 601 of title 5, United States Code, is

amended by adding at the end the following new paragraph:

"(9) ECONOMIC IMPACT.—The term 'economic impact' means, with respect to a proposed or final rule—

"(A) any direct economic effect on small entities of such rule; and

"(B) any indirect economic effect on small entities which is reasonably foreseeable and results from such rule (without regard to whether small entities will be directly regulated by the rule).".

(c) INCLUSION OF RULES WITH BENEFICIAL EFFECTS.—

(1) INITIAL REGULATORY FLEXIBILITY ANALYSIS.—Subsection (c) of section 603 of title 5, United States Code, is amended by striking the first sentence and inserting "Each initial regulatory flexibility analysis shall also contain a detailed description of alternatives to the proposed rule which minimize any adverse significant economic impact or maximize any beneficial significant economic impact on small entities.".

(2) FINAL REGULATORY FLEXIBILITY ANALYSIS.—The first paragraph (6) of section 604(a) of

title 5, United States Code, is amended by striking "minimize the significant economic impact" and inserting "minimize the adverse significant economic impact or maximize the beneficial significant economic impact".

(d) INCLUSION OF RULES AFFECTING TRIBAL ORGANIZATIONS.—Paragraph (5) of section 601 of title 5, United States Code, is amended by inserting "and tribal organizations (as defined in section 4(l) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(l))),'' after "special districts,".

(e) INCLUSION OF LAND MANAGEMENT PLANS AND FORMAL RULEMAKING.—

(1) INITIAL REGULATORY FLEXIBILITY ANALYSIS.—Subsection (a) of section 603 of title 5, United States Code, is amended in the first sentence—

(A) by striking "or" after "proposed rule,"; and

(B) by inserting "or publishes a revision or amendment to a land management plan," after "United States,".

(2) FINAL REGULATORY FLEXIBILITY ANALYSIS.—Subsection (a) of section 604 of title 5,

United States Code, is amended in the first sentence—

(A) by striking "or" after "proposed rulemaking,"; and

(B) by inserting ", or adopts a revision or amendment to a land management plan," after "section 603(a),".

(3) LAND MANAGEMENT PLAN DEFINED.—Section 601 of title 5, United States Code, is amended by adding at the end the following new paragraph:

"(10) LAND MANAGEMENT PLAN.—

"(A) IN GENERAL.—The term 'land management plan' means—

"(i) any plan developed by the Secretary of Agriculture under section 6 of the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. 1604); and

"(ii) any plan developed by the Secretary of Interior under section 202 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1712).

"(B) REVISION.—The term 'revision' means any change to a land management plan which—

"(i) in the case of a plan described in subparagraph (A)(i), is made under section 6(f)(5) of the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. 1604(f)(5)); or

"(ii) in the case of a plan described in subparagraph (A)(ii), is made under section 1610.5–6 of title 43, Code of Federal Regulations (or any successor regulation).

"(C) AMENDMENT.—The term 'amendment' means any change to a land management plan which—

"(i) in the case of a plan described in subparagraph (A)(i), is made under section 6(f)(4) of the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. 1604(f)(4)) and with respect to which the Secretary of Agriculture prepares a statement described in section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)); or

"(ii) in the case of a plan described in subparagraph (A)(ii), is made under section 1610.5–5 of title 43, Code of Federal

Regulations (or any successor regulation) and with respect to which the Secretary of the Interior prepares a statement described in section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)).".

(f) INCLUSION OF CERTAIN INTERPRETIVE RULES INVOLVING THE INTERNAL REVENUE LAWS.—

(1) IN GENERAL.—Subsection (a) of section 603 of title 5, United States Code, is amended by striking the period at the end and inserting "or a recordkeeping requirement, and without regard to whether such requirement is imposed by statute or regulation.".

(2) COLLECTION OF INFORMATION.—Paragraph (7) of section 601 of title 5, United States Code, is amended to read as follows:

"(7) COLLECTION OF INFORMATION.—The term 'collection of information' has the meaning given such term in section 3502(3) of title 44, United States Code.".

(3) RECORDKEEPING REQUIREMENT.—Paragraph (8) of section 601 of title 5, United States Code, is amended to read as follows:

"(8) RECORDKEEPING REQUIREMENT.—The term 'recordkeeping requirement' has the meaning given such term in section 3502(13) of title 44, United States Code.".

(g) DEFINITION OF SMALL ORGANIZATION.—Paragraph (4) of section 601 of title 5, United States Code, is amended to read as follows:

"(4) SMALL ORGANIZATION.—

"(A) IN GENERAL.—The term 'small organization' means any not-for-profit enterprise which, as of the issuance of the notice of proposed rulemaking—

"(i) in the case of an enterprise which is described by a classification code of the North American Industrial Classification System, does not exceed the size standard established by the Administrator of the Small Business Administration pursuant to section 3 of the Small Business Act (15 U.S.C. 632) for small business concerns described by such classification code; and

"(ii) in the case of any other enterprise, has a net worth that does not exceed $7,000,000 and has not more than 500 employees.

"(B) LOCAL LABOR ORGANIZATIONS.—In the case of any local labor organization, subparagraph (A) shall be applied without regard to any national or international organization of which such local labor organization is a part.

"(C) AGENCY DEFINITIONS.—Subparagraphs (A) and (B) shall not apply to the extent that an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions for such term which are appropriate to the activities of the agency and publishes such definitions in the Federal Register.".

SEC. 3. REQUIREMENTS PROVIDING FOR MORE DETAILED ANALYSES.

(a) INITIAL REGULATORY FLEXIBILITY ANALYSIS.—

(1) Subsection (b) of section 603 of title 5, United States Code, is amended to read as follows:

"(b) Each initial regulatory flexibility analysis required under this section shall contain a detailed statement—

"(1) describing the reasons why action by the agency is being considered;

"(2) describing the objectives of, and legal basis for, the proposed rule;

"(3) estimating the number and type of small entities to which the proposed rule will apply;

"(4) describing the projected reporting, record-keeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report and record;

"(5) describing all relevant Federal rules which may duplicate, overlap, or conflict with the proposed rule, or the reasons why such a description could not be provided;

"(6) estimating the additional cumulative economic impact of the proposed rule on small entities beyond that already imposed on the class of small entities by the agency or why such an estimate is not available; and

"(7) describing any disproportionate economic impact on small entities or a specific class of small entities.".

(b) FINAL REGULATORY FLEXIBILITY ANALYSIS.—

(1) IN GENERAL.—Section 604(a) of title 5, United States Code, is amended—

(A) in paragraph (4), by striking "an explanation" and inserting "a detailed explanation";

(B) in each of paragraphs (4), (5), and the first paragraph (6), by inserting "detailed" before "description"; and

(C) by adding at the end the following:

"(7) describing any disproportionate economic impact on small entities or a specific class of small entities.".

(2) INCLUSION OF RESPONSE TO COMMENTS ON CERTIFICATION OF PROPOSED RULE.—Paragraph (2) of section 604(a) of title 5, United States Code, is amended by inserting "(or certification of the proposed rule under section 605(b))" after "initial regulatory flexibility analysis".

(3) PUBLICATION OF ANALYSIS ON WEBSITE.—Subsection (b) of section 604 of title 5, United States Code, is amended to read as follows:

"(b) The agency shall make copies of the final regulatory flexibility analysis available to the public, including placement of the entire analysis on the agency's website, and shall publish in the Federal Register the final regulatory flexibility analysis, or a summary thereof which includes the telephone number, mailing address, and link to

1 the website where the complete analysis may be ob-
2 tained.".

3 (c) CROSS-REFERENCES TO OTHER ANALYSES.—
4 Subsection (a) of section 605 of title 5, United States
5 Code, is amended to read as follows:

6 "(a) A Federal agency shall be treated as satisfying
7 any requirement regarding the content of an agenda or
8 regulatory flexibility analysis under section 602, 603, or
9 604, if such agency provides in such agenda or analysis
10 a cross-reference to the specific portion of another agenda
11 or analysis which is required by any other law and which
12 satisfies such requirement.".

13 (d) CERTIFICATIONS.—Subsection (b) of section 605
14 of title 5, United States Code, is amended—

15 (1) by inserting "detailed" before "statement";
16 and

17 (2) by inserting "and legal" after "factual".

18 (e) QUANTIFICATION REQUIREMENTS.—Section 607
19 of title 5, United States Code, is amended to read as fol-
20 lows:

21 **"§ 607. Quantification requirements**

22 "In complying with sections 603 and 604, an agency
23 shall provide—

"(1) a quantifiable or numerical description of the effects of the proposed or final rule and alternatives to the proposed or final rule; or

"(2) a more general descriptive statement and a detailed statement explaining why quantification is not practicable or reliable.".

SEC. 4. REPEAL OF WAIVER AND DELAY AUTHORITY; ADDITIONAL POWERS OF THE CHIEF COUNSEL FOR ADVOCACY.

(a) IN GENERAL.—Section 608 is amended to read as follows:

"§ 608. Additional powers of Chief Counsel for Advocacy

"(a)(1) Not later than 270 days after the date of the enactment of the Regulatory Flexibility Reform Act, the Chief Counsel for Advocacy of the Small Business Administration shall, after opportunity for notice and comment under section 553, issue rules governing agency compliance with this chapter. The Chief Counsel may modify or amend such rules after notice and comment under section 553. This chapter (other than this subsection) shall not apply with respect to the issuance, modification, and amendment of rules under this paragraph.

"(2) An agency shall not issue rules which supplement the rules issued under subsection (a) unless such

1 agency has first consulted with the Chief Counsel for Ad-
2 vocacy to ensure that such supplemental rules comply with
3 this chapter and the rules issued under paragraph (1).
4 "(b) Notwithstanding any other law, the Chief Coun-
5 sel for Advocacy of the Small Business Administration
6 may intervene in any agency adjudication (unless such
7 agency is authorized to impose a fine or penalty under
8 such adjudication), and may inform the agency of the im-
9 pact that any decision on the record may have on small
10 entities. The Chief Counsel shall not initiate an appeal
11 with respect to any adjudication in which the Chief Coun-
12 sel intervenes under this subsection.
13 "(c) The Chief Counsel for Advocacy may file com-
14 ments in response to any agency notice requesting com-
15 ment, regardless of whether the agency is required to file
16 a general notice of proposed rulemaking under section
17 553.".
18 (b) CONFORMING AMENDMENTS.—
19 (1) Section 611(a)(1) of such title is amended
20 by striking "608(b),".
21 (2) Section 611(a)(2) of such title is amended
22 by striking "608(b),".
23 (3) Section 611(a)(3) of such title is amend-
24 ed—
25 (A) by striking subparagraph (B); and

(B) by striking "(3)(A) A small entity" and inserting the following:

"(3) A small entity".

SEC. 5. PROCEDURES FOR GATHERING COMMENTS.

Section 609 of title 5, United States Code, is amended by striking subsection (b) and all that follows and inserting the following:

"(b)(1) Prior to publication of any proposed rule described in subsection (c), an agency making such rule shall notify the Chief Counsel for Advocacy of the Small Business Administration and provide the Chief Counsel with—

"(A) all materials prepared or utilized by the agency in making the proposed rule, including the draft of the proposed rule; and

"(B) information on the potential adverse and beneficial economic impacts of the proposed rule on small entities and the type of small entities that might be affected.

"(2) An agency shall not be required under paragraph (1) to provide the exact language of any draft if the rule—

"(A) relates to the internal revenue laws of the United States; or

"(B) is proposed by an independent regulatory agency (as defined in section 3502(5) of title 44, United States Code).

"(c) Not later than 15 days after the receipt of such materials and information under subsection (b), the Chief Counsel for Advocacy of the Small Business Administration shall—

"(1) identify small entities or representatives of small entities or a combination of both for the purpose of obtaining advice, input, and recommendations from those persons about the potential economic impacts of the proposed rule and the compliance of the agency with section 603 of this title; and

"(2) convene a review panel consisting of an employee from the Office of Advocacy of the Small Business Administration, an employee from the agency making the rule, and in the case of an agency other than an independent regulatory agency (as defined in section 3502(5) of title 44, United States Code), an employee from the Office of Information and Regulatory Affairs of the Office of Management and Budget to review the materials and information provided to the Chief Counsel under subsection (b).

"(d)(1) Not later than 60 days after the review panel described in subsection (c)(2) is convened, the Chief Coun-

1 sel for Advocacy of the Small Business Administration
2 shall, after consultation with the members of such panel,
3 submit a report to the agency and, in the case of an agen-
4 cy other than an independent regulatory agency (as de-
5 fined in section 3502(5) of title 44, United States Code),
6 the Office of Information and Regulatory Affairs of the
7 Office of Management and Budget.

8 "(2) Such report shall include an assessment of the
9 economic impact of the proposed rule on small entities and
10 a discussion of any alternatives that will minimize adverse
11 significant economic impacts or maximize beneficial sig-
12 nificant economic impacts on small entities.

13 "(3) Such report shall become part of the rulemaking
14 record. In the publication of the proposed rule, the agency
15 shall explain what actions, if any, the agency took in re-
16 sponse to such report.

17 "(e) A proposed rule is described by this subsection
18 if the Administrator of the Office of Information and Reg-
19 ulatory Affairs of the Office of Management and Budget,
20 the head of the agency (or the delegatee of the head of
21 the agency), or an independent regulatory agency deter-
22 mines that the proposed rule is likely to result in—

23 "(1) an annual effect on the economy of
24 $100,000,000 or more;

"(2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local governments, tribal organizations, or geographic regions;

"(3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets; or

"(4) a significant economic impact on a substantial number of small entities.

"(f) Upon application by the agency, the Chief Counsel for Advocacy of the Small Business Administration may waive the requirements of subsections (b) through (e) if the Chief Counsel determines that compliance with the requirements of such subsections are impracticable, unnecessary, or contrary to the public interest.".

SEC. 6. PERIODIC REVIEW OF RULES.

Section 610 of title 5, United States Code, is amended to read as follows:

"§ 610. Periodic review of rules

"(a) Not later than 180 days after the enactment of the Regulatory Flexibility Improvements Act of 2011, each agency shall publish in the Federal Register and place on its website a plan for the periodic review of rules

1 issued by the agency which the head of the agency deter-
2 mines have a significant economic impact on a substantial
3 number of small entities. Such determination shall be
4 made without regard to whether the agency performed an
5 analysis under section 604. The purpose of the review
6 shall be to determine whether such rules should be contin-
7 ued without change, or should be amended or rescinded,
8 consistent with the stated objectives of applicable statutes,
9 to minimize any adverse significant economic impacts or
10 maximize any beneficial significant economic impacts on
11 a substantial number of small entities. Such plan may be
12 amended by the agency at any time by publishing the revi-
13 sion in the Federal Register and subsequently placing the
14 amended plan on the agency's website.

15 "(b) The plan shall provide for the review of all such
16 agency rules existing on the date of the enactment of the
17 Regulatory Flexibility Improvements Act of 2011 within
18 10 years of the date of publication of the plan in the Fed-
19 eral Register and for review of rules adopted after the date
20 of enactment of the Regulatory Flexibility Improvements
21 Act of 2011 within 10 years after the publication of the
22 final rule in the Federal Register. If the head of the agen-
23 cy determines that completion of the review of existing
24 rules is not feasible by the established date, the head of
25 the agency shall so certify in a statement published in the

1 Federal Register and may extend the review for not longer
2 than 2 years after publication of notice of extension in
3 the Federal Register. Such certification and notice shall
4 be sent to the Chief Counsel for Advocacy of the Small
5 Business Administration and the Congress.

6 "(c) Each agency shall annually submit a report re-
7 garding the results of its review pursuant to such plan
8 to the Congress, the Chief Counsel for Advocacy of the
9 Small Business Administration, and, in the case of agen-
10 cies other than independent regulatory agencies (as de-
11 fined in section 3502(5) of title 44, United States Code)
12 to the Administrator of the Office of Information and Reg-
13 ulatory Affairs of the Office of Management and Budget.
14 Such report shall include the identification of any rule
15 with respect to which the head of the agency made a deter-
16 mination described in paragraph (5) or (6) of subsection
17 (d) and a detailed explanation of the reasons for such de-
18 termination.

19 "(d) In reviewing a rule pursuant to subsections (a)
20 through (c), the agency shall amend or rescind the rule
21 to minimize any adverse significant economic impact on
22 a substantial number of small entities or disproportionate
23 economic impact on a specific class of small entities, or
24 maximize any beneficial significant economic impact of the
25 rule on a substantial number of small entities to the great-

1 est extent possible, consistent with the stated objectives
2 of applicable statutes. In amending or rescinding the rule,
3 the agency shall consider the following factors:
4 "(1) The continued need for the rule.
5 "(2) The nature of complaints received by the
6 agency from small entities concerning the rule.
7 "(3) Comments by the Regulatory Enforcement
8 Ombudsman and the Chief Counsel for Advocacy of
9 the Small Business Administration.
10 "(4) The complexity of the rule.
11 "(5) The extent to which the rule overlaps, du-
12 plicates, or conflicts with other Federal rules and,
13 unless the head of the agency determines it to be in-
14 feasible, State and local rules.
15 "(6) The contribution of the rule to the cumu-
16 lative economic impact of all Federal rules on the
17 class of small entities affected by the rule, unless the
18 head of the agency determines that such calculations
19 cannot be made and reports that determination in
20 the annual report required under subsection (c).
21 "(7) The length of time since the rule has been
22 evaluated or the degree to which technology, eco-
23 nomic conditions, or other factors have changed in
24 the area affected by the rule.

"(e) The agency shall publish in the Federal Register and on its website a list of rules to be reviewed pursuant to such plan. Such publication shall include a brief description of the rule, the reason why the agency determined that it has a significant economic impact on a substantial number of small entities (without regard to whether it had prepared a final regulatory flexibility analysis for the rule), and request comments from the public, the Chief Counsel for Advocacy of the Small Business Administration, and the Regulatory Enforcement Ombudsman concerning the enforcement of the rule.".

SEC. 7. JUDICIAL REVIEW OF COMPLIANCE WITH THE REQUIREMENTS OF THE REGULATORY FLEXIBILITY ACT AVAILABLE AFTER PUBLICATION OF THE FINAL RULE.

(a) IN GENERAL.—Paragraph (1) of section 611(a) of title 5, United States Code, is amended by striking "final agency action" and inserting "such rule".

(b) JURISDICTION.—Paragraph (2) of such section is amended by inserting "(or which would have such jurisdiction if publication of the final rule constituted final agency action)" after "provision of law,".

(c) TIME FOR BRINGING ACTION.—Paragraph (3) of such section is amended—

(1) by striking "final agency action" and inserting "publication of the final rule"; and

(2) by inserting ", in the case of a rule for which the date of final agency action is the same date as the publication of the final rule," after "except that".

(d) INTERVENTION BY CHIEF COUNSEL FOR ADVOCACY.—Subsection (b) of section 612 of title 5, United States Code, is amended by inserting before the first period "or agency compliance with section 601, 603, 604, 605(b), 609, or 610".

SEC. 8. JURISDICTION OF COURT OF APPEALS OVER RULES IMPLEMENTING THE REGULATORY FLEXIBILITY ACT.

(a) IN GENERAL.—Section 2342 of title 28, United States Code, is amended—

(1) in paragraph (6), by striking "and" at the end;

(2) in paragraph (7), by striking the period at the end and inserting "; and"; and

(3) by adding at the end the following new paragraph:

"(8) all final rules under section 608(a) of title 5, United States Code.".

(b) CONFORMING AMENDMENTS.—Paragraph (3) of section 2341 of title 28, United States Code, is amended—

(1) in subparagraph (D), by striking "and" at the end;

(2) in subparagraph (E), by striking the period at the end and inserting "; and"; and

(3) by adding at the end the following new subparagraph:

"(F) the Office of Advocacy of the Small Business Administration, when the final rule is under section 608(a) of title 5, United States Code.".

(c) AUTHORIZATION TO INTERVENE AND COMMENT ON AGENCY COMPLIANCE WITH ADMINISTRATIVE PROCEDURE.—Subsection (b) of section 612 of title 5, United States Code, is amended by inserting "chapter 5, and chapter 7," after "this chapter,".

SEC. 9. CLERICAL AMENDMENTS.

(a) Section 601 of title 5, United States Code, is amended—

(1) in paragraph (1)—

(A) by striking the semicolon at the end and inserting a period; and

(B) by striking "(1) the term" and inserting the following:

"(1) AGENCY.—The term";

(2) in paragraph (3)—

(A) by striking the semicolon at the end and inserting a period, and

(B) by striking "(3) the term" and inserting the following:

"(3) SMALL BUSINESS.—The term";

(3) in paragraph (5)—

(A) by striking the semicolon at the end and inserting a period, and

(B) by striking "(5) the term" and inserting the following:

"(5) SMALL GOVERNMENTAL JURISDICTION.—The term"; and

(4) in paragraph (6)—

(A) by striking "; and" and inserting a period, and

(B) by striking "(6) the term" and inserting the following:

"(6) SMALL ENTITY.—The term".

(b) The heading of section 605 of title 5, United States Code, is amended to read as follows:

1 **"§ 605. Incorporations by reference and certifi-**
2 **cations"**.

3 (c) The table of sections for chapter 6 of title 5,
4 United States Code, is amended—

5 (1) by striking the item relating to section 605
6 and inserting the following new item:

"605. Incorporations by reference and certifications";

7 (2) by striking the item relating to section 607
8 and inserting the following new item:

"607. Quantification requirements";

9 and

10 (3) by striking the item relating to section 608
11 and inserting the following:

"608. Additional powers of Chief Counsel for Advocacy".

12 (d) Chapter 6 of title 5, United States Code, is
13 amended as follows:

14 (1) In section 603, by striking subsection (d).

15 (2) In section 604(a) by striking the second
16 paragraph (6).

○

Mr. COHEN. Thank you, sir. I appreciate the recognition. Small businesses have a significant part of our Nation's economy and everybody knows they're so important for our Nation's health.

According to a March 2010 Small Business Administration report, firms employing fewer than 500 employees employed over half of the private sector workers in 2006. Additionally, small businesses can be drivers of innovation and economic growth, as well.

It's interesting to note, though, that both of these facts, the 500 employees, over half the growth, et cetera, have been true under the existing regulatory system that has been in place since 1980 when the Regulatory Flexibility Act was enacted.

Despite the testimony that we will hear today about how the RFA has been ineffective at stemming overbearing regulations that stifle small businesses, the fact is that small businesses have done well in the almost 36 years since the RFA, as amended in '96 by the Small Business Regulatory Enforcement Fairness Act, has been in place.

I'm concerned that the bill that's the subject of today's hearing, H.R. 527, the "Regulatory Flexibility Improvements Act of 2011," may be a solution in search of a problem. In fact, it's very similar to a bill introduced in 2003, apparently to get at the oppressiveness of the Bush Administration's regulations on small business.

In the written testimony, the three majority witnesses all cite the same study by Nicole and Mark Crain that claims the Federal rulemaking imposes a cumulative cost of $1.75 trillion on the Nation's economy. Mr. Shull, one of our witnesses, will rebut the particulars of that study, I'm sure, but I will note that the Center for Progressive Reform, among others, has debunked the Crain study thoroughly, noting the study does not account for any benefits of regulation and it's relied on suspect methodology in reaching its conclusions.

I would like to ask unanimous consent, Mr. Chairman, that the CPR Report entitled Setting the Record Straight: The Crain and Crain Report on Regulatory Costs be entered into the record.

Mr. COBLE. Without objection.

[The information referred to follows:]

Setting the Record Straight:

The Crain and Crain Report on Regulatory Costs

by CPR Member Scholar Sidney A. Shapiro (University Distinguished Chair in Law, Wake Forest University School of Law),
Ruth Ruttenberg (Professor, National Labor College),
and CPR Policy Analyst James Goodwin

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Setting the Record Straight: The Crain and Crain Report on Regulatory Costs

Introduction

Critics of health, safety, and environment regulation have sought to buttress the case against regulation by citing a 2010 report by economists Nicole Crain and Mark Crain called *The Impact of Regulatory Costs on Small Firms*[1] ("the Crain and Crain report"). The Crain and Crain report is the fourth in a series of reports that have been produced under contract for the Small Business Administration's (SBA) Office of Advocacy since 1995, each of which has attempted to calculate the total "burden" of federal regulations, and to demonstrate that small businesses in all economic sectors bear a disproportionate share of that burden.[2]

Among the Crain and Crain report's findings is one that has become a centerpiece of regulatory opponents' rhetoric: the "annual cost of federal regulations in the United States increased to more than $1.75 trillion in 2008."[3] This figure is several orders of magnitude larger than the estimate generated by the Office of Management and Budget (OMB)—the official estimate of the aggregate costs and benefits of federal regulations prepared annually for Congress. The 2009 OMB report found that in 2008 annual regulatory *costs* ranged from $62 billion to $73 billion.[4] The authors of the Crain and Crain report attribute this massive difference to the fact that their report considers many more rules than do the annual OMB reports, including rules with estimated costs less than $100 million, rules that were put on the books more than 10 years ago, and rules issued by independent regulatory agencies.[5]

As this report demonstrates, however, much more is at work than that. In areas where the OMB and Crain and Crain calculations overlap, Crain and Crain use the same cost data as OMB, but, unlike OMB, which presents regulatory costs as a range, Crain and Crain always adopt the upper end of the range for inclusion in their calculations, a departure that is not justified as we explain in this report. Further, Crain and Crain's calculations for the regulations not covered by OMB's report appear to be based largely on a decidedly unusual data source for economists—public opinion polling, the results of which Crain and Crain massage into a massive, but unsupported estimate of the costs of "economic" regulations. Because Crain and Crain have refused to make their underlying data or calculations public—apparently even withholding them from the SBA office that contracted for the study—it is difficult to know precisely how they arrived at the result that economic regulation has a cost of $1.2 trillion dollars, comprising more than 70 percent of the total costs in their report. Nevertheless, even based on what Crain and Crain reveal, their calculation of the cost of economic regulations is deeply flawed, as we also explain.

In addition, the OMB report accounts for an equally relevant figure that the Crain and Crain's $1.75 trillion figure simply omits: the economic benefits of regulation. OMB's 2009 recent report found that in 2008 annual *benefits* of regulation ranged from $153 billion to $806 billion.[6] And, as a series of CPR reports have explained, the OMB reports likely overestimate regulatory costs and underestimate regulatory benefits, including omitting from its calculations altogether significant benefits that happen to defy monetization.[7] In contrast, the Crain and Crain report makes no effort to account for regulatory benefits. If, for example, a regulation imposes $100 in

costs on a business, but provides twice that in benefits, the Crain and Crain report would still tally that as $100 cost to society, even though it provides substantial net benefits.

It's easy to see why the anti-regulatory critics have seized on the Crain and Crain report and its findings.[8] The $1.75 trillion figure is a gaudy number that was sure to catch the ear of the media and the general public. Upon examination, however, it turns out that the $1.75 trillion estimate is the result of transparently unreliable methodology and is presented in a fashion calculated to mislead.

This report points out the severe flaws with the effort by Crain and Crain to estimate total regulatory costs. These flaws include:

- **Omitted benefits of regulation**. A discussion of regulation is inherently incomplete—and distorted—if it focuses on costs without also considering benefits. Simply put, OMB's calculations demonstrate that regulation has a positive net effect on the economy, and not by a little. The Crain and Crain report simply ignores the benefits of regulation, focusing solely on one half of the equation. But, claiming to present a compilation of regulatory costs, without also presenting a compilation of regulatory benefits, is fundamentally misleading. Indeed, using Crain and Crain's methodology, practically any economic transaction—from the purchase of a loaf of bread to the construction of a manufacturing plant—would be counted as a drain on the economy, because they only include the costs not the benefits.[*] The Crain and Crain report's failure to include an accounting of regulatory benefits is particularly puzzling, since virtually every source the authors rely on for estimates of costs also provide estimates of benefits as well.
- **Questionable assumptions and flimsy data**. The report's estimate of "economic regulatory" costs—financial regulations, for example—which account for 70 percent of the total regulatory costs, is not based on actual cost estimates. Instead, this estimate is based on the results of public opinion polling concerning the business climate of countries that has been collected in a World Bank report. The authors of the World Bank report warn that its results should not be used for exactly the type of extrapolations made by Crain and Crain, because their underlying data are too crude. Crain and Crain nevertheless enter the World Bank data into a formula, which they appear to have created out of whole cloth, that purports to describe a relationship between a country's regulatory stringency and its Gross Domestic Product (GDP). OMB has repeatedly warned against

[*] While comparing costs and benefits is beyond the scope of this paper, it is notable that the 2009 OMB report found that total regulatory benefits are far larger than total regulatory costs. *See infra* endnote 4 and *supra* accompanying text. This finding refers to total aggregate net benefits, which means that some individual regulations may not have benefits that exceed costs. But, this result usually arises from the difficulty of monetizing regulatory benefits, rather than the lack of actual benefits. *See* comments cited *infra* endnote 7; *see also* Rena Steinzor et al., *A Return to Common Sense: Protecting Health, Safety, and the Environment Through "Pragmatic Regulatory Impact Analysis"* (Ctr. for Progressive Reform, White Paper 909, 2009), *available at* http://www.progressivereform.org/articles/PRIA_909.pdf; John Applegate et al., *Reinvigorating Protection of Health, Safety, and the Environment: The Choices Facing Cass Sunstein* (Ctr. for Progressive Reform, White Paper 901, 2009), *available at* http://www.progressivereform.org/articles/SunsteinOIRA901.pdf; Frank Ackerman et al., *Applying Cost Benefit Analysis to Past Decisions: Was Protecting the Environment* Ever *a Good Idea?* (Ctr. for Progressive Reform, White Paper 401, 2004), *available at* http://www.progressivereform.org/articles/Wrong_401.pdf.

trying to reduce the complex relationship between these two concepts to such simplistic terms, yet this is precisely what Crain and Crain do.

- **Opaque calculations**. Contrary to academic and government norms, Crain and Crain do not reveal their data or show the calculations they used to arrive at their cost estimates. Neither is the information available from the SBA Office of Advocacy. Moreover, Crain and Crain declined to furnish their data to CPR despite several requests. As a result, it is impossible to replicate their results, a flaw so significant it would prevent the publication of their paper in any respectable academic journal.
- **Slanted methodology**. The Crain and Crain report suffers from several methodological problems, all of which tilt the results towards an overstatement of regulatory costs. These problems are itemized and explained further below.
- **Overstated costs**. To estimate the cost of non-economic regulation, Crain and Crain almost always used the agency estimates of such costs that were submitted to OMB. Although OMB presents these costs as a range, Crain and Crain always used the upper bound estimate, effectively eliminating the agencies' careful efforts to draw attention to the uncertainties in these calculations. Moreover, cost estimates are typically based on industry data, and regulated entities have a strong incentive to overstate costs in this circumstance. As discussed below, empirical studies have shown that such estimates are usually too high.
- **Peer review rendered meaningless.** The peer review process used by the SBA Office of Advocacy does not support the reliability of the report. Only two people examined the document. The authors ignored a significant criticism raised by one of the two reviewers concerning their estimate of economic regulatory costs. As for the second person, the entire review consisted of the following comments: "I looked it over and it's terrific, nothing to add. Congrats[.]"[9]

For the reasons that follow, we conclude that the Crain and Crain report is sufficiently flawed that it does not come close to justifying regulatory reform efforts, such as the REINS Act,[†] which seek to limit protection of people and the environment. If Crain and Crain had used a more straightforward and generally accepted methodology, they likely would have reached a figure that was several orders of magnitude smaller. And, if Crain and Crain had properly considered regulatory benefits, they likely would have found that regulation is a net economic plus for society. Such findings, however, would not comport with the political agenda of the SBA's Office of Advocacy or of the opponents of regulation in general.

[†] Regulations from the Executive in Need of Scrutiny (REINS) Act, H.R. 10, 112th Cong. (2011). Under this bill, no new "economically significant" regulations would take effect unless Congress affirmatively approved the regulation within 90 days of receiving it, by means of a joint congressional resolution of approval, signed by the President. For more information on the REINS Act, see Sidney Shapiro, *The REINS Act: The Conservative Push to Undercut Regulatory Protections for Health, Safety, and the Environment* (Ctr. for Progressive Reform, Backgrounder, 2011), *available at* http://www.progressivereform.org/articles/CPR_Reins_Act_Backgrounder_2011.pdf.

The Crain and Crain Report's Methodology

The Crain and Crain report purports to provide a complete accounting of all regulatory costs. It divides the regulatory universe into four categories: economic regulations; environmental regulations; tax compliance regulations; and occupational health and safety and homeland security regulations. Notably, the report never provides a clear definition of the term "regulation," nor does it provide clear definitions of each of the four regulatory categories. Next, the authors employ different methodologies to calculate the total costs of regulation in each category. Finally, they add up the costs of regulation for each category to derive a total cost of federal regulations.

The report provides only a part of the data, equations, assumptions, extrapolations, and calculations that would be necessary for replicating the report's results. The authors of this white paper made several attempts to obtain the missing additional materials from the authors of the Crain and Crain report, as well as from the SBA Office of Advocacy, which funded the report, so that we could fully understand and verify the methodologies, data, and assumptions that were employed. The authors of the Crain and Crain report provided us with only very general responses and have given no indication that they would furnish us with the missing information.

Remarkably, a staff member at the SBA Office of Advocacy explained that his office did not have access to any of the additional materials, since it had only contracted to receive the final report from the authors.[10] Thus, the SBA Office of Advocacy entered into an agreement with Crain and Crain to spend taxpayer money on a report whose findings it could not then have verified in any significant way—not even checking the arithmetic.[‡]

Because this underlying information is unavailable, the Crain and Crain report is a political document, rather than an academic study. No academic author would submit such a study for publication without revealing the data and calculations on which the scholar relied. No academic publication would accept such a study unless such information was released. Academic reports also acknowledge and discuss potential weaknesses in their calculations, a modesty that is absent from the Crain and Crain report.

Methodological Problems

Economic Regulation Costs

To calculate the total cost of economic regulations, Crain and Crain employ a regression analysis that purports to establish a correlation between a country's score on the World Bank's "Regulatory Quality Index" (RQI) and the size of the country's economic activity, as measured by GDP per capita.[11] According to the World Bank report, the RQI seeks to measure public "perceptions of the ability of the government to formulate and implement sound policies and regulations that permit and promote private sector development."[12] Crain and Crain have

[‡] If the SBA Office of Advocacy contracts to have similar reports performed in the future, we strongly urge it to obtain all the data, equations, assumptions, extrapolations, and calculations as part of the contract, and to make these materials readily available in a useable format on its website.

interpreted the RQI as measuring how friendly a country is to business interests.[13] The World Bank researchers did not intend for the RQI to be used as a proxy measure for regulatory burden or as a tool for critiquing a particular country's regulatory stringency.[14] Nevertheless, Crain and Crain use the RQI in precisely this fashion.

As the World Bank report explains, the RQI is based on public opinion polling, not quantitative data. It is derived from a composite of 35 opinion surveys that asked questions about the regulatory climate of approximately 200 countries.[15] Given its subjective origins, the World Bank researchers responsible for the RQI designed it with a few limited applications in mind—namely, to make meaningful cross-country comparisons as well as to monitor a single country's progress over time. At the same time, these researchers strongly caution against using the RQI for developing specific policy prescriptions in particular countries.[16]

Crain and Crain provide no justification defending their use of the RQI to estimate regulatory costs, nor do they ever acknowledge the myriad theoretical or empirical problems with calculating such costs based on public opinion polling. Significantly, one of the peer reviewers of the Crain and Crain report raised this objection, stating "I am concerned that the index may not measure what the authors say it measures, and even if it does, it may overstate the costs of regulation when used in conjunction with the other measures."[17] The authors do not appear to have revised the report in response to this comment.

As noted above, the Crain and Crain report uses the RQI, which the authors have converted into a proxy measure for a country's regulatory stringency, as the main variable in their formula for calculating the cost of a country's economic regulations—that is, the supposed reduction in that country's GDP caused by the regulations. The authors do not explain how they devised this formula, nor do they provide any of the underlying data, calculations, and assumptions that they used to devise it. Consequently, no one can verify whether or not the formula provides a reasonable model of reality, nor can anyone verify their calculations.

Using this formula, Crain and Crain calculate the loss in GDP the United States suffers because of economic regulation. It is unclear whether Crain and Crain calculate the loss in GDP as compared to the country with the highest RQI score or whether they calculate the loss in GDP attributed to all regulation. The latter baseline would reflect the GDP in a hypothetical United States that had no economic regulations. Whichever baseline they use, Crain and Crain thus conclude that the cost of economic regulations in the United States in 2008 was $1.236 trillion, "as reflected in lost GDP."[18]

Crain and Crain do not clearly define the category of "economic regulations," other than to note it is broadly inclusive.[§] The lack of a clear definition opens up the possibility that the category of "economic regulations" also includes the other categories of regulations identified by Crain and Crain. If, for example, this category includes some environmental regulation costs, those costs are also the subject of a separate calculation in the report. This would mean that some of

[§] The report indicates that the category of economic regulations is broad enough to include "a wide range of restrictions and incentives that affect the way businesses operate—what products and services they produce, how and where they produce them, and how products and services are priced and marketed to consumers." CRAIN & CRAIN, *infra* endnote 1, at 17.

these regulation costs would be counted twice (once as an economic regulation and once as an environmental regulation), leading to an exaggeration of total regulation costs. Some of the polling data used by the authors of the World Bank study in the calculation of the RQI asks questions of environmental and safety regulations, although the majority of the questions are about tax and price control regulations, trade barriers, access to capital, and regulatory barriers to starting a new business.[**]

One other significant problem in this category of costs is that the regression analysis used in the report assumes an overly simplistic relationship between regulatory stringency and GDP. As noted above, the Crain and Crain report's formula implies that increases in regulatory stringency *cause* a reduction in a country's economic activity, which are reflected in a decreased GDP. The actual relationship between regulatory stringency and a country's economic activity is not so clear-cut, however, because measurements of GDP do not include regulatory benefits. On this subject, the 2009 OMB report to Congress notes:

> The relationship between regulation and indicators of economic activity raises a number of complex questions, conceptual, empirical, and normative. A key issue involves identification of the appropriate measures. For example, is GDP the appropriate measure? As we have seen, many regulations have favorable net benefits, and by hypothesis, such regulations are desirable on standard economic grounds. Of course it would be useful to understand the effects on GDP of particular regulations and of classes of regulations. But while important, GDP is hardly a complete measure of relevant values, and some of the benefits of regulation, such as environmental protection, are not adequately captured by changes in GDP.[19]

Finally, the report's use of the RQI is misleading because it gives the false impression that the U.S. regulatory burden is especially high. In fact, the United States has one of the highest RQI scores, ranking eleventh out of more than 200 countries.[20] The United States ranks higher than many of its competitive trading partners, including China, Germany, Japan, Mexico, South Korea, and Taiwan, and its RQI score has remained fairly constant since 1996, when these scores were first developed.[21] But Crain and Crain's use of the RQI, and the SBA's use of the Crain and Crain report, imply that the U.S. is inferior to these other countries as an excellent place to do business.

Environmental Regulation Costs

To calculate the costs of environmental regulations, the Crain and Crain report adds up the estimated costs of environmental regulations found in each of OMB's annual reports to Congress on cost-benefit analysis since 2001.[22] These estimates in turn are based on aggregation of the

[**] The World Bank study relied on 35 different sources of global or regional surveys, produced by 33 different organizations. Only 16 of the sources had any measure of regulation at all. Only one specifically mentioned environmental regulations (the World Economic Forum Global Competitiveness Survey). Only 2 of the 35 sources mentioned labor market policy: the African Development Bank (not relevant to the US) and the Institute for Management Development World Competitiveness Yearbook. Neither of these two said which labor market issues they measured, and there was no mention of safety and health by them. *See* Kaufmann et al., *infra* endnote 11, at 29 (Table 1), 39-71 (App. A).

cost-benefit analyses that EPA produced when developing the regulations. Based on this data, Crain and Crain find that the total cost of environmental regulations in 2008 was $281 billion,[23] which is 16 percent of the total regulatory costs according to their estimate of total costs.

To generate cost estimates for its cost-benefit analyses, EPA primarily relies on surveys of representative companies that the regulation will likely affect. Because companies know the purpose of the surveys, they have a strong incentive to overstate costs in order to skew the final cost-benefit analysis toward weaker regulatory standards.[24] Agencies must also fill in any data gaps they encounter by making various assumptions. Due to fear of litigation over the regulation, they tend to adopt conservative assumptions about regulatory costs, such that the cost assessment ends up reflecting the maximum possible cost, rather than the mean.[25]

Industry cost estimates—and therefore the cost estimates that EPA develops-- do not account for technological innovations that reduce the cost of compliance and produce non-regulatory co-benefits, such as increased productivity. When companies are asked to predict which technology they will employ to comply with a particular environmental regulation, they often will point to the most expensive existing "off-the-shelf" technology available. Once the regulation actually goes into effect, however, companies have a strong incentive to invent or purchase less costly technologies to come into regulatory compliance. As a result, compliance costs tend to be less, and often much less, than the predicted costs. Moreover, the technological innovations tend to produce co-benefits unrelated to the regulation—such as increased productivity and efficiency—that the company strives to achieve in any event. Given these co-benefits, only a portion of the innovative technology's costs can fairly be counted as compliance costs.[26]

As the following chart indicates, retrospective studies of regulatory costs find that the initial cost estimates are often too high.

Retrospective Studies of Regulatory Costs

Study	Subject of Cost Estimates	Results
PHB, 1980[27]	Sector level capital expenditures for pollution controls	– EPA overestimated capital costs more than it underestimated them, with forecasts ranging 26 to 126% above reported expenditures
OTA, 1995[28]	Total, annual, or capital expenditures for occupational safety & health regulations	– OSHA overestimated costs for 4 of 5 health regulations, with forecasts ranging from $5.4 million to $722 million above reported expenditures
Goodstein & Hedges, 1997[29]	Various measures of cost for pollution prevention	– Agency and industry overestimated costs for 24 of 24 OSHA & EPA regulations, by at least 30% and generally by more than 100%
Resources for the Future, 1999[30]	Various measures of cost for environmental regulations	– Agency overestimated costs for 12 of 25 rules, and underestimated costs for 2 rules

Finally, unlike the OMB reports, which present regulatory costs as a range, Crain and Crain always adopt the upper end of the range for inclusion in their calculations.[31] The authors justify this move by claiming that agencies allegedly have a strong incentive to underestimate regulatory costs, although they provide no empirical evidence to support this claim. In fact, as just explained, it is likely that regulatory costs are overstated. In any case, the choice by Crain and Crain to always take the higher bound estimate, rather than presenting their results as a range of costs, as OMB does, is a misleading use of the OMB data.

Agencies were not required by Executive Order to provide OMB with estimates of regulatory costs and benefits prior to 1988. For this reason, OMB had to rely on non-government estimates in order to estimate regulatory benefits and costs prior to 2000. For environmental regulations issued before 1988, the 2001 OMB report relied on a 1991 study of regulatory costs undertaken by economists Robert Hahn and John Hird.[32]

Hahn and Hird performed no new calculations of regulatory costs, but instead they generated an estimate by synthesizing a set of earlier studies of regulatory costs conducted by a small circle of conservative economists.[33] These estimates are subject to the same limitations as agency-produced cost analyses, including relying on industry-estimates of compliance costs and failing to account for innovation.[††] An additional problem is that the Hahn and Hird study is nearly 20 years old, and many of the earlier studies and data it relies upon are more than 30 years old. The data and assumptions reflected in the Hahn and Hird study cannot be reasonably extrapolated to modern social and economic reality.[‡‡]

Occupational Safety and Health and Homeland Security Regulation Costs

The Crain and Crain report concludes that the total cost of occupational safety and health and homeland security regulations in 2008 was $75 billion,[34] which is four percent of their total costs. Occupational safety and health regulations accounted for $65 billion of the total.

Occupational Safety and Health Regulation Costs

To calculate the occupational safety and health regulations, the Crain and Crain report relies on two sources. The first source, a 2005 study by Joseph Johnson, provides the total costs of all occupational safety and health regulations issued before 2001.[35] The second source, the 2009

[††] In addition, many of these earlier studies assume a regulatory baseline of zero for their comparisons of regulatory costs. In other words, these studies assume that in the absence of the regulations under examination, companies would have taken no environmentally protective actions. This assumption has no basis in a reality where other existing regulations (federal, state, and local), fear of tort liability, and simple market forces induce companies to take some minimal level of environmentally protective action all the time. This minimal level of actions represents the proper baseline against which regulatory costs should be measured. To the extent that these earlier studies assume a zero baseline, they grossly overestimate regulatory costs. McGarity & Ruttenberg, *infra* endnote 24, at 2047.

[‡‡] In the intervening years, the U.S. economy and society have drastically changed. For example, scientific knowledge regarding the harmful public health and environmental effects of pollution has greatly improved, the U.S. has shifted from an industrial sector-based economy to a service sector-based one, and even industry has become characterized by more automation and less human labor. *See* Ian D. Wyatt & Daniel E. Hecker, *Occupational Changes During the 20th Century*, MONTHLY LABOR REV., March 2006.

OMB report to Congress, provides the total cost of all occupational safety and health regulation issued since 2001.

The cost estimate from the 2009 OMB report to Congress is based on a simple aggregation of the cost-benefit analyses that OSHA produced when developing these regulations.[36] As discussed above, the cost assessments generated as part of these cost-benefit analyses greatly overstate the costs of regulations, since the agencies that produce them rely on industry for estimates of compliance costs, adopt conservative assumptions to fill in data gaps, and fail to account for innovation.

The Johnson study likewise suffers from several flaws, leading it to overestimate these regulatory costs. The study begins by aggregating the agency-produced cost-benefit analyses for all of OSHA rules issued before 2001.[37] As just noted, these costs estimates are overstated. Nevertheless, the Johnson study then inflates OSHA's cost estimates by multiplying the total of all of the estimates by 5.5. According to Johnson, using the multiplier is necessary to account for the costs of all of OSHA's non-major regulations—since OSHA does not perform cost-benefit analyses for these regulations—and for *fines* levied for violations of any OSHA standards.[38] In other words, the Johnson study assumes that for every dollar industry spends on compliance with OSHA's major rules, it spends $5.50 on compliance with non-major regulations and on fines for violations of existing OSHA standards.

We see no justification for counting the fines that companies pay for violating regulatory standards as regulatory costs. Instead, these are the costs of *choosing* to break the law. That is, the fines would never have occurred if the firms had not chosen to disobey the law. Under this logic, mass lawbreaking raises regulatory costs, enabling regulatory opponents to argue that we need to reduce regulation because of these high regulatory costs.

The Johnson study took the multiplier of 5.5 from a 1996 study by Harvey James.[39] The James study uses an unpublished and otherwise unavailable 1974 estimate prepared by the National Association of Manufacturers (NAM) of the per-firm cost of compliance with OSHA regulations.[40] Because the report is unavailable, it cannot be checked for accuracy. As we related earlier, industry estimates of regulatory costs are suspect because of the political incentive to inflate such costs. Nevertheless, the Crain and Crain report incorporate the Johnson study without any discussion of this significant limitation in the data.

Homeland Security Regulation Costs

To calculate the cost of all homeland security regulations, the Crain and Crain report again relies on the 2009 OMB report to Congress,[41] which is based on the cost-benefit analyses that the Department of Homeland Security produced when developing its regulations.[42] The cost assessments provided in these cost-benefit analyses are overstated for all the reasons stated above: industry-supplied estimates of compliance estimates; conservative assumptions to fill in data gaps; and failure to account for innovation.

Tax Compliance Regulation Costs

To calculate the cost of tax compliance regulations, the Crain and Crain report starts with estimates of the time that businesses, non-profit organizations, and individuals spend each year completing tax-related forms and filings, and multiplies it by an estimate of the hourly cost of filling out the forms. Using this methodology, the Crain and Crain report concludes that the total cost of tax compliance regulations in 2008 was $160 billion,[43] which is about nine percent of their total costs.

The report says it derives its estimates of the time it takes to fill out tax forms from the Internal Revenue Service and the Tax Foundation, a conservative-leaning non-profit organization.[44] However, they do not explain which data they use or how those data contribute to their estimate. To the extent that data from the Tax Foundation are used, the report's estimate of the amount time spent on tax compliance should be viewed with caution since the Tax Foundation tends to be "anti-tax" in orientation.

The authors calculate tax compliance costs for businesses separately from individuals and non-profit organizations, using the reasonable assumption that businesses spend more money per hour complying with tax regulations. Crain and Crain assume that all businesses rely on "Human Resources professionals" to prepare their taxes, but they provide no evidence to justify this assumption. They nevertheless multiply estimates of the amount of time it takes to fill out the tax forms by $49.77 per hour ("the hourly compensation rate for Human Resources professionals") on tax compliance.[45] The report then appears to assume that all individuals and non-profit organizations have their taxes prepared by accountants or auditors, and it estimates that these entities spend $31.53 per hour ("the average hourly wage rate for accountant and auditors") on tax compliance.[46] With respect to individuals, this assumption seems particularly unfounded given that millions of American households prepare their own taxes.

Conclusion

The Crain and Crain study is rife with flawed methodologies and questionable data and assumptions. Of even greater importance, each of the problems with the Crain and Crain report's methodologies, data, and assumptions lead to an overstatement of regulatory costs. Because of these problems with the Crain and Crain report's reliability, we believe policymakers should disregard its misleading conclusions as they consider matters of regulatory policy.

Endnotes

[1] NICOLE V. CRAIN & W. MARK CRAIN, THE IMPACT OF REGULATORY COSTS ON SMALL FIRMS (2010) (This report was developed under a contract with the Small Business Administration's Office of Advocacy), *available at* http://www.sba.gov/sites/default/files/rs371tot.pdf.

[2] For the three earlier reports, see W. MARK CRAIN, THE IMPACT OF REGULATORY COSTS ON SMALL FIRMS (2005) (This report was developed under a contract with the Small Business Administration's Office of Advocacy), *available at* http://archive.sba.gov/advo/research/rs264tot.pdf; W. MARK CRAIN & THOMAS D. HOPKINS, THE IMPACT OF REGULATORY COSTS ON SMALL FIRMS (2001), *available at* http://archive.sba.gov/advo/research/rs207tot.pdf; THOMAS D. HOPKINS, PROFILES OF REGULATORY COSTS (1995), *available at* http://archive.sba.gov/advo/research/rs1995hoptot.pdf.

[3] CRAIN & CRAIN, *supra* endnote 1, at 6 (2009 dollars).

[4] OFFICE OF MGMT & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, 2009 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 3 (converted from 2001 to 2009 dollars), *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/legislative_reports/2009_final_BC_Report_01272010.pdf [hereinafter 2009 OMB Report]. The Regulatory Right-to-Know Act requires OMB to produce a report every year that, among other things, calculates the annual cost of major regulations. Treasury and General Government Appropriations Act of 2001 §624, Pub. L. 106-554, 31 U.S.C. §1105 note.

[5] CRAIN & CRAIN, *supra* endnote 1, at 3-5.

[6] 2009 OMB Report, *supra* endnote 4, at 3 (converted from 2001 to 2009 dollars).

[7] *See, e.g.*, Sidney Shapiro et al., *CPR Comments on Draft 2010 Report to Congress on the Benefits and Costs of Federal Regulations* 16-19 (App. A, Pt. C.) (2010), *available at* http://www.progressivereform.org/articles/2010_CPR_Comments_OMB_Report.pdf; Rena Steinzor et al., *CPR Comments on Draft 2009 Report to Congress on the Benefits and Costs of Federal Regulations* 16-19 (App. A, Pt. C.) (2009), *available at* http://www.progressivereform.org/articles/2009_CPR_Comments_OMB_Report.pdf; Amy Sinden & James Goodwin, *CPR Comments on Draft 2008 Report to Congress on the Benefits and Costs of Federal Regulations* 5-8 (2008), *available at* http://www.progressivereform.org/articles/2008_Comments_OMB_Report.pdf. For all of the comments on OMB's annual reports to Congress on the benefits and cost of federal regulation produced by CPR Member Scholars and staff, see Ctr. for Progressive Reform, *OMB Reports on the Costs and Benefits of Regulation*, http://www.progressivereform.org/OMBCongress.cfm (last visited Feb. 5, 2011).

[8] For examples of instances in which anti-regulatory critics have cited the Crain and Crain report and its conclusions, see, e.g., James L. Gattuso, Diane Katz, & Stephen A. Keen, *Red Tape Rising: Obama's Torrent of New Regulation* (Heritage Foundation, Backgrounder No. 2048, 2010) ("According to a report recently released by the Small Business Administration, total regulatory costs amount to about $1.75 trillion annually . . . ."), *available at* http://thf_media.s3.amazonaws.com/2010/pdf/bg2482.pdf; Sen. Mark R. Warner, Op-Ed, *To Revive the Economy, Pull Back the Red Tape*, WASH. POST, Dec. 13, 2010 ("According to the U.S. Small Business Administration, the estimated annual cost of federal regulations in 2008 exceeded $1.75 trillion."), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/12/12/AR2010121202639.html?hpid=opinionsbox1; Press Release, U.S. Chamber of Commerce, U.S. Chamber Calls on Federal and State Lawmakers to Stem the Growing Tide of Excessive Regulation (Oct. 7, 2010) ("Donohue cited statistics from the Small Business Administration's Office of Advocacy estimating the total cost of federal regulations at $1.75 trillion."), http://www.uschamber.com/press/releases/2010/october/us-chamber-calls-federal-and-state-lawmakers-stem-growing-tide-excessive (last visited Feb. 1, 2011).

[9] OFFICE OF ADVOCACY, SMALL BUSINESS ADMINISTRATION, INFORMATION QUALITY PEER REVIEW REPORT FOR THE IMPACT OF FEDERAL REGULATORY COSTS ON SMALL FIRMS 4 (2010) (Bob Litan's peer review), *available at* http://www.sba.gov/sites/default/files/files/TheImpactofFederalRegulatoryCostsonSmallFirmsPRFY2010.pdf.

[10] Telephone Interview with Radwan Saade, Regulatory Analyst, Small Business Administration, Office of Advocacy, Office of Economic Research (Jan. 11, 2011).

[11] CRAIN & CRAIN, *supra* endnote 1, at 18-25. The RQI was developed as part of the World Bank's Worldwide Governance Indicators project, which seeks to establish a variety of indexes for measuring countries' governance and institutional quality. *See* Daniel Kaufmann et al., *Governance Matters VIII: Aggregate and Individual Governance Indicators 1996–2008* at 2 (The World Bank, Development Research Group, Macroeconomics and

Growth Team, Policy Research Working Paper No. 4978, 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1424591## (follow "One-Click Download" hyperlink at the top of the page).

[12] Kaufmann et al., *supra* endnote 11, at 6.

[13] *See* CRAIN & CRAIN, *supra* endnote 1, at 21 (explaining that increases in the RQI correspond to "reductions in regulatory burden.").

[14] *See id.*

[15] Kaufmann et al., *supra* endnote 11, at 4.

[16] *Id.* at 5 (describing the RQI as "too blunt a tool to be useful in formulating specific governance reforms in particular country contexts. Such reforms, and evaluation of their progress, need to be informed by much more detailed and country-specific diagnostic data . . . .").

[17] OFFICE OF ADVOCACY, *supra* endnote 9, at 2 (Richard Williams' peer review), *available at* http://www.sba.gov/sites/default/files/files/TheImpactofFederalRegulatoryCostsonSmallFirmsPRFY2010.pdf. Richard Williams is a conservative economist who currently works as the Director of Policy Research at the Mercatus Center, an anti-regulatory think tank. *See* Mercatus Ctr., *Richard Williams Biography*, http://mercatus.org/richard-williams (last visited February 4, 2011).

[18] CRAIN & CRAIN, *supra* endnote 1, at 24 (2009 dollars).

[19] 2009 OMB Report, *supra* endnote 4, at 29.

[20] *See* Kaufmann et al., *supra* endnote 11, at 89-91 (Table C4). The RQI is designed so that possible scores range from -2.5 (*i.e.*, the greatest regulatory burden, however defined) to 2.5 (*i.e.*, the lowest regulatory burden, however defined). In 2008, the RQI score for the United States was 1.579. CRAIN & CRAIN, *supra* endnote 1, at 24.

[21] *See* Kaufmann et al., *supra* endnote 11, at 89-91 (Table C4).

[22] CRAIN & CRAIN, *supra* endnote 1, at 25- 27.

[23] *Id.* at 31 (Table 6) (2009 dollars).

[24] Thomas O. McGarity & Ruth Ruttenberg, *Counting the Cost of Health, Safety, and Environmental Regulation*, 80 TEX. L. REV. 1997, 2011, 2044-45 (2002).

[25] *Id.* at 2046.

[26] *Id.* at 2049-50. Studies of OSHA's vinyl chloride and cotton dust standards concluded that actual compliance costs were much lower than predicted costs in part because of overall productivity gains achieved by regulatees. When company scientists and engineers were forced to concentrate on cost-effective compliance techniques, they also identified ways to improve the overall productivity of an industrial process, or even an entire industry. *See* OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, OFFICE OF PROGRAM EVALUATION, REGULATORY REVIEW OF OSHA'S COTTON DUST STANDARD (2000) (identifying extensive technological improvements and increased productivity in the textile industry spurred by OSHA's cotton dust standard); RUTH RUTTENBERG, REGULATION IS THE MOTHER OF INVENTION 42, 44-45 (Working Papers for a New Society, May/June 1981), (identifying six regulation-induced changes in the vinyl chloride industry that resulted in increased productivity).

[27] Winston Harrington, Richard D. Morgenstern, & Peter Nelson, *On the Accuracy of Regulatory Cost Estimates* 6 (Resources for the Future, Discussion Paper 99-18, 1999) (citing PUTNAM, HAYES, & BARTLETT, INC., COMPARISONS OF ESTIMATED AND ACTUAL POLLUTION CONTROL CAPITAL EXPENDITURES FOR SELECTED INDUSTRIES (Report prepared for the Office of Planning & Evaluation, U.S. Envtl. Protection Agency, 1980)), *available at* http://www.rff.org/documents/RFF-DP-99-18.pdf.

[28] OFFICE OF TECHNOLOGY ASSESSMENT, GAUGING CONTROL TECHNOLOGY AND REGULATORY IMPACTS IN OCCUPATIONAL SAFETY AND HEALTH: AN APPRAISAL OF OSHA'S ANALYTICAL APPROACH 58 (1995).

[29] Eban Goodstein & Hart Hodges, *Polluted Data: Overestimating Environmental Costs*, 8 AM. PROSPECT 64 (Nov./Dec. 1997).

[30] Harrington, Morgenstern, & Nelson, *supra* endnote 27. The Resources for the Future study notes that actual compliance costs can also be less than an agency estimates because there can be less regulatory compliance than the agency anticipates. If an agency overestimates the extent of pollution reduction, or some similar benefit, then the regulation may cost less than the agency estimates. In such cases, the original agency estimate might have been accurate, but it turns out to be wrong because the regulatory industry does not obey the regulation to the extent that the agency predicted. *Id.* at 14-15.

[31] CRAIN & CRAIN, *supra* endnote 1, at 27.

[32] *Id.* at 25.

[33] Robert W. Hahn & John A. Hird, *The Costs and Benefits of Regulation: Review and Synthesis*, 8 YALE J. ON REG. 233, 248-54 (1991).

[34] CRAIN & CRAIN, *supra* endnote 1, at 31 (2009 dollars).
[35] *Id.*
[36] 2009 OMB Report, *supra* endnote 4, at 11 (Table 1-2).
[37] Joseph M. Johnson, *A Review and Synthesis of the Cost of Workplace Regulations*, *in* CROSS-BORDER HUMAN RESOURCES, LABOR, AND EMPLOYMENT ISSUES 433, 453-54, 466 (Table 10) (Andrew P. Morriss & Samuel Estreicher eds., 2005).
[38] *Id.* at 455.
[39] HARVEY S. JAMES, JR., ESTIMATING OSHA COMPLIANCE COSTS 10-13 (Ctr. for the Study of Am. Bus., Policy Study No. 135, 1996).
[40] *Id.* James compared the NAM estimate to cost-benefit estimates produced by OSHA. Since the NAM estimate was approximately 5.5 times greater than the aggregate value of OSHA's cost-benefit analyses, he assumes he was justified using a 5.5 multiplier. *Id.* James did not cite an original source for the numbers that he derived from the NAM estimate. He merely cited a book by Robert S. Smith in which the NAM estimate was featured in a table. *Id.* at 4. There is no indication in James' report that he read or made any independent attempt to evaluate the accuracy of the NAM report.
[41] CRAIN & CRAIN, *supra* endnote 1, at 31.
[42] 2009 OMB Report, *supra* endnote 4, at 17-18.
[43] CRAIN & CRAIN, *supra* endnote 1, at 29 (2009 dollars).
[44] *Id.* at 28.
[45] *Id.* at 29.
[46] *Id.* at 29.

About the Center for Progressive Reform

Founded in 2002, the Center for Progressive Reform is a 501(c)(3) nonprofit research and educational organization comprising a network of scholars across the nation dedicated to protecting health, safety, and the environment through analysis and commentary. CPR believes sensible safeguards in these areas serve important shared values, including doing the best we can to prevent harm to people and the environment, distributing environmental harms and benefits fairly, and protecting the earth for future generations. CPR rejects the view that the economic efficiency of private markets should be the only value used to guide government action. Rather, CPR supports thoughtful government action and reform to advance the well-being of human life and the environment. Additionally, CPR believes people play a crucial role in ensuring both private and public sector decisions that result in improved protection of consumers, public health and safety, and the environment. Accordingly, CPR supports ready public access to the courts, enhanced public participation, and improved public access to information. The Center for Progressive Reform is grateful to the Public Welfare Foundation for its generous support of CPR's work on regulatory issues in general.

The Center for Progressive Reform
455 Massachusetts Ave., NW, #150-513
Washington, DC 20001
202.747.0698
info@progressivereform.org

Direct media inquiries to Matthew Freeman or Ben Somberg, 202.747.0698,
mfreeman@progressivereform.org or bsomberg@progressivereform.org.

Visit CPR on the web at www.progressivereform.org.
Read CPRBlog at www.progressivereform.org/CPRBlog.cfm.

Mr. COHEN. Thank you, Mr. Chairman. Unfortunately for the proponents of H.R. 527, the Crain study appears to be the only statistical evidence that they can cite or can be cited in support of this notion that regulations impose undue cost on small business.

While I don't dispute that regulations can impose costs and that can cost-benefit analysis is a valuable tool for ensuring that agen-

cies promulgate good regulations, I remain skeptical as to the degree of the purported problem as the proponents of H.R. 527 suggest.

I also take notion with the—take issue with the notion that the Federal regulations are to blame for what remains an unacceptably-high unemployment rate. If anything, current employment problems can be traced to a lack of adequate regulation of the financial services and housing industries which allowed for reckless private sector behavior that just about everybody recognizes as the cause of the Great Recession, the 2008 financial crisis, the most severe economic recession since the Great Depression. It was the lack of regulation that hurt us, not regulation.

Almost anything that can stand—anything can stand to be improved and I'm open to suggestions on how we can improve our regulatory process, particularly how it relates to small business, but H.R. 527 proposes some needlessly drastic measures that threaten to undermine public health and safety and waste public resources.

I point to three particular examples. First, I'm concerned about the requirement that as part of the Regulatory Flexibility Analysis, agencies must consider the indirect effect of a proposed or final rule. Although the bill attempts to put some sort of logical limit on this requirement by specifying that the required analysis be restricted to those indirect effects that are reasonably foreseeable, that qualification is insufficient.

Asking what is indirect and what is reasonably foreseeable still requires highly-speculative analysis. Forcing agencies to devote limited staff and resources to engage in such type of unwieldy, indeterminate and speculative analysis which would constitute nothing more than a guessing game is a waste of taxpayer money, putting government workers more and more to work on issues that are not going to result in an aid to our economy or small business.

Second, I'm troubled by the repeal of agencies' authority to waive or delay their Regulatory Flexibility Analysis in the event of an emergency. If we're truly concerned about flexibility in the rulemaking process, then at a minimum agencies ought to retain the ability to respond to an emergency. The rationale for appealing this emergency authority is not clear, at least not to me, other than as a general attack on rulemaking.

Third, I'm concerned that H.R. 527's look-back provision is simply a backdoor way for special interests to undermine existing health and safety regulations. You know, the Clean Air Act was passed in the EPA created by a Republican president, Richard Nixon, one of his crowning achievements, other than making the trip to China.

As Mr. Shull notes in his written testimony, agencies will be forced to rejustify longstanding rules ensuring the safety of the air we breathe, the water we drink, the food we eat, the products we buy, and the places we work, rules that most Americans support and rules that need to be maintained for the health and safety and welfare of the American public which is part of the government police powers that need to be maintained, enforced, and strengthened for the benefit of all.

I'm open to ideas on tweaking the regulatory process in modest ways to make regulatory compliance easier for small businesses

and perhaps finding better ways for small business to provide input to specific rules. As drafted, though, H.R. 527, a redraft of the 2003 law that's dusted off in the 2006 law, now introduced as the 2011 law, simply goes too far and hasn't changed much in 8 years.

Thank you, Mr. Chairman. I yield back the remainder of my time.

Mr. COBLE. I thank the gentleman. The Chair recognizes the distinguished gentleman from Michigan, the Chairman Emeritus of the House Judiciary Committee, for an opening statement.

Mr. CONYERS. Thank you, Chairman Coble. I'm happy to be serving on this Committee and I repeat my congratulations to you for assuming the Chairmanship of this Committee. You're a senior Member of Judiciary and we respect that so very much.

Now on January 24, our Subcommittee had hearings on the REINS Act. Now this was our colleague from Kentucky Jeff Davis's notion that all regulations ought to be approved or disapproved by the Congress and apparently the notion of the Separation of Powers Doctrine could be set aside in this instance.

I don't know how in the world after we pass a law, obligate the appropriate Federal agency to deal with it, we then say that any regulation has to be approved by us. So we come back and we legislate on what they're doing to implement the law that we passed in the first place and your speed, Chairman Coble, is remarkable because you introduced this bill and here we are 2 days later holding hearings on it. I envy that. I tried to do that when I was Chair of this Committee and I was a miserable failure. We never could move with that kind of speed.

Of course. I yield.

Mr. COBLE. I did not introduce it. I think the Chairman of the full Committee introduced it.

Mr. CONYERS. Oh, Smith. Oh, well, then that explains the speed then.

Mr. COBLE. I'm not as good as you think.

Mr. CONYERS. No. This Chairman is swifter than the previous Chairman and I will discuss this a little bit more, but here's what I'm looking at.

In addition to what Steve Cohen just talked about, a credible cost that is alleged to be occurring, the whole notion that this will cost almost $2 trillion is—well, I'll just read the one quote from here.

"It's easy to see why the anti-regulatory critics have seized on the Crain and Crain Report and its findings." That's the one that Mr. Cohen just put in the record. "The 1.75 trillion figure is a gaudy number that was sure to catch the ear of the media and the general public. Upon examination, however, it turns out that the 1.75 trillion estimate is the result of transparently unreliable methodology and is presented in a fashion calculated to mislead."

I'd like to ask all of the four witnesses to be prepared to respond to this at any time during this hearing.

The other matter is the OMB Watch Statement on the Regulatory Flexibility Improvements Act and there are five problems that deeply concern them about this proposed legislation. One, it adds yet another analytical layer to the rulemaking process, further complicating agencies' ability to implement statutes for full admissions and serve the public interests.

This measure before us gives more power to the Small Business Administration, Office of Advocacy, which is in fact an office of taxpayer-subsidized industry lobbyists who funnel the objections of businesses into agency decision-making.

Three, it politicizes important decisions about public protections, potentially allowing economists and political offices to overrule agency scientists and other experts.

Four, it would actually make it more difficult for agencies to review and revise existing regulations by forcing agencies to use a formula to decide which rules to review rather than reviewing the rules at their discretion.

And finally, it's an unfunded mandate, asking much of agencies but authorizing no additional resources.

Get the picture? I do, and that's why this is so important. I'm concerned that in this time of fiscal restraint, this bill will result in wasting public resources and there are several other reasons that I'd like to bring to your attention, but I think I can bring it up safely in the course of our discussions, and I thank Chairman Coble for his generosity in terms of time.

Mr. COBLE. I thank the gentleman and all other opening statements will be made a part of the record without objection.

[The prepared statement of Mr. Conyers follows:]

Statement of the Honorable John Conyers Jr.
for the Hearing on the "Regulatory Flexibility Improvements Act of 2011"
Before the Subcommittee on Courts, Commercial and Administrative Law

Thursday, February 24, 2011, at 1:30 p.m.
2141 Rayburn House Office Building

We are being asked to focus this afternoon on a newly introduced bill known as the "Regulatory Flexibility Improvements Act of 2011." This is a long bill, and the final language was not provided to me until yesterday, but it is already strikingly clear to me that this bill is deeply problematic, and will overwhelm regulatory agencies in unnecessary analysis, hampering their ability to promulgate and enforce regulations created to protect working families.

There are three chief areas of concern with the bill I would like to examine in today's hearing.

1. My first concern is that the Regulatory Flexibility Improvement Act will threaten public safety.

Our agencies are charged with producing regulations that protect every single one of us as we breathe the air around us, drink water, eat food, drive on highways, go to work, and strive to live safe and healthy lives.

Small businesses, like all businesses, contribute to the hazards that we face every single day. It makes no difference to someone who is breathing dirty air or drinking poisoned water, whether the hazards that we face come from small businesses or large businesses. The far-reaching legislation we are examining today could have devastating effects, calling into question longstanding health, safety and environmental protections while needlessly burdening agencies and squandering agency resources. By overburdening the agencies charged with protecting us, this bill will threaten valuable protections, and, puts corporate special interests ahead of the public interest.

2. My second chief concern is that the Regulatory Flexibility Improvements Act will waste public resources.

I understand the desire to help small businesses and recognize the fact that small businesses face a different kind of hurdle than their larger counterparts when trying to comply with regulations. The answer, however, is not to burden the agencies who are responsible for protecting the public. The answer is to help small businesses comply with important, and often life-saving, regulations.

The Regulatory Flexibility Improvements Act amends the Regulatory Flexibility Act by requiring federal agencies to conduct comprehensive analyses of the impacts of federal rules on small businesses. The bill would drastically change current law in several ways. It would expand the RFA's coverage to include <u>all regulations on the books</u>, even long-proven safeguards such as the ban on lead in gasoline.

This bill is also dangerous because it will invite what some of the critics describe as "paralysis analysis," by requiring agencies to examine both direct <u>and indirect</u> effects of regulations.

The bill requires agencies to examine not only direct effects, which are currently assessed under the RFA, but also indirect effects. Agencies face substantial difficulties in attempting to calculate indirect effects. Some critics have suggested, and I believe we will hear from at least one witness today, that requiring analysis of indirect effects would be so speculative as to be useless for policymakers.

In addition, the courts have consistently held that the RFA does not impose an obligation on agencies to analyze indirect economic effects on entities it does not regulate. Requiring a guessing game to divine and then consideration of indirect economic effects would drown agencies in burdensome and highly speculative analyses and paperwork that would impede their ability to promulgate needed protections, such as protections for workers against exposure to deadly chemicals.

This bill would impose additional burdens on agency rulemaking in other ways. It would expand the scope of rules subject to the RFA by including amendments to land management plans, rules affecting Indian tribes, and Internal Revenue Service recordkeeping requirements. It also requires analyses of proposed and final rules' impacts on small entities to be more detailed and quantitative that it was previously, requiring agencies to spend more time and resources engaged in such analyses rather than rulemaking. Finally, it expands the use of review panels (consisting of representatives from the agency proposing a rule, affected small entities, and the Office of Information and Regulatory Affairs). Currently, only rules proposed by the Environmental Protection Agency and the Occupational Safety and Health Administration (OSHA) are subject to such panel review. The RFIA would expand the use of these panels to all rules. If enacted, this bill would waste agency resources on highly speculative assessments, and burdens agencies with redundant and unnecessary analysis.

3. My third point is that the benefits of regulation outweigh the costs. In addition to further hampering the rulemaking process, the bill suffers from flawed economic analysis. I suspect we will hear testimony today that regulations produce costs for the economy, and for the businesses who have to comply with them. Some proponents of the RFIA have relied on a study - known as the Crain study - that has been thoroughly discredited. I trust none of the witnesses - or members - in today's hearing will rely on this discredited study, but in case they do, I refer them to the Center for Progressive Reform White Paper, # 1103, February 2011, entitled *Setting the Record Straight: The Crain and Crain Report on Regulatory Costs.* What you might hear cited in today's hearing is a claim that has become a centerpiece of regulatory opponents' rhetoric: that the "annual cost of federal regulations in the United States increased to more than $1.75 trillion in 2008." The reality is that this figure has been thoroughly discredited. It is based upon severely flawed methodology, and comes from a report - Crain and Crain report - which fails, among other things, to account for regulatory benefits.

We must recognize that the benefits of regulation greatly exceed the costs. The underlying rationale for the bill being discussed today fails to account for the benefits of regulation, including benefits for the economy and for public health and safety. For example, a review of OSHA's Cotton Dust Standard reveals that the affected industry grew and prospered in the aftermath of the rule's promulgation, and that much of that growth and prosperity was the result of innovations relating to compliance with the rule. Indeed, the costs of the rule ended up being much smaller than predicted because of these innovations

We can see measurable and marked benefits of regulation. We can look at increased I.Q. points in our children, when we took out lead from gasoline and now that children aren't inhaling that lead from the air they breathe. That is one of just many, many examples.

I look forward to hearing more about these issues today. Thank you.

Mr. COBLE. We're pleased to have an outstanding panel today. I will introduce them from my left to right.

Mr. Richard Gimmel is the President and third-generation owner of Atlas Machine and Supply, Inc., based in Louisville, Kentucky. The company is a 104 years old and has branches in Ohio and Indiana. Mr. Gimmel says of his position, "It's my responsibility to do all I can to grow, strengthen, and improve the company and then to pass it on," and his son Richard Gimmel III heads the company's Engineering Division.

In addition to presiding at Atlas Machine and Supply, Inc., Mr. Gimmel sits on the Board of Directors at the National Association

of Manufacturers and he received his MBA from Bellarmine University. Did I pronounce that correctly, Mr. Gimmel? Bellarmine in Kentucky. Good to have you with us.

Mr. Thomas Sullivan is Of Counsel of Nelson Mullins Riley and Scarborough, LLP, in Washington. Mr. Sullivan also heads the Small Business Coalition for Regulatory Relief. In the past, Mr. Sullivan served as Chief Counsel for Advocacy at the Small Business Administration, worked with the National Federation of Independent Business, served on Congressional Affairs staff of the U.S. Environmental Protection Agency, and was an official of the University Department of Justice, Environment, and Natural Resources Division.

Mr. Sullivan earned his Juris Doctorate Degree from Suffolk University School of Law.

Mr. Robert Shull is our third witness and is a Program Officer for Worker's Rights at the Public Welfare Foundation in Washington, D.C. Prior to coming to the Public Welfare Foundation, Mr. Shull was the Deputy Director for Auto Safety and Regulatory Policy at Public Citizen and Director of Regulatory Policy at OMB Watch.

Our fourth witness, Mr. Karen Harned, is the Executive Director of the National Federation of Independent Business, Small Business Legal Center. Prior to coming to NFIB, Ms. Harned worked as an associate at Olsson, Frank, and Weeda, PC, and on the staff of Senator Dodd Nichols of Oklahoma.

She earned her BA Degree from the University of Oklahoma and her JD Degree from the George Washington University School of Law.

Now I am told that there is a Floor Vote imminent. So we'll have to just wait until the bell rings.

Ladies and gentlemen, we try to comply with the 5-minute rule and we try to apply that to us as well as to you all. So when you see the amber light appear in your face, you will know the ice on which you're skating is getting thinner but nobody will be keelhauled for violating but we would appreciate your staying within the 5-minute rule, if you could. When the red light appears, that is your warning that the 5 minutes have in fact expired.

Good to have each of you with us. Mr. Gimmel, why don't you kick it off?

TESTIMONY OF RIC GIMMEL, PRESIDENT, ATLAS MACHINE & SUPPLY, INC.

Mr. GIMMEL. Well, Mr. Chairman, I appreciate the opportunity to be here and I kind of feel a little out of place. I'm probably the only person up here that doesn't do this for a living. I mean, I run a machine shop, so I hope you'll bear with me——

Mr. COBLE. We will, indeed.

Mr. GIMMEL [continuing]. In that regard. My company, Atlas Machine, is based in——

Mr. COBLE. Mr. Gimmel, pull that mike a little closer to you, if you will.

Mr. GIMMEL. Yes. My company is Atlas Machine & Supply. We're based in Louisville. I have 200 employees, a 104-year-old company,

third, actually fourth generation now with my son taking over in Engineering.

I also serve on the Board of the National Association of Manufacturers and am pleased to testify on their behalf today.

The United States is the world's largest manufacturing economy. It produces 1.6 trillion of value each year and employs 12 million Americans working directly in manufacturing.

On behalf of the NAM and the millions of men and women working in manufacturing in the United States, I want you folks to know that we support your efforts to reform the RFA and to unleash the small manufacturers of this country to do what they do best which is to make things and create jobs and, I might also add, to pay taxes.

Manufacturers have been deeply affected by the most recent recession. This sector lost 2.2 million jobs during this period. Our own company suffered the worst downturn since the Great Depression. So far, only 6.2 percent of these jobs have come back and the numbers show that American manufacturing is growing more slowly than in the countries we have to compete with.

We have seen policies from Washington that will not help our economic recovery and can actually discourage job creation. Some have proposed policies that fortunately have not yet been enacted, such as huge increases in the individual income tax rate, the Employee Free Choice Act, the so-called cap and trade legislation.

We still face threats from an EPA that we believe is out of control and a healthcare mandate that appears to make the business healthcare burden even worse. All of these will worsen our ability to compete as a Nation. To regain manufacturing momentum and to return to net job gains, we need improved economic conditions and we need improved government policies.

In recent years, many of us in manufacturing have transformed our operations. We've adopted a Japanese principle some of you may have heard of. It's called "lean thinking." The concept is very simple. You just identify everything in the organization that consumes resources, that adds no value to the customer. That's called "muda" or waste. Then you look for a way to eliminate the muda.

Our modest proposal is that the government learns from manufacturing and incorporates lean thinking into the regulatory process. Many of the proposals that are being offered by this Subcommittee, including more detailed statements in the RFA process and requirements to identify redundant, overlapping, or conflicting regulations, will do just that.

My written statement details our support for amendments to the periodic review requirements of the RFA, thus applying lean thinking and continuous improvement, another manufacturing principle, to the regulatory process.

It's crucial that agency action be made mandatory when these inefficiencies are identified. The gains could be tremendous, as we found on the factory floor.

My written remarks also detail examples of the damage to be done by runaway regulation at the agency level, including the EPA's ozone proposals. One estimate is that the most stringent standard under consideration would result in the loss of 7.3 million

jobs by 2020 and one trillion per year in new regulatory costs, beginning 2020.

Manufacturers hope that this legislation is just the beginning of a more thoughtful regulatory system built on common sense with an understanding of modern manufacturing.

A few days ago, the President appeared before business leaders here in Washington. He urged us to "get in the game," those were his words, and to invest in growth and job creation and I'm here to tell you we would love to do just that, but we don't invest our personal assets just because somebody, even the President, tells us we should. We do so because we believe the environment is right and that good opportunities exist for return on the investment and job creation.

Many of the NAM's members are family businesses, like our own. We want to invest to grow. That's why we exist. But when our government creates policies, laws, and regulations that increase the cost of doing business, the natural reaction by small businesses, in particular, is to simply hunker down and wait things out.

Manufacturers in the United States created the middle class. We can regain our momentum with the right policies in place. I'm confident that our Nation's leaders will take action to promote and not increase the risks of investment and job creation and the NAM stands ready to assist you in this effort.

Thank you, and I'll look forward to any questions.

[The prepared statement of Mr. Gimmel follows:]

NATIONAL ASSOCIATION OF
Manufacturers

Testimony

of Rich Gimmel
President
Atlas Machine & Supply, Inc.
Louisville, Kentucky
on behalf of the National Association of Manufacturers

before the Subcommittee on Courts, Commercial & Administrative Law
Committee on the Judiciary
U.S. House of Representatives

on the Regulatory Flexibility Improvements Act of 2011
Unleashing Small Businesses to Create Jobs

February 10, 2011

COMMENTS OF THE NATIONAL ASSOCIATION OF MANUFACTURERS
BEFORE THE

SUBCOMMITTEE ON COURTS, COMMERCIAL & ADMINISTRATIVE LAW
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

FEBRUARY 10, 2011

Chairman Coble, Ranking Member Cohen and members of the Subcommittee on Courts, Commercial and Administrative Law, thank you for the opportunity to testify before you today about reform of the Regulatory Flexibility Act (RFA) and job creation.

My name is Rich Gimmel, and I am president and owner of Atlas Machine and Supply, Inc. Atlas is a 104-year-old industrial machine shop and engineering firm based in Louisville, Kentucky, with additional manufacturing and service facilities in Cincinnati and Columbus, Ohio and Evansville, Indiana. My son is in charge of our engineering operations, which makes us a fourth-generation family business. We have nearly 200-employees; most of them are in skilled trades and have an average tenure of more than 11 years each with our company. We tend to take a long-term view of things, including our relationships with employees, vendors and customers, and our financial investments. We sometimes say we don't operate from quarter to quarter, but from generation to generation

I also serve as a member of the Board of Directors of the National Association of Manufacturers (NAM) and am pleased to testify on their behalf today. The NAM is the nation's largest manufacturing trade association, representing manufacturers in every industrial sector and in all 50 states. Manufacturing has a presence in every single

congressional district providing good, high-paying jobs. The United States is the world's largest manufacturing economy. It produces $1.6 trillion in value each year, or 11.2 percent of GDP, and employs nearly 12 million Americans working directly in manufacturing.

On behalf of the NAM and the millions of men and women working in manufacturing in the United States, I wish to express my support for your efforts to reform the Regulatory Flexibility Act (RFA) and allow the small manufacturers of this country to do what they do best – make things and create jobs.

Manufacturers have been deeply affected by the most recent recession. The manufacturing sector lost 2.2 million jobs during this period. Our own company suffered its worst downturn since the Great Depression. Fortunately, we were able to maintain stable employment for our skilled workforce of machinists, welders, mechanics and engineers. Last year, there seemed to be some positive signs of job growth in manufacturing, but most of that occurred in the first five months of the year, and then modest job losses started again through November.

Manufacturing finished the year with a net gain of 136,000 manufacturing jobs, only 6.2 percent of our total losses in the recession, and with a significant deceleration in our jobs recovery. But we are competing globally. And despite our current upswing, the numbers show that manufacturing in America is growing more slowly than in countries such as Taiwan, Japan, Ireland and Great Britain — to name just a few. Some of these challenges are self-inflicted. We have seen policies from Washington, D.C. that will not help our economic recovery and will not create jobs. Some are proposed policies that were prevented from being enacted, such as huge increases in the individual income tax rate, the deceptively-named Employee Free Choice Act and so-called cap and trade legislation. And we still face threats from an Environmental Protection Agency (EPA) that

is out of control and a health care mandate that appears to worsen an already onerous health care cost burden on American businesses.

To regain manufacturing momentum and return to net manufacturing job gains, we need improved economic conditions and improved government policies. It is because of the significant challenges affecting manufacturing that the NAM developed a strategy to enhance our growth.

The NAM published its "Manufacturing Strategy for Jobs and a Competitive America" in June of last year. In that strategy, we identified three overarching objectives: 1) to be the best country in the world to headquarter a company; 2) to be the best country in the world to do the bulk of a company's research and development; and 3) to be a great place to manufacture goods and export products. To achieve those objectives, we need sound policies in taxation, energy, labor, trade, health care, education, reform of the staggering cost of litigation and, certainly, regulation.

The manufacturing community — especially smaller manufacturers — welcomes today's hearing. As noted in a 2004 White House Office of Management and Budget (OMB) Report to Congress on the Costs and Benefits of Federal Regulations, regulations hit the manufacturing sector especially hard. Because manufacturing is such a dynamic process, involving the transformation of raw materials into finished products, it creates more environmental and safety issues than other businesses. Thus, environmental and workplace health and safety regulations have a disparate impact on manufacturers, especially small manufacturers.

Another report, entitled "The Impact of Regulatory Costs on Small Firms," by Mark Crain and Thomas Hopkins, issued in 2001 and updated by Dr. Crain in 2005 and 2008 for the Office of Advocacy of the Small Business Administration (SBA), makes the same point. The burden of regulation falls disproportionately on small businesses.

In this most recent report, Dr. Crain found that the manufacturing sector shouldered $193 billion of the $907 billion onus of environmental, economic, workplace and tax compliance regulation in the year 2008.

Overall, Crain found that the per-employee regulatory costs of businesses with fewer than 20 employees were $10,585. This is 36 percent more than the $7,755 cost per worker for firms with more than 500 employees.

In manufacturing, this disparity was even wider. The cost per employee for small firms (meaning fewer than 20 employees) was $28,316 — 110 percent higher than the $13,504 cost per employee for medium-sized firms (defined as 20–499 employees). And it was 125 percent higher than the $12,586 cost per employee for large firms (defined as 500 or more employees).

A decade ago, many of us in manufacturing transformed our operations by adopting a Japanese principle called "lean" thinking. The concept is very simple. You identify everything in the organization that consumes resources but adds no value to the customer. That's called "*muda*", or waste. Then you look for a way to eliminate efforts that create no value. My modest proposal is that the government learn something from manufacturing and incorporate "lean" thinking into the development of regulation. A careful and thoughtful analysis of every regulatory requirement and its absolute necessity and an estimation of its value are important when considering regulations that will be imposed on small businesses. Many of the proposals being offered by this Subcommittee — including more detailed statements in the RFA process and requirements to describe duplicative, overlapping or conflicting regulations — will do just that.

But an even more important way to incorporate "lean" thinking, the elimination of waste and continuous improvement is through amendments to the periodic review requirements of Section 610 of the RFA. There was great hope that this original

provision would rationally reduce or eliminate unnecessary burdens that had outlived their usefulness or had not appropriately considered the concerns of small business when they were first promulgated.

A Government Accountability Office (GAO) report from July of 2007 suggested that of the agency retrospective reviews that were mandatory, few changes to the underlying rules occurred. Although their recommendations were not specific to changes to Section 610 reviews, it speaks to the need for change. Making agency action mandatory when it finds these efficiencies is crucial. If agencies were truly purposeful about eliminating every wasteful or unnecessary requirement, the efficiency gains could be tremendous. As we've found on the factory floor, elimination of unnecessary steps leads to productivity gains and more capital to invest in our plants, equipment and people.

In this change in our regulatory culture, we also cannot wear blinders to some challenges over others. The current RFA is unable to review indirect economic effects of regulation. A timely example of this shortcoming is the EPA's National Ambient Air Quality Standards (NAAQS) for Ozone. Because the implementation of NAAQS standards is done through the regulation and approval of state implementation plans, there are said to be no direct effects on small entities because states are not small entities. This is clearly contrary to what Congress intended when it passed the RFA. And the Obama Administration's reconsideration of the Ozone Standard will be very significant to local communities and their small business economies. One estimate is that the most stringent standard under consideration would result in the loss of 7.3 million jobs by 2020 and add $1 trillion in new regulatory costs per year between 2020 and 2030. This legislation obviously won't change how this rule is made. But future rules should be judged on both their direct and indirect impacts.

We believe it is very important to give regulatory authority to the chief counsel for Advocacy at the SBA. Court cases involving the chief counsel's interpretations have failed to provide the proper weight to that office's interpretations of the RFA. Rulemaking authority would provide that certainty. And since over 80 percent of the government's billions of hours of paperwork burden imposed on the American people come from the IRS, efforts to fix the loopholes by which the IRS avoids compliance with the RFA are certainly welcome.

Manufacturers hope this proposed legislation is just the beginning of a more thoughtful regulatory system built on common sense with an appreciation of modern manufacturing, a commitment to eliminate wasteful requirements and an understanding of the needs of small business. The NAM and its members stand ready to assist you in these efforts.

Mr. Chairman, thank you for the opportunity to testify today, and I will be happy to respond to any questions.

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Mr. COBLE. Mr. Sullivan?

TESTIMONY OF THOMAS M. SULLIVAN, OF COUNSEL, NELSON MULLINS RILEY SCARBOROUGH, LLP

Mr. SULLIVAN. Thank you, Mr. Chairman, Members of the Subcommittee.

I'm pleased to present testimony in strong support of H.R. 527, the "Regulatory Flexibility Improvements Act of 2011."

I'd like to briefly summarize, so I ask that my full written statement be made part of the record.

Mr. COBLE. Without objection.

Mr. SULLIVAN. There are three basic reasons for the Regulatory Flexibility Act. One size fits all Federal mandates do not work when applied to small business; second, small business face higher costs per employee to comply with Federal regulation than their larger competitors, and, third, small business is critically important to the American economy.

The Regulatory Flexibility Act has not worked as well as it can to address regulatory challenges faced by small business. That's why I support H.R. 527 and how it will improve the law's effectiveness.

Before I get into detail about the provisions in the bill that are particularly important, I want to point out why there's an immediate need for these reforms. In the last 2 years, the Federal Government issued 132 economically-significant regulations. Rulemakings are not slowing down either. There are a 181 more new regulations underway now than there were last year, representing a 5-percent increase in activity.

According to plans issued recently by regulatory agencies, there is a 20 percent increase in significant regulations currently under development.

As far as H.R. 527 and its benefits on how it will improve the Regulatory Flexibility Act, currently, the law requires agencies to analyze the direct impact a rule will have on small entities. Unfortunately, limiting the analysis to direct impacts does not accurately portray how small entities are affected by a new Federal rule.

For instance, when EPA's greenhouse gas regulations impose a direct cost on electric utility, EPA should make public how its proposal will likely affect the cost of electricity for small businesses. I believe the rulemaking process is shortchanged by not including discussion about the obvious ripple effects of regulations on small business and H.R. 527 tries to correct this.

All agencies should utilize small business advocacy review panels. When I was Chief Counsel for Advocacy, I did not think that the Regulatory Flexibility Act needed to be amended to force every agency to convene small business panels the way that EPA and OSHA do under the Small Business Regulatory Enforcement Fairness Act. I thought that agencies could do a good enough job soliciting input from small businesses on their own. Now, I realize some agencies will resist formally soliciting help from small entities prior to issuing proposed rules.

Requiring the Consumer Financial Protection Bureau that was created out of the Dodd-Frank Financial Reform Law to have to use the small business panel process made sense. That's why it

was passed into law. The same logic applies across the board to all Federal agencies and that's why the small business panel process, under the Small Business Regulatory Enforcement Fairness Act, should become the norm, not the exception.

The Small Business Administration's Office of Advocacy should clarify definitions in the Regulatory Flexibility Act. The disputes over whether an agency's proposal will "impose a significant economic impact on a substantial number of small entities" have limited the effectiveness of the Regulatory Flexibility Act.

H.R. 527 addresses this problem by giving the Office of Advocacy rulemaking authority. The rules promulgated by the Office of Advocacy will better define how agencies are to properly consider small business impacts and that will benefit the process in two ways.

First, it will minimize confusion over whether agencies are properly considering small business impact, and, second, rulemaking authority by the Office of Advocacy will confirm the primacy by the Chief Counsel for Advocacy when courts ultimately render opinions on the Regulatory Flexibility Act.

The periodic review of regulations under the Reg Flex Act should be improved. H.R. 527 will bolster the effectiveness of the look-back provision by broadening the number of rules agencies will review, requiring transparency of those reviews, and by better defining the process through the Office of Advocacy's rulemaking.

There are additional reforms that Congress can consider to benefit small business. I'm happy to work with this Committee to explore additional legislative efforts beyond amending the Reg Flex Act that will help create an economic climate so small businesses have an easier time growing and creating jobs.

Thank you.

[The prepared statement of Mr. Sullivan follows:]

Testimony of

Thomas M. Sullivan

U.S. House of Representatives
Committee on the Judiciary
Subcommittee on Commercial and Administrative Law

February 10, 2011
Improvements to the Regulatory Flexibility Act

Nelson
Mullins

Nelson Mullins Riley & Scarborough LLP

Mr. Chairman and Members of the Committee, I am pleased to present this testimony on legislation that is needed to improve the Regulatory Flexibility Act so that small business can benefit from regulatory relief.[1] 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.[2] 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). My crowning achievement at NFIB was the successful effort to prevent small businesses from being sued under the Superfund law just because they sent household garbage to their local landfill. That was the story of Barbara Williams of Gettysburg, Pennsylvania who I was honored to be with when President Bush signed the small business superfund bill on January 11, 2002.[3] Later that month, I was unanimously confirmed to head the Office of Advocacy at the U.S. Small Business Administration (SBA). The Office of Advocacy is responsible for overseeing the Regulatory Flexibility Act.[4] I served as Chief Counsel for Advocacy until October 2008.

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 business faces higher costs per employee to comply with federal regulation; and
- small business is critically important to the American economy.

As I will explain, the Regulatory Flexibility Act has not worked as well as it could to address the underlying regulatory challenges faces by small businesses. That is why I support efforts to improve the law's effectiveness through legislation.

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,

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[1] *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).
[2] *See* http://www.SBCRR.com.
[3] *Small Business Liability Relief and Brownfields Revitalization Act*, Pub. L. No. 107-118, 115 stat. 2356 (2002).
[4] *See* http://www.sba.gov/advocacy.

Pennsylvania. Parts of the ergonomics regulation distinguished between the employees who worked on equipment and employees who were in charge of paperwork and back room operations. 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 the equipment maintenance employees that were very different from those responsibilities for the employees in charge of paperwork. Brian continually asked the Occupational Safety and Health Administration (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 busiuess

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.[5] 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 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 environmental engineers to track all the greenhouse gas regulations issued by the EPA. The task of figuring out volumes of federal requirements often falls on the small business owners themselves, taking

[5] 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

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 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.[6] 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.[7] 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.[8]

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 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; much like this Committee is doing now. 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 the Small Business Regulatory Enforcement Fairness Act (SBREFA) in March of 1996.[9] Those amendments to the Regulatory Flexibility Act established formal procedures for

[6] Office of Advocacy, U.S. Small Business Administration, *Frequently Asked Questions* (January 2011), available at http://www.sba.gov/advocacy/7495.
[7] *Id.*
[8] 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.
[9] *Small Business Regulatory Enforcement Fairness Act of 1996*, Pub. L. No. 104-121, 110 Stat. 857 (1996).

the EPA and for OSHA to receive input from small entities prior to the agencies proposing rules.[10]

In August of 2002, President Bush signed Executive Order 13272, *Proper Consideration of Small Entities in Agency Rulemaking*.[11] 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.[12]

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 conduct a small business panel process when issuing rules, the same requirement that EPA and OSHA already follow.[13]

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.[14] 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 rule while minimizing impact on small entities. In the case of EPA, OSHA, and the CFPB, a small business advocacy review 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

[10] *See*, 5 U.S.C. §609.
[11] Executive Order 13272, *Proper Consideration of Small Entities in Agency Rulemaking*, 67 Fed. Reg. 53461 (August 16, 2002).
[12] *Small Business Jobs Act of 2010*, Pub. L. No. 111-240, §1601 (September 27, 2010).
[13] *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub. L. No. 111-203, §1100G (July 21, 2010).
[14] *See*, 5 U.S.C. §605(b).

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.

Regulatory Flexibility Act in practice

The Office of Advocacy at the U.S. Small Business Administration monitors implementation of the Regulatory Flexibility Act. A full accounting of how agencies are complying with the Act is published annually.[15] Also, a comprehensive history of the office's work has been published twice to aid with political transitions (Jere Glover published a background paper covering 1994-2000 and the office published a background paper covering 2001-2008 under my signature).[16]

From 2001-2008, the Office of Advocacy reviewed approximately 1,300 regulatory proposals every year. In those 7-years, the Office of Advocacy issued 300 public comment letters to 60 agencies (averaging 38 per year). Most of the comment letters are critical of agencies, but offer constructive suggestions on how agencies can tailor their approaches to achieve the desired regulatory outcome while minimizing the burden on small businesses. Even though the back and forth between the Office of Advocacy and regulatory agencies produces cost-savings, enhancements to the Regulatory Flexibility Act will make outcomes more consistent government wide and will reduce the tendency of some agencies to ignore the requirements of the Act.

Improvements to the Regulatory Flexibility Act are needed

There are gaps in the law that need to be fixed and now is the time to do it. Small businesses continue to struggle as our economy tries to recover and they need to have their voices heard when government is considering piling more federal mandates on them. If you have any doubt about the fear small businesses have of the federal regulatory state, just consider these daunting statistics: In the last 2-years, the federal government issued 132 economically significant regulations (defined as having impacts of $100 million or more per year).[17] Compare this against the average of 66 major rules per year with the average of 48 per year under President Bush and the average of 47 per year under President Clinton. Rulemakings are not slowing down either. There are 181 more regulations underway now than last year, representing a 5 % increase in activity. According to plans issued recently by regulatory agencies, there is a 20% increase in economically significant regulations under development.[18]

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[15] *See*, Office of Advocacy annual reports on the Regulatory Flexibility Act, available at http://archive.sba.gov/advo/laws/flex/.

[16] *See*, Background Paper on the Office of Advocacy 1994-2000, available at http://archive.sba.gov/advo/advo_backgr00.html http://archive.sba.gov/advo/about.html. *See*, Background Paper on the Office of Advocacy 2001-2008, available at http://archive.sba.gov/advo/backgr08.pdf.

[17] Susan Dudley, *President Obama's Executive Order: Improving Regulation and Regulatory Review*, Regulatory Policy Commentary, The George Washington University Regulatory Studies Center (January 18, 2011). Available at http://www.regulatorystudies.gwu.edu/images/commentary/20110118_reg_eo.pdf.

[18] *Id.*

Require Agencies to publish more complete impact analysis

With the exception of the Consumer Financial Protection Bureau (CFPB), the Regulatory Flexibility Act requires agencies to analyze the *direct* impact a rule will have on small entities. Unfortunately, limiting the analysis to direct impacts does not accurately portray how small entities are affected by a new federal rule. For instance, when greenhouse gas regulations impose a direct cost on an electric utility, EPA should make public how its proposal will likely affect the cost of electricity for small businesses. I believe that the rulemaking process is short changed by not including discussion of such obvious impacts.

The notice and comment rulemaking process benefits from informed stakeholders who participate and offer constructive suggestions for how agencies can achieve their regulatory objectives. Analysis of how a regulatory proposal will impact energy costs, transportation costs, jobs and employment costs, and other reasonably foreseeable costs would go far in educating stakeholders so they can offer constructive solutions to regulatory agencies.

All agencies should utilize small business advocacy review panels

As of now, the Regulatory Flexibility Act requires that EPA, OSHA, and the CFPB convene small business advocacy review panels to solicit input from small entities. The report that contains small business input is published with proposed rules. The panel process was created under the Small Business Regulatory Enforcement Fairness Act (SBREFA), so I refer to them as "SBREFA Panels" for the remainder of this testimony. SBREFA panels have proved instrumental in helping EPA and OSHA come up with regulatory solutions that minimize burden on small entities. When I was Chief Counsel for Advocacy, I did not think that the Regulatory Flexibility Act needed to be amended to force every regulatory agency to utilize SBREFA. I thought that agencies could do a good enough job soliciting input from small businesses on their own. Now I realize that some agencies will resist formally soliciting help from small entities prior to issuing proposed rules. Requiring the CFPB to have SBREFA panels made sense and that is why it passed into law. The same logic applies across the board to all federal agencies and that is why SBREFA panels should become the norm, not the exception.

SBA's Office of Advocacy should clarify definitions in the Regulatory Flexibility Act

Disputes over whether an agency's proposed rule will "significantly economic impact on a substantial number of small entities" have limited the effectiveness of the Regulatory Flexibility Act. Legislation under consideration by this Committee addresses this problem by giving the Office of Advocacy rulemaking authority. Rules that better define how agencies are to properly consider small business impacts will benefit the process in two ways. First, it will minimize the confusion over whether agencies are properly considering small business impact. Second, rulemaking authority will confirm the primacy of the Chief Counsel for Advocacy when courts ultimately render opinions on the Regulatory Flexibility Act.

Section 610 (periodic review of regulations) should be improved

Section 610 of the Regulatory Flexibility Act requires agencies to review rules within 10 years of their publication.[19] It only makes sense that if the federal government expects business owners to know what rules are on the books, the agencies themselves have a duty to make sure rules are not out-of-date or duplicative of newer requirements. Unfortunately, the look back section of the Regulatory Flexibility Act has not resulted in significant regulatory reform that benefits small business. Michael See, an attorney who worked at the Office of Advocacy, wrote a law review article that has in its title, "willful blindness: federal agencies' failure to comply with the Regulatory Flexibility Act's periodic review requirement."[20] As you would guess from its title, Mr. See's research paints a dismal picture of agency compliance with Section 610. Mr. See's observations are supported by Government Accountability Office (GAO) reports issued in 1994, 1997, and 1999 and a report issued by the Congressional Research Service (CRS) issued in 2005.[21] The legislation being considered by this Committee will bolster the effectiveness of Section 610 by broadening the number of rules that agencies will review, requiring transparency of the reviews by reporting annually to Congress and to the Chief Counsel for Advocacy, and by better defining the process through rulemaking by the Office of Advocacy.

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[19] 5 U.S.C. § 610.

[20] Michael See, *Willful Blindness: Federal Agencies' Failure to Comply With the Regulatory Flexibility Act's Periodic Review Requirement – And Current Proposals to Invigorate the Act*, 33 Fordham Urb. L.J. 1199 (2006) available at http://archive.sba.gov/advo/laws/rfa_610review06.pdf

[21] *See*, U.S. Government Accountability Office, *Regulatory Flexibility Act: Status of Agencies' Compliance* (1994), available at http://archive .gao.gov/t2pbat3/151400.pdf
See, U.S. Government Accountability Office, *Regulatory Reform: Agencies' Efforts to Eliminate and Revise Rules Yield Mixed Results* (1997), available at http://www.gao.gov/archive/1998/gg98003.pdf
See, U.S. Government Accountability Office, *Regulatory Flexibility Act: Agencies' Interpretations of Review Requirements Vary* (1999), available at http://www.gao.gov/archive/1999/gg99055.pdf
See, Curtis Copeland, Congressional Research Service, *Reexamining Rules: Section 610 of the Regulatory Flexibility Act* (2005), available at http://assets.openers.com/rpts/RL32801_20050311.pdf

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Small business regulatory relief beyond the context of the Regulatory Flexibility Act

There are additional ways for Congress to reform the regulatory process to benefit small business. One reform that I would urge this Committee to look at in this Congress is to force agencies to waive penalties for first time non-harmful paperwork violations. I have never met a small business owner who was trying to be successful based on deliberately thwarting government regulators. I have talked with many small employers who are terrified they may be doing something wrong and the last person they would call for advice is someone at a government agency. Despite several efforts by government to move away from "gotcha" towards an attitude of "help ya," there still is a perception that federal regulators will fine a business even when the mistake is an innocent paperwork violation that did not result in any real harm. Small businesses should be rewarded for trying to comply and if their efforts result in a harmless paperwork error, enforcement officials should be required to waive that violation.

Another reform is to insert greater accountability into the regulatory process. Legislation that is already under consideration by this Committee, the Regulations from the Executive In Need of Scrutiny Act (REINS) accomplishes this goal.

Conclusion

I strongly support the legislation being considered by this Committee to amend the Regulatory Flexibility Act. The legislation will help focus regulatory agencies on the need to remove regulatory barriers and create an environment where small businesses can grow and create jobs.

Mr. COBLE. Thank you, Mr. Sullivan.

Mr. Shull, I was in law school long, long ago with a chap whose surname was Shull. Do you have Carolina kin?

Mr. SHULL. That's not—you know, I don't know. There's a large network of Shulls out there whose connection with our Shulls we don't know yet.

Mr. COBLE. Well, he was a good fellow. He had high honors in law school.

You're recognized, Mr. Shull.

TESTIMONY OF J. ROBERT SHULL, PROGRAM OFFICER, WORKER'S RIGHTS, PUBLIC WELFARE FOUNDATION

Mr. SHULL. Well, then I have quite an act to live up to.

I want to thank you for the opportunity to testify. These are very important issues for small business owners, for their families, for their communities, for their customers, for their workers, for really all of us.

I want to start with the proposition that agencies don't regulate for the sake of regulating. They regulate because they have been charged by Congress with the task of getting things done to protect the public and to protect the public's health, its safety, the environment, the air we breathe, the water we drink, the food we eat, the products we buy, the traffic conditions in which we all drive, the jobs that we go to. These are important tasks, and there are new regulations in the works. There will always be new regulations in the works because the world is changing—and as the world changes, we discover that there are unmet needs for public protection.

I'll give you an example. In the world of auto safety, thanks to important regulations, like the mandates for seatbelts, mandates for airbags, mandates for side impact protection, even as simple a rule as the fact that the steering column collapses now whereas it used to be a solid piece of metal that would impale the driver in some crashes: Now, all of that means that people are coming away surviving crashes that just years ago they wouldn't have been able to survive. But we're increasingly discovering because people's lives are being saved, that there are still new needs to protect vehicle occupants in crashes. For example, because they are now surviving a larger number of crashes, we're increasingly discovering that they're coming away with injuries to their lower extremities, to their legs and their feet, which opens the door to the fact that there may not be sufficient protection at the bottom of the car, the tire wheel well, and intrusion into that part of the survival zone of the vehicle, and so the National Highway Traffic Safety Administration should be looking at that and should be developing new regulations in that regard.

Automakers have increasingly computerized motor vehicles. They're becoming more and more like the computers on wheels. A new research report found that some of these computer systems which control, in some cases, really critical functions of an automobile, like the brakes, can be hacked by folks outside of the car and so it really behooves NHTSA to start looking into whether or not the performance of these computerized components is adequately protecting vehicle occupants.

So the fact that there are new regulations on the book doesn't necessarily mean that we have runaway agencies. It just means that we have agencies that are doing what they're supposed to do, assessing the public's unmet needs and assessing what needs to be done to protect the public.

I also want to start with the proposition that small businesses, I think we all agree, are vital. Small businesses also are owned by small business owners who have families, who live in communities, who have employees, who have coworkers and neighbors, who themselves are breathing this air, drinking the water, eating the food, buying products, getting out on the road and going to work every day. They receive the benefits of regulation, not just shoulder the burden of its costs.

And we hear a lot about costs today, but one of the assumptions that seems to be here in the RFIA is that analysis and review and all the new layers of process that would be mandated by this bill are somehow costless. But the fact is all of this is going to require money or agency time and diversion of agency resources away from the task of assessing the public's unmet needs and toward the task of reviewing in many cases protections that we know beyond a shadow of a doubt are incredibly important, like the removal of lead in gasoline. You can measure the value of that in our children's IQ points.

I am concerned that this bill would paralyze the regulatory agencies we need to protect the public and keep them from getting things done to protect the public.

I'll wrap up with the suggestion that we do want our businesses to compete with China but we don't want this Nation to become China with the dirty air and the unsafe workplaces they have.

[The prepared statement of Mr. Shull follows:]

Testimony of
J. Robert Shull
Before the
Subcommittee on Courts, Commercial and Administrative Law
Committee on the Judiciary
U.S. House of Representatives

February 10, 2011

I am Robert Shull, and I thank you for opportunity to testify before you on the Regulatory Flexibility Improvements Act, a bill that would significantly affect the ability of federal programs to get things done to protect the public health, safety, civil rights, workers' rights, consumers, and the environment. I have to start by noting that this testimony is solely my personal opinion and that I am not speaking on behalf of any organization, including the one for which I currently work. Instead, this testimony is the product of my past experience as a consumer advocate and advocate for effective government, at Public Citizen (where I was the Deputy Director for Auto Safety and Regulatory Policy) and OMB Watch (where I was Director of Regulatory Policy). In my time as a consumer advocate, I met daughters who lost their fathers, mothers who lost their sons, and families that will never be the same again because of crises that, in too many cases, could have been prevented easily if only a regulation had been in place or had been tough enough to discourage a corporate executive from putting profits before people. Any policy that slows down the regulatory process and diverts agencies from getting things done to protect the public is a policy that puts people at risk.

Such is the case with the Regulatory Flexibility Improvements Act (RFIA). No one can fault this committee for expressing concern about small businesses, small nonprofits, and small local governments that every day are keeping the economy moving, looking out for people in need, and reliably delivering essential services such as drinking water. The RFIA, however, is not the way to go about it. In the name of protecting these small and medium sized entities (SMEs), this bill would wrap federal programs up in costly, time-consuming, and unnecessary red tape—putting consumers and working families at increased risk of harm.

The wrong starting point

Before walking through the working parts of the RFIA, I think it's best to start with the operating premises of the bill and what a better starting point would be.

The premises of the RFIA seem to be that regulations are a grave threat to the economy and that there cannot be enough second- or third-guessing of agency decisions. Regulations are regarded as a flat cost to society, in particular small entities, with so few benefits to small entities that regulations must be regarded suspiciously at all stages, from their formation to their ongoing existence. The costs to small entities are apparently so vast that it makes sense to add new layers of government process and bureaucracy, many new rolls of red tape, no matter the cost of those new processes, bureaucrats, and red tape. Lost in all this is that regulation provides enormous benefits to society: all that matters, as far as this bill is concerned, is the cost to small entities.

I suggest a few different starting points:

- Government in America is not independent of the people but is, instead, the embodiment of the will of the people. We use government institutions to pool our collective resources into forces strong enough to act against the larger forces that isolated individuals cannot surmount. FDR explained it best in a July 1933 fireside chat: "It goes back to the basic

idea of society and of the nation itself that people acting in a group can accomplish things which no individual acting alone could even hope to bring about." The federal government is a powerful way for the people to "act[] in a group" on a national basis to meet national needs.

- Agencies do not regulate for the sake of regulating. Regulations are the primary tool that the people, acting through their government, use to check wealthy corporate special interests who would otherwise overwhelm the ability of people to protect themselves. Regulations are the way that agencies get things done to protect the public.
- The unparalleled aggregation of resources that we have in our federal government entails a responsibility to use those resources to identify our unmet needs and to continue to act so that long-resolved problems do not erupt into new crises.
- Accountability means helping the people maintain control over their own government. Accountability should not, however, be the excuse for policies that divert government resources away from the important work of addressing the public's unmet needs. Given the risk that policies instituted in the name of accountability could come with costs that keep government from being responsive, it is important for any major accountability initiatives to build in reflexivity: checks that count the costs of accountability reforms, assess the performance of performance measurement rubrics, and make sure that reforms are not obstacles in the way of responsive government.
- Small businesses do not matter simply because of their economic function but, perhaps more importantly, because behind every small business is a small business owner, someone who lives in the local community, perhaps has a family living in that local community, breathing the air, drinking the water, eating the food, and buying consumer products released into the community. Concerns of small businesses are not necessarily distinct from the concerns of every other person who is at risk of breathing polluted air, drinking toxin-laced water, eating food loaded with pathogens, and buying dangerous products which put themselves and their families at risk.
- The stakes are high: illness, injury, disability, death. Any delay in getting a regulation out the door is a delay during which people are unnecessarily dying, being injured, and falling ill from the preventable harms unleased on the public by corporations. The stakes are so high that the principles we should demand of regulatory agencies is that they put safety first, call on businesses to look before they leap instead of waiting until the bodies have piled up, and demand that businesses do the best they can rather than settle on bottom-shelf, cut-rate technologies and approaches to protecting the public.

We have had now 30 years at least of changes and alterations to the simple regulatory process laid out just over 60 years ago by the Administrative Procedure Act. Instead of yet more changes that would slow down the regulatory process, it is time look back at those 30 years of changes and assess whether they are getting in the way of agencies' ability to get things done to protect the public.

One of the rationales for the RFIA and other examinations of the regulatory process delivered in the name of small entities is a paper commissioned with taxpayer dollars by the Small Business Administration's Office of Advocacy. The third edition of this paper (formerly the Hopkins paper, then the Crain and Hopkins paper, and now the Crain and Crain paper) has recently been published, and it once again proclaims, using the shakiest methodology, that the costs of regulation are enormous and that small entities in particular shoulder a disproportionate share of those costs. It is unfortunate that this paper is so frequently cited in these situations, because the report is not worth the paper it is printed on. In all its iterations, it has been subject to withering criticism by scholars such as John Graham (former administrator of the Office of Information and Regulatory Affairs during the Bush II administration),

Winston Harrington (of Resources for the Future), and now the Center for Progressive Reform, which just released this week an important analysis of the current iteration of the Crain and Crain paper.[1] Crain and Crain rely in some cases on 30-year-old reports, which in turn rely on research going back at least 10 years prior, and even base a significant part of their analysis on nothing more than public opinion research. Even more troubling is that Crain and Crain refuse to release to the public the data and formulas used to make their claims; not even the SBA Office of Advocacy has access to those materials. Taxpayer dollars went into the preparation of this report, which members of Congress repeatedly cite in their public statements about regulation and small business. They and the people they represent deserve to have access to this information, so that we can all assess whether they have used taxpayer dollars to produce unreliable numbers they know will be repeated by policymakers.

Aside from the Crain and Crain report, bills like the RFIA are born out of the idea that regulation will drive small American companies out of business. The real scholarly evidence, however, refutes this claim. While the business community may be hampered in competing in global trade, regulation is not at fault. The business community, however, has nothing to gain by publicizing the real reasons for its difficulties, such as lower wages paid in other countries with which we now have self-destructive free trade agreements. The idea that regulation causes competitive decline is the product not of careful scholarship but, rather, of a multi-million dollar public relations campaign.

These criticisms of regulation are insufficient for four reasons:

(A) *Regulatory safeguards produce significant benefits for the public.* Citations of the high cost of regulation do not establish that regulation is unwarranted because they completely ignore what we gain from these expenditures. Protecting people and the environment may cost a lot of money, but it also produces far larger benefits. In fact, even the Office of Management and Budget, which is a main proponent of the idea that regulations are too costly, nonetheless reports every year that regulation in the United States generates aggregate benefits that greatly exceed the cost of the federal regulations.

(B) *Not all costs have the same moral or ethical value.* Some regulatory costs represent the cost to industry of doing what it should have done as a good corporate citizen in the absence of regulation. For example, stunning new evidence reveals that U.S. automakers misled the government and the public for years by claiming that the strength of vehicle roofs is unrelated to the serious injuries sustained when vehicles crash and roll over. According to industry documents, Ford denied this link even though its Volvo subsidiary had conducted research demonstrating that strengthening car roofs and other improvements are the key to preventing injuries and saving lives in rollover crashes.[2] If and when the National Highway Traffic Safety Administration issues a rule to safeguard against vehicle roofs caving in during rollover crashes, the cost to the automakers of complying will mean little if it is not offset by the profits earned during the period that the automakers knew of the need for stronger roofs but failed to do anything about it.

(C) *Cost estimates are overblown.* Moreover, many claims about regulatory costs are suspicious because they rely on cost estimates that come from industry sources that have an incentive to overstate the costs for regulatory and public relation purposes. According to a recent influential study,

> *ex ante* cost estimates have usually been high, sometimes by orders of magnitude, when compared to actual costs incurred. This conclusion is not at all surprising in light of the strategic environment in which the predictions are generated. In preparing regulatory impact assessments for proposed rules, agencies are heavily dependent upon the regulated

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[1] *See* Center for Progressive Reform, *Setting the Record Straight: The Crain and Crain Report on Regulatory Costs* (CPR White Paper No. 1103, Feb. 2011), *available at* <http://www.progressivereform.org/articles/SBA_Regulatory_Costs_Analysis_1103.pdf>; Winston Harrington, *Grading Estimates of the Benefits and Costs of Federal Regulation: A Review of Reviews* (RFF Disc. Paper 06-39, Sept. 2006).

> entities for information about compliance costs. Knowing that the agencies are less likely to impose regulatory options with high price tags (or to support them during the review process), the regulatees have every incentive to err on the high side.[2]

(D) *Compliance costs are so minuscule that they have minor competitive consequences.* Finally, and most importantly for these purposes, regulation cannot be blamed for a decline in competitiveness or other economic ills because compliance costs are only a very small percentage of total value of the shipments made by manufacturers. On the basis of data from the World Bank, Professor Kevin Gallagher of Boston University finds the "sum of all marginal pollution abatement costs in the United States is less than one percent of value added production."[3] Department of Commerce data confirm this estimate. This information indicates abatement expenditures are an average of 0.62 percent of the value of shipments of all industries. Industry sectors with high abatement costs only pay between 1.27 and 1.51 percent of the value of shipments.[4] Indirect costs are derivative of direct compliance costs; since low direct costs generally will produce low indirect costs, regulation overall should have a minor competitive and labor impacts.

The scholarly evidence backs up this claim. Economists have considered the impact of environmental regulations on plant location decisions (do pollution-intensive industries build disproportionate number of new factories in countries or areas of the United States where there is weak environmental regulation?) and on trade flows (do exports from developing to developed countries show an increasing percentage of pollution-intensive goods?). Neither type of study supports a regulation-competitiveness link. I recommend a recent literature review by Professor Sidney Shapiro, which synthesizes the major research on the questions and comes to the following conclusions:

> The leading meta-study of plant location and trade flow studies found that "studies attempting to measure the effect of environmental regulation on net exports, overall trade flows, and plant-location-decisions have produced estimates that are either small, statistically insignificant, or not a robust to test of model specification." These authors concluded that there is "[o]verall … relatively little evidence to support the hypothesis that environmental regulations have had a large adverse effect on competitiveness, however that elusive term is defined."[5]

According to another survey of the literature, "The vast majority of studies have found no systematic evidence that the share of developing country exports and production is becoming more pollution-intensive. In addition, no studies have indicated that there is substantial evidence that pollution-intensive industries flee developed countries with relatively high (and costly) environmental standards)."[6]

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[2] Thomas O. McGarity & Ruth Ruttenberg, *Counting the Cost of Health, Safety & Environmental Regulation*, 80 TEX. L. REV. 1997, 1998 (2002).

[3] Testimony of Prof. Sidney A. Shapiro, Hearing on Impact of Regulations on U.S. Manufacturing, 109th Cong. (April 12, 2005), at 5 text accompanying note 5.

[4] *Id.* at 5 (citing Adam B. Jaffe, Steven R. Peterson, Paul R. Portney, & Robert N. Stavins, *Environmental Regulation and the Competitiveness of U.S. Manufacturing: What Does the Evidence Tell Us?*, 33 J. Econ. Lit. 132, 141 Tbl.5 (1995)).

[5] *Id.* at 5-6 (citing Jaffe et al., *supra* note 5, at 141).

[6] *Id.* at 6 (citing Kevin O. Gallagher, Free Trade and the Environment: Mexico, NAFTA, and Beyond 26 (2004)).

What the bill would do

Starting from its shaky premises, the RFIA would make some radical changes to the regulatory process, with far-reaching consequences for the ability of agencies to get things done to protect the public. Some of the working parts of the bill[7] that are most troubling are the following:

- Expanding the RFA to apply to a wide range of agency activities, not just binding regulations. The RFIA would amend the definition of "rule" to incorporate the definition at 5 U.S.C. § 551(4), which covers not just binding or "legislative" rules but also guidance documents and policy statements. The bill also expands the scope of rules subject to the Regulatory Flexibility Act by including amendments to land management plans, rules affecting Indian tribes, and IRS recordkeeping requirements. These changes drastically expand the scope of the Regulatory Flexibility analysis requirements and will needlessly drown agencies in burdensome analysis every time the agency seeks to act in any way.
- Creating a new super-regulator in the SBA Office of Advocacy. Advocacy would be charged with generating regulations governing all other agencies' implementation of the RFA. Additionally, its jurisdiction would extend to independent regulatory agencies. Its duties would extend to conducting new regulatory impact assessments, duplicating those already performed by agencies which are in turn reviewed by the OMB Office of Information and Regulatory Affairs. It would somehow have to expand its bureaucracy while also serving the needs of small businesses, but with no authorization of additional funds for these new duties.
- Expanding required analysis of the impacts on small entities to include highly speculative assessments of indirect impacts. The RFIA would force agencies to assess not just the particular impacts of a proposed regulation on regulated small entities but also the reverberating potential impacts on any small entities not covered by the regulation. If, for example, a Wall Street reform regulation would put the brakes on reckless speculation by banks using federally insured deposits, the agency would be forced to try to count up the impacts on small janitorial firms that clean the banks at night.

One of the resulting problems is that the RIA would open the door to endless litigation. The judicial review provisions already built into the Regulatory Flexibility Act would be dramatically expanded to allow corporate special interests to challenge the adequacy of analysis over a wide range of agency activities, not limited to the "final agency actions" that normally are the decision point that must be reached before an agency can be dragged into court.

Additionally, the RFIA would force agencies into a deregulatory posture. The RFIA would create a mandatory, nondiscretionary duty for agencies to launch rulemakings to "amend or rescind" existing regulations. Agencies would be forced once again to review all their existing regulations which have a significant economic impact on a substantial number of small entities, and they would have to do the same 10 years after producing any new regulations which have such impacts. Going through all that red tape is bad enough, but the RFIA would not stop at the analysis: instead, it would force the agency ("the agency *shall* amend or rescind") to embark upon new rulemakings for all of those regulations. In a time of budget cuts, agencies would be forced to spend precious resources on reducing existing protections instead of addressing the public's unmet needs for protection. Keep in mind that these existing regulations under review would include such proven protections as the phase-out of lead in gasoline, warning labels on aspirin products to prevent Reye's Syndrome, standards to protect children from exposure to lead in

[7] These comments are based on the discussion draft of the bill. The final legislative text was released while these comments were being prepared.

paint or toys, requirements for air bags, and much more. And wealthy corporate special interests would be empowered under the RFIA to bring lawsuit after lawsuit to enforce this duty.

The bill also ties the hands of agencies by eliminating procedures for delaying analysis. Under current law, the agency can continue to promulgate a regulation before it has finished the regulatory flexibility analysis, if the agency head believes it is necessary to do so. The RFIA would eliminate these commonsense procedures, instead forcing agencies to delay needed protections until the analysis is finished. Imagine if emergency regulations to protect miners after the Sago incident, for instance, had to be delayed until the agency could finish this onerous and highly speculative analysis. Even when the need for the regulation has been clearly proven, the agency would have to wait for the regulatory flexibility analysis before it could proceed.

The RFIA gives corporate interests an even greater advantage in the regulatory process by giving the head of the Small Business Administration's Office of Advocacy a preview of proposed rules before they are published in the *Federal Register* and increased opportunities to intervene in the process. Current law requires EPA and OSHA to submit draft rules to panels of business lobbyists, and a section of this bill would expand these preview opportunities to all agencies. The bill would also expand the regulations that would require SBREFA panels by including all rules that result in "an annual effect on the economy of $100,000,000 or more," "a major increase in costs or prices," "significant adverse effects" on a variety of economic factors, "a significant impact on a substantial number of small entities." An additional section would actually give SBA's Office of Advocacy the power to write regulations governing all agencies' compliance with the Regulatory Flexibility Act. Given that Advocacy is a taxpayer-funded voice for business interests, this provision is particularly troubling.

The bill's requirement for piles and piles of new studies (which probably would cost millions of taxpayer dollars) would needlessly divert staff time and money to re-justify important and proven health and environmental safeguards, such as airbag safety standards in cars or food safety inspections that prevent against foodborne pathogens like E. coli or Listeria. These look-back studies would add to the lengthy regimen of regulatory assessments already performed by agencies, including those required under Executive Order 12866, the Paperwork Reduction Act, the Unfunded Mandates Reform Act, and the National Environmental Policy Act, among others.

A better way

The RFIA was put forward under the banner of relieving regulatory burden to small business, but this legislation puts public protections at stake while failing to get at the heart of what ails small business. The small business community is a major source of innovation and employment in this country. Like their larger counterparts, however, small businesses are also responsible for social ills addressed by regulations, ranging from workplace health and safety problems to environmental pollution.[8] Thus, we cannot simply give small businesses a free pass from regulation. Small businesses want to do their part and be responsible; real reforms, then, must help small businesses comply with regulations in order to level the playing field with large businesses while giving the public the protection it needs and deserves.

We already have these reforms. Small firms receive direct government subsidies such as outright and government-guaranteed loans from the Small Business Administration (SBA) as well as indirect preferential treatment through federal procurement requirements and tax provisions. Additionally, small business is treated to many exemptions or special treatment in the area of regulation. For example, employers with fewer than 15 employees are exempt from the Equal Employment Opportunity Act, and OSHA levies lighter penalties for smaller firms, exempts businesses with fewer than 10 workers from recordkeeping requirements, and provides free on-site compliance consultations.

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[8] *See* Richard J. Pierce, Jr., *Small is Not Beautiful: The Case Against Special Regulatory Treatment of Small Firms*, 50 Admin. L. Rev. 537 (1998).

Small business concerns are inscribed in law. The Small Business Regulatory Enforcement Fairness Act (SBREFA) requires agencies to give special consideration and voice to small business as part of the rulemaking process as well as expanded judicial review for small businesses wishing to challenge agency decisions. Likewise, the Equal Access to Justice Act gives small businesses special privileges when litigating against agencies: small businesses can recover attorney's fees if they prevail in court against a federal agency.

Real reforms for small businesses would make these benefits meaningful by clamping down on the ways that large businesses game the rules and claim the status of "small business." Real reform would consider the role of small business in contributing to pollution and other harms to the public and would respond by adequately funding compliance assistance offices in every congressional district, which would be given the resources they need to give small businesses the help that they, in turn, need to be good corporate citizens and comply with the law. This bill does not come close to being real reform; it is a shameful giveaway of the protections we need, and it shamelessly exploits the real needs of small businesses in order to justify this dangerous exercise.

There are better ways to help small business without sacrificing longstanding public protections. Members of Congress have in the past introduced bills like the National Small Business Regulatory Assistance Act, intended to strengthen Small Business Development Centers (SBDCs) around the country by launching a pilot in which SBDCs would provide compliance assistance to small businesses. The SBA itself launched an initiative to provide small entities with a special online gateway to information they need to know in order to comply with the law and work with government officials. These kinds of approaches would help level the playing field for small businesses by giving them specialized assistance with understanding and complying with federal regulations, without compromising the public's protections, directly or indirectly.

Additionally, a far less expensive and much more sensible approach to reviewing existing regulations would be to look to small entities themselves. Processes already exist that allow both businesses and the public interest community to ask federal agencies to address particular regulatory problems. Small businesses are already well aware of the regulations that they believe are particularly burdensome or obsolete. Rather than expanding the Regulatory Flexibility Act to review all federal regulations on the books, small businesses already have the power to petition agencies to revisit specific regulations. Relying on this petition process would use existing mechanisms to open the door to reforms without drowning agencies in reviews of existing regulations.

I encourage this committee to avoid the potential for costly red tape, endless litigation, and reckless deregulation that would put the public at risk.

Mr. COBLE. Thank you, Mr. Shull.

Ms. Harned, we'll be glad to hear from you.

TESTIMONY OF KAREN R. HARNED, ESQ., EXECUTIVE DIRECTOR, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, SMALL BUSINESS LEGAL CENTER

Ms. HARNED. Thank you. Good afternoon, Chairman Coble and Ranking Member Cohen.

NFIB, the Nation's largest small business advocacy organization, appreciates the opportunity to testify on the burdens and effects of regulation on small business and how H.R. 527 would address many of those concerns.

Overzealous regulation is a perennial cause of concern for small business owners and is particularly burdensome in times like these when the Nation's economy remains sluggish. According to a recent study, regulation costs the American economy 1.75 trillion every year and, more concerning, small businesses face an annual regulatory cost of $10,585 per employee which is 36 percent more than the regulatory cost facing businesses with more than 500 employees.

Recently, the Administration did acknowledge that excessive and duplicative regulation has damaging effects on the American economy. NFIB believes that it has been a long time coming for small business owners to hear the Administration emphasize the harmful effects of over-regulation on small business and job creation. We will be watching closely to see if last month's directive leads to real regulatory reform.

In the meantime, NFIB believes that Congress must take actions to level the playing field. Congress should expand the Small Business Regulatory Enforcement and Fairness Act and its Small Business Advocacy Review Panels to all agencies, including independent agencies. In so doing, all agencies would be in a better position to understand how small businesses fundamentally operate, how the regulatory burden disproportionately impacts them, and how each agency can develop simple and concise guidance materials.

Moreover, Congress's advocacy should ensure that agencies are following the spirit of SBREFA. There are instances where EPA and OSHA have declined to conduct a SBAR panel for significant rule and/or rule that would greatly benefit from small business input. Congress should ensure agencies perform regulatory flexibility analyses and require them to list all of the less burdensome alternatives that were considered. Each agency should provide an evidence-based explanation for why it chose the more burdensome versus less burdensome option and explain how their rule may act as a barrier to entry for a new business.

Section 610 reviews should be strengthened. H.R. 527 would require agencies to amend or rescind the rules where the 610 reviews show that the agency could achieve its regulatory goal at a lower cost to the economy.

NFIB also believes that Congress should explore requiring agencies to provide updated information on how each agency mitigates penalties and fines on small businesses as currently required by SBREFA but also require that such a report be completed on an annual basis.

Regulatory agencies often proclaim indirect benefits for regulatory proposals but decline to analyze the make publicly available the indirect costs to consumers, such as higher energy costs, jobs lost, and higher prices. Agencies should be required to make public a reasonable estimate of a rule's indirect impact.

Agencies should be held accountable when they fail to give proper consideration to the comments of the Office of Advocacy and af-

fordable mechanisms should be considered for resolving disputes regarding economic costs of a rule between the agency and advocacy.

NFIB believes that the Office of Advocacy needs to be strengthened. The office should have the ability to issue rules governing how agencies should comply with Regulatory Flexibility requirements. Because of improvements inherent within H.R. 527, NFIB is hopeful that review of agency actions will be strengthened and the small business voice will be more substantively considered throughout the regulatory process.

NFIB is concerned that many agencies are shifting from an emphasis on small business compliance assistance to an emphasis on enforcement. Congress can help by stressing to agencies that they devote adequate resources to help small businesses who do not have the benefit of inside counsel and HR people to comply with the complicated and vast regulatory burdens that they face.

Congress also should pass legislation waiving fines and penalties for small businesses the first time they commit a non-harmful error on regulatory paperwork. Mistakes in paperwork will happen. If no harm is committed as a result of the error, agencies should waive penalties for first-time offenses and help owners to understand the mistakes they make. With high rates of unemployment continuing, Congress needs to take steps to address the growing regulatory burdens on small business. The proposed reg reforms in H.R. 527 are a good first step.

Thank you.

[The prepared statement of Ms. Harned follows:]

Prepared Statement of Karen R. Harned

TESTIMONY BEFORE THE UNITED STATES CONGRESS
ON BEHALF OF THE

NATIONAL FEDERATION OF INDEPENDENT BUSINESS

NFIB
The Voice of Small Business.®

House of Representatives Committee on the Judiciary
Subcommittee on Courts, Commercial and Administrative Law

on the date of

February 10, 2011

on the subject of

The Regulatory Flexibility Improvements Act of 2011
Unleashing Small Businesses to Create Jobs

National Federation of Independent Business
1201 F Street NW, Suite 200 • Washington, DC 20004 • 202-554-9000
www.NFIB.com

Dear Chairman Coble and Ranking Member Cohen:

On behalf of the National Federation of Independent Business (NFIB), I appreciate the opportunity to submit for the record this testimony for the Subcommittee on Courts, Commercial and Administrative Law hearing entitled "the Regulatory Flexibility Improvements Act of 2011 — Unleashing Small Businesses to Create Jobs."

My name is Karen Harned and I serve as the executive director of the NFIB Small Business Legal Center. NFIB is the nation's leading small business advocacy association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents about 350,000 independent business owners who are located throughout the United States.

The NFIB Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses.

Overzealous regulation is a perennial cause of concern for small business owners, and is particularly burdensome in times like these when the nation's economy remains sluggish. Unfortunately, the regulatory burden on small business has only grown. A recent study by Nicole and Mark Crain for the U.S. Small Business Administration Office of Advocacy (Office of Advocacy) found that the total cost of regulation on the American economy is $1.75 trillion per year.[1]

If that number is not staggering enough, the study reaffirmed that small businesses bear a disproportionate amount of the regulatory burden. The study found that for 2008, small businesses spent 36 percent more per employee on regulation than their larger counterparts.

Job growth in America remains stagnant. Small businesses create two-thirds of the net new jobs in this country, yet the NFIB Research Foundation's most recent edition of *Small Business Economic Trends* revealed in the next three months 12 percent of respondents plan to increase employment while 8 percent plan a reduction in workforce.[2] Reducing the regulatory burden would go a long way toward giving entrepreneurs the confidence they need to expand their workforce in a meaningful way.

Last month, President Obama issued an executive order directing agencies to follow certain processes "to improve regulation and regulatory review." I share the view of

[1] Crain, Nicole V. and Crain, W. Mark, *The Impact of Regulatory Costs on Small Firms*, 2010. http://www.sba.gov/advo/research/rs371tot.pdf
[2] NFIB Research Foundation, *Small Business Economic Trends*, February 2011. http://www.nfib.com/Portals/0/PDF/sbet/sbet201102.pdf

Susan Dudley, a former administrator of the Office of Information and Regulatory Affairs (OIRA). Dudley wrote: "Whether the President's actions signal a real recognition that regulations can place unreasonable burdens on economic growth remains to be seen. Over the first two years of his term, the federal government issued 132 economically significant regulations (defined as having impacts of $100 million or more per year). That averages out to 66 major regulations per year, which is dramatically higher than the averages issued by [the previous two administrations]."[3]

NFIB believes that it has been a long time coming for small business owners to hear the administration emphasize the harmful effects of overregulation on small business and job creation, and we will be watching closely to see if last month's directive leads to real regulatory reform.

In the meantime, NFIB believes that Congress must take actions — like those proposed in the bill being considered — to level the playing field, and the following ideas will help improve regulatory conditions for small businesses.

Expansion and oversight of SBREFA

The Small Business Regulatory Enforcement and Fairness Act (SBREFA) — when followed correctly — can be a valuable tool for agencies to identify flexible and less burdensome regulatory alternatives. NFIB believes Congress should expand SBREFA's reach into other agencies and laws affecting small businesses. SBREFA and its associated processes, such as the Small Business Advocacy Review (SBAR) panels, are important ways for agencies to understand how small businesses fundamentally operate, how the regulatory burden disproportionately impacts small businesses, and how the agency can develop simple and concise guidance materials.

Furthermore, Congress should take steps to require independent agencies to follow SBREFA requirements. Last year, Congress took an important initial step to do this by requiring the new Consumer Financial Protection Bureau to conduct SBAR panels on the rules that will affect small businesses. Now more than ever, the rules promulgated by independent agencies have a considerable impact on small businesses. Congress should hold these independent agencies accountable for their effect on the small business economy.

While SBREFA itself is a good first step, in order for it to provide the regulatory relief that Congress intended the agencies must make good-faith efforts to comply. As an example, the Environmental Protection Agency's (EPA) proposed Boiler MACT rule from last year failed to heed the recommendation of its SBAR panel to adopt a health-based standard and instead proposed a much higher standard that is virtually impossible to attain at any reasonable cost. This higher standard provided little, if any, additional benefit to the public over the health-based standard.

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[3] Dudley, Susan E. *President Obama's Executive Order: Improving Regulation and Regulatory Review*, January 2011. http://www.regulatorystudies.gwu.edu/images/commentary/20110118_reg_eo.pdf

Committees with oversight authority should hold agencies accountable to the spirit of the law, and the Office of Advocacy should uphold its obligation to ensure that agencies consider the impacts of their rules on small businesses. There are plenty of instances where both EPA and the Occupational Safety and Health Administration (OSHA) have declined to conduct an SBAR panel despite developing significant rules, or a rule that would greatly benefit from small business input.

Congress should require agencies to perform regulatory flexibility analyses. Agencies should also be required to list all of the less-burdensome alternatives that it considered, and in the final rule, provide an evidence-based explanation for why it chose a more-burdensome alternative versus a less-burdensome option — or why no other means were available to address a rule's significant impact. Agencies should also address how their rule may act as a barrier to entry for a new business.

Within SBREFA is a requirement known as Section 610 review, which requires agencies to periodically review existing rules and determine if they should be modified or rescinded. NFIB supports this requirement, but believes it could be improved — since all too often this requirement is disregarded by agencies. The proposed legislation would require agencies to amend or rescind rules where the 610 review shows that the agency could achieve its regulatory goal at a lower cost to the economy.

Finally, when SBREFA was enacted it required all agencies to perform a one-time report on how it had reduced penalties for violations from small businesses. NFIB believes that Congress should explore making such reports an annual requirement. Many of the original reports occurred at least a decade ago. Congress should investigate ways to make agencies provide updated information and require that information on an annual or biannual basis.

Indirect costs in economic impact analyses

Regulatory agencies often proclaim indirect benefits for regulatory proposals, but decline to analyze and make publicly available the indirect costs to consumers, such as higher energy costs, jobs lost, and higher prices. Agencies should be required to make public a reasonable estimate of a rule's indirect impact. This requirement exists if agencies follow the Regulatory Impact Analysis (RIA) mandate contained in Executive Order 12866 signed during the Clinton Administration. Congress should hold agencies accountable and clarify the agencies' responsibility for providing a balanced statement of costs and benefits in public regulatory proposals.

Strengthen the role of the Office of Advocacy

The Office of Advocacy plays an important role within the government to ensure that federal agencies consider the impact of regulations on small businesses. This role was further strengthened by executive order 13272. This order required agencies to notify the Office of Advocacy of any draft rules that may have a significant impact on small businesses, and "[g]ive every appropriate consideration to any comments provided by Advocacy regarding a draft rule."

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Despite this executive order, agencies frequently fail to give proper consideration to the comments of the Office of Advocacy. In addition, there is no mechanism for resolving disputes regarding the economic cost of a rule between the agency and the Office of Advocacy.

NFIB believes that the Office of Advocacy needs to be strengthened. The Chief Counsel for Advocacy should have the ability to issue rules governing how agencies should comply with regulatory flexibility requirements. This will help ensure that agencies fully consider the views of the Office of Advocacy.

Increase judicially reviewable agency requirements within SBREFA
As this committee well knows, SBREFA provided important reforms to the Regulatory Flexibility Act (RFA), including providing that agency decisions are judicially reviewable once a rule is finalized and published in the *Federal Register*. However, waiting until the end of the regulatory process to challenge a rule creates uncertainty for the regulated community — which directly stifles employment growth. Under the current system, an agency could make a determination of no significant impact on a substantial number of small entities on its initial regulatory flexibility analysis that may be years before the rule is finalized.

In addition, we have had the experience of filing a lawsuit when a rule is finalized, won the case, yet received a resolution that was of no benefit to small business. About a decade ago, the U.S. Army Corps of Engineers (USACE) issued a rule on what it considers a wetland pertaining to its Nationwide Permits (NWP) program. The USACE performed no regulatory flexibility analysis and instead pushed through the rule using a "streamlined process." After four years of legal battles, we emerged victorious – a federal court ruled that the agency had violated the RFA. Yet, instead of sending the rule back to be fixed, the court only required that the USACE not use its streamlined process in the future. Small business owners affected by the NWP rule realized no relief.

Because of the regulatory flexibility process improvements inherent within this proposed bill, NFIB is hopeful that review of agency actions will be strengthened. Small business will have its voice more substantively considered throughout the entire rulemaking process.

Agency focus on compliance
NFIB is concerned that many agencies are shifting from an emphasis on small business compliance assistance to an emphasis on enforcement. Unfortunately, the evidence in this area is plentiful. Both of the five-year strategic plans released last year by EPA and the Department of Labor strongly emphasized increased enforcement. In OSHA's FY 2011 budget request, it proposed shifting 35 staff members from compliance assistance to enforcement activities. Most recently, OSHA has proposed significant changes in its On-site Consultation Program that would reduce incentives for small businesses to participate and identify potential workplace hazards. Small businesses rely on compliance assistance from agencies because they lack the resources to employ

specialized staff devoted to regulatory compliance. Congress can help by stressing to the agencies that they need to devote adequate resources to help small businesses comply with the complicated and vast regulatory burdens they face.

For example, the Department of Treasury late last year notified small businesses that beginning on January 1, 2011, they could no longer make tax payments through Federal Tax Deposit Coupons. Instead small businesses are required to make these payments electronically or face a 10 percent penalty. For many businesses this was a major change in the way they make their payments and lack the means to make such payments electronically. Providing only a few weeks notice gave some businesses little chance to make the necessary changes. As proof, we have already heard from NFIB members this year that are confused about the change and scrambling to figure out how they will submit their payments.

Additionally, Congress should pass legislation waiving fines and penalties for small businesses the first time they commit a non-harmful error on regulatory paperwork. Because of a lack of specialized staff, mistakes in paperwork will happen. If no harm is committed as a result of the error, the agencies should waive penalties for first-time offenses and instead help owners to understand the mistake they made.

With high rates of unemployment continuing, Congress needs to take steps to address the growing regulatory burden on small businesses. The proposed reforms in the Regulatory Flexibility Improvements Act are a good first step.

Thank you for holding this important hearing on reducing the regulatory burden on small businesses. I look forward to working with you on this and other issues important to small business.

Sincerely,

Karen R. Harned

Karen R. Harned, Esq.
Executive Director
NFIB Small Business Legal Center

National Federation of Independent Business
1201 F Street NW, Suite 200 • Washington, DC 20004 • 202-554-9000
www.NFIB.com

CORE VALUES

We believe deeply that:

Small business is essential to America.
Free enterprise is essential to the start-up and expansion of small business.
Small business is threatened by government intervention.
An informed, educated, concerned, and involved public
is the ultimate safeguard for small business.
Members determine the public policy positions of the organization.
Our employees and members, collectively and individually, determine the success of
the NFIB's endeavors, and each person has a valued contribution to make.
Honesty, integrity, and respect for human and spiritual values are important
in all aspects of life, and are essential to a sustaining work environment.

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Mr. COBLE. Thank you, Ms. Harned. Thanks to all of you.

As I said at the outset, we try to apply the 5-minute rule to us, as well. So if you all could keep your responses terse, we would appreciate that.

And at the outset, I want to apologize for my raspy voice. I am coming down with my annual midwinter cold, so I know this doesn't sound good. So you all bear with me.

Mr. Sullivan, Elizabeth Warren, the Consumer Advocate and head of the new Consumer Financial Protection Bureau, has embraced and, I've been told, has warmly embraced the new obligations to comply with Regulatory Flexibility requirements.

Now most oftentimes regulatory discussions involve to the right of center or to the left of center, depending upon the position of the advocate, and I would assume that it is not believed that Ms. Warren would probably to the left of center.

If she can embrace these proposals, it seems to me all agencies should be comfortable doing likewise. What do you say to that, Mr. Sullivan?

Mr. SULLIVAN. Mr. Chairman, I agree with you. Elizabeth Warren, who traveled up to Maine a few weeks ago with Senator Snowe, actually embraced the amendment that was part of the Dodd-Frank Financial Regulatory Reform Bill, saying that she would have done the type of analysis that we're talking about here today, even if it weren't required by law.

So if you had Federal regulators with that attitude at every agency, they would be embracing the idea of having small business advocacy review panels because it is through those panels you get constructive input on how agencies can regulate better, meet their objectives while minimizing costs on small firms.

So perhaps after Professor Warren sets up the Consumer Financial Protection Bureau, we can all work to get her in front of other regulatory agencies to preach that type of gospel.

Mr. COBLE. I applaud you, sir. And, folks, I don't want to in any way imply that I'm advocating compromising safety. I don't want that to come out of this hearing because I don't want to do that.

Mr. Gimmel, what challenges do Federal regulations present to your company today as it attempts to create additional jobs in this economy?

Mr. GIMMEL. Well, the first one is simply understanding what they are. We're a small company. We're a machine shop, and there are literally tens and tens and tens of thousands of pages of regulations that we have to not just comply with but understand and I just have to tell you that the burden of that is really overwhelming for any single business to effectively do.

We have had—in our case, we have people, two people full time that are dedicated to compliance. Much of this is dealing with compliance that is fruitful. Regulations are not something that we are speaking against here, Mr. Chairman. We believe regulation is necessary. We believe protection of the worker, protection of the environment, fair taxation, et cetera, are certainly necessary.

What we're talking about here is a process that we feel has resulted in redundant and inefficient network of sometimes overlapping regulations and there seems to be a lot of support for that regardless of what your political orientation is. We have the same objective.

Mr. COBLE. Thank you, sir. Mr. Shull, you suggest that H.R. 527 would wrap Federal programs up in costly, time-consuming, and

unnecessary red tape, putting consumers, and working families at risk of harm.

If the regulation, for example, discourages small business, would not the working family that lost his job be in a box?

Mr. SHULL. Well, you know, I think that that would be a concern if that were the case, but there's not really any proof that regulation harms competitiveness of industry, harms jobs, harms trade flows. There's a document I'd be happy to submit for the record that OMB Watch produced in the mid 2000's called Regulation and Competitiveness as well as an article by an economist, Frank Ackerman, called The Unbearable Lightness of Regulatory Costs.

Both of these are documents that exhaustively go through the studies that have been conducted and found that there really is no evidence that regulations have harmed the U.S. competitiveness or have harmed jobs.

Now, I mean, when it comes to, say, jobs, OSHA, for example, is not in the business of destroying jobs. It's in the business of making sure that jobs don't destroy workers, and those are really critical concerns.

Mr. COBLE. The red light has illuminated, so I will yield to the gentleman from Tennessee, Mr. Cohen.

Mr. COHEN. Thank you, Mr. Coble.

First of all, Mr. Gimmel, I know you come here with a heavy heart for I saw the overtime and it wasn't pretty. You are a Louisville fan, as well, I presume.

Mr. GIMMEL. Well, I'd prefer to think that we are not adversaries, Congressman Cohen, except when it comes to maybe basketball and football.

Mr. COHEN. We're not. I like Louisville and I was cheering for them last night and they had a terrible overtime.

Mr. GIMMEL. I am a Louisville fan, so don't put me in that category with those guys down the road there.

Mr. COHEN. Okay. You mentioned in your——

Mr. COBLE. If Mr. Cohen would yield? I missed it. What was the game in question?

Mr. COHEN. Louisville and Notre Dame.

Mr. COBLE. Well, Carolina and Duke were playing yesterday, so I missed Louisville.

Mr. COHEN. Should I ask who won?

Mr. COBLE. I don't want you to do that.

Mr. COHEN. I won't ask who won.

Mr. GIMMEL. Memphis won, though, I know that.

Mr. COHEN. Let me ask you this, Mr. Gimmel. The EPA, you mentioned in your opening remarks, what parts of the EPA would you keep and what parts of the EPA would you not want to keep?

Mr. GIMMEL. As it relates to manufacturing, what we see is an overlapping series of, for instance, air quality rules, Federal versus local in our case. In Jefferson County in Louisville, we have two different sets of qualifications that we have to comply with, both of which are very, very complex. Part of that, of course, is a local problem.

In the case of EPA, I think what we would like to see is a system that addresses the efficiency of each of the regulations in place, much like President Clinton started in 1993. I believe he called it

the National Performance Review, and it wound up eliminating, as it sought out redundancy, as it sought out duplicative and no longer necessary regulation or inefficient application of regulation, we were able to eliminate some 16,000 pages of regulations that they determined, the Clinton Administration determined was unnecessary at the time.

We would like to see that same approach. We are certainly in favor of clean water and clean air, but we think that a lean approach to the process could yield tremendous savings because our competition is not just with how our economy used to be here any more. Our competition is global right now and we're competing against people that operate on a different set of rules and in some cases more efficient regulatory processes than we have.

Mr. COHEN. I noted in your remarks, you did comment that we need to have clean air and clean water, et cetera, and I appreciate that understanding.

Mr. GIMMEL. And as you point out, we're beneficiaries of that, sir.

Mr. COHEN. Right. All of us are. The Chinese, of course, as Mr. Shull pointed out, don't have this government regulation in this area. They have it in other areas and so they have the worst water and air quality possible but the highest productivity and I don't know about the Japanese. You mentioned them. I think they're—Mr. Shull, you might know and somebody else here might know, but I don't think the Japanese have got the best air quality. I think they've got some problems there with that.

Mr. Shull, let me ask you this. You talked about the—we talked about the indirect effects that are in the proposed rule. Would you elaborate on your concerns and tell us if you think that anything dealing with indirect effects could result in industry going to court to challenge decisions there?

Mr. SHULL. Sure. So the bill would amend the Regulatory Flexibility Act requirements of these analyses for the effects on small entities by requiring agencies not just to look at the impacts on the regulated small entities that would be covered by a regulation but also any small entity outside of the world of regulated small entities for whom there would be reasonably foreseeable economic consequences, adverse or beneficial.

It's hard to know where that stops. So, for example, if NHTSA really gets on the ball and starts regulating to improve, say, protection of vehicle occupants' lower extremities, NHTSA would probably have to, under this legislation, look at the consequences not just for the automakers, not just for the suppliers who make the parts that go into motor vehicles but also the car dealers.

Now under recent revisions to the SBA size standards, most new car dealers in this country, somewhere between 83 to 93 percent of them, would be counted as small businesses and that includes even a car dealer who makes up to, say, a $120 million in receipts. So these are actually not terribly small, not terribly inexpensive—these are not economically-struggling entities.

Then when you think about—if you're thinking about the impacts on, say, those auto dealers, they conceivably hire payroll services to handle their payroll. They conceivably hire janitorial

services to clean their facilities. They conceivably—they do buy ads from local TV and radio and newspapers.

Now, all of those small entities——

Mr. COBLE. Mr. Shull, if you could wrap up pretty——

Mr. SHULL. Oh, of course. It's turtles all the way down. There's really no conceivable limit to what agencies would be forced to assess and the point at which wealthy corporate special interests could sue them for having failed to consider.

Mr. COHEN. Thank you, sir, and I will—even though the first minute of my time was dedicated to Sports Center, I will yield back the remainder of my time.

Mr. COBLE. The Chair recognizes the distinguished gentleman from South Carolina, Mr. Gowdy, for 5 minutes.

Mr. GOWDY. Thank you, Mr. Chairman, and thank you for conducting these hearings.

Mr. Sullivan, I'm going to put your legal acumen on display. Rules and regulations, the violations thereof, can they be evidence of negligence in a civil suit?

Mr. SULLIVAN. Could you ask the question one more time?

Mr. GOWDY. Violations of rules and regulations, can they be used as evidence of negligence if Mr. Gimmel is sued in a civil suit?

Mr. SULLIVAN. I don't know.

Mr. GOWDY. Do you know whether or not any of the rules and regulations have criminal provisions where Mr. Gimmel could in theory suffer criminal consequences because of a rule or regulation that is not promulgated by Congress but is by someone who's unelected, yet he stands to face criminal sanctions if he violates it?

Mr. SULLIVAN. There are some strict liability provisions within statute that are then implemented through rulemakings that do convey strict liability and criminal sanctions, yes.

Mr. GOWDY. Mr. Shull made a comment, and I tried to write it down, that there is no evidence, which is a phrase that does strike the attention of a former prosecutor, no evidence that the regulatory schemes have impacted productivity or trade in this country, and judging by your body language, you may have had a different view of that. Do you agree or disagree with his comment?

Mr. SULLIVAN. Congressman Gowdy, I disagree with the comment. We're living in a global competitive environment right now and we're seeing different countries trying to both protect the air and the land and the safety of their workers while minimizing further burden on manufacturers and small businesses, and those countries that really do try to strike that balance correctly end up with more employment and more growth and I fear that the overwhelming amount of regulations that do not take into account how they impact small business will drive businesses away from the United States.

So I believe it's a competitive question and the answer is we can't afford to simply look for evidence on a piece of paper that says, oh, we went too far and we're losing businesses. We have to act now to make sure that that doesn't happen.

Mr. GOWDY. Mr. Gimmel, you made the comment that the EPA was out of control. That was one agency that you cited with specificity that is out of control. Can you give me a specific example of that? And also, if you were to get a call from a regulator, the per-

ception, because you embody small business, the perception that you have as a small businessman, is it one of we are to help you or we are here to get you?

Mr. GIMMEL. Well, first of all, Congressman, with regard to the EPA, the ozone regulatory functions the EPA seems to be taking on, we believe, are overstepping. There's no question about that.

The second—what was the second part of your question?

Mr. GOWDY. Whether or not there's a perception among small business owners that the regulatory entities in this country are there to provide help or there to lay in wait to catch you doing something wrong?

Mr. GIMMEL. That's more than a perception, sir. I think that's a reality, particularly when it comes to the new attitude at OSHA. Workplace injuries have been at record lows, historic lows for the last several years in this country because of, I think largely, a cooperative relationship between businesses and the regulatory agencies.

We could call them in, ask them for advice, ask them to take a look at part of our plant that we're reconfiguring or that we may have questions about and get their input without fear of consequences. Now, the attitude at OSHA is we're going to get you and you invite us in and we find something, you're going to get a big fine. So it's more of an adversarial relationship now as opposed to a cooperative relationship.

Mr. GOWDY. Last question. Mr. Shull, the President himself has acknowledged that there are regulations that have an unintentionally deleterious impact on job creation in industry. Got about 45 seconds left.

Can you list me four or five regulations that you would concede have had unintended pernicious deleterious consequences on industry?

Mr. SHULL. You know, I've been waiting for the President to offer some specifics.

Mr. GOWDY. In lieu of his presence, would you give me some? Would you give me just a handful of regulations that you concede, out of the myriad of ones out there, you concede have had an unintendedly-pernicious impact on job creation?

Mr. SHULL. Actually, yes. The fuel economy standards are set too low and have stayed too low for too long, until just recently, and that meant that the U.S. automakers were not prepared to compete when gas prices spiked and they had these heavy gas-guzzling SUVs——

Mr. COBLE. Mr. Shull, I'm not buggy-whipping you but wrap it up, if you will, because the red light's on.

Mr. SHULL. All right. Well, then that's one that I would list, in addition to the failure of the automakers to make SUVs that perform well in crashes. They really suffered significantly when the Ford Firestone debacle came to light.

Mr. GOWDY. Thank you, Mr. Chairman.

Mr. COBLE. The gentleman's time has expired. The distinguished gentleman from Illinois, Mr. Quigley.

Mr. QUIGLEY. Thank you, Mr. Chairman, and again congratulations on your new position.

Mr. COBLE. Thank you.

Mr. QUIGLEY. We appreciate your cordiality and accommodations.

Mr. Conyers has talked about how quickly this bill has come to a hearing. What's interesting, this is, I think, my fifth meeting already between my two Committees on the issue of regulations. If we could squeeze one more in this week, they tell me I get a set of steak knives.

But here's what's interesting, folks. We're basically saying the same things, as the Chairman said, just on either side of this middle ground line. We all recognize the need for regulation, we just want it to do a better job. I think that's what the President talked about and like I've said before, I dare anyone in this room not to think of regulation the next time you get on a commuter airline or if you come to my hometown and you drink tap water, right?

Chicago, not the lake water, the water from the tap which has levels of chromium, not healthy for you, three times what's been judged to be a healthy standard. So we get we're not perfect and it has to improve.

I recognize that for some, this is even more offensive because non-elected officials are actually part of the enforcement mechanisms, but we recognize that under Democratic and Republican Administrations, our laws and our regulations have always had criminal penalties to them out of absolute necessity, enforced by non-elected officials.

If you take it to its extreme, Assistant State's Attorneys aren't elected. Their bosses are. Well, the same is true with the Executive Branch, FBI agents, police officers.

So I think we need to recognize it's important to let the public know there's a balance here. If we come off that the only message here is that regulation is what's killing people—killing jobs, we forget that a lack of regulation can kill people. So I sense in these now five meetings that we're all getting sort of the same point and we have to do better. We have to avoid duplication and redundancy and to make the—if we want to get to the same goal, there might be more efficient ways to do that. So to the extent that we can do all that, that's fine.

I just ask that we try to use the same numbers. So when we talk about this, what I'm trying to get from both sides is why one set of figures are better than the other and why we only have a few minutes today, let me just ask the first because it's such a prominent number that's being thrown out there.

Mr. Shull, the Crain study threw out the biggest number so far, so it wins, but can you tell me, beyond what you said in your written documents, what you see the concerns are with that report?

Mr. SHULL. So the concerns, and these are concerns, by the way, which have been identified by a range of folks, the Center for Progressive Reform on the one hand and President Bush's former Administrator of the Office of Information and Regulatory Affairs on the other hand, folks from a variety of viewpoints have recognized that this study and its previous iterations are deeply flawed. And it comes out with this number that is so easy to cite and memorize and use and repeat and understandably because it's so large, folks are going to quote it and be alarmed, but it seems to be the result of a garbage-in/garbage-out process.

I mean, the Crain and Crain or Crain and Hopkins or Hopkins studies have repeatedly used really shaky methodologies. For example, the key formula using the Regulatory Quality Index from the World Bank is based on public opinion surveys. The costs of environmental regulations depend in large part on a 20-year-old study by Hahn and Hird which itself used 30-year-old studies produced by conservative economists to produce its numbers.

There's a really strange study by Joseph Johnson on the costs of occupational safety and health regulations which nobody can figure out quite why he did what he did and how he got to the numbers he got. It's a very opaque document that actually takes some old numbers and then multiplies them by 5.5.

You know, at the core of this is a presumption that regulatory costs are always the same year after year after year, even after businesses learn how to adapt to the new climate and innovate and discover new ways of doing business that are actually far cheaper than they realize going in.

Mr. QUIGLEY. Because we're running out of time, we do recognize there's a cost and we try to keep those to a minimum. What I'm trying to get both sides to do is to work with the same numbers. The hyperbole exists on both sides of the world here. So if anyone on these panels, Mr. Chairman, have the opportunity to submit further evidence arguing, footnoting the best research as possible toward their ends of what numbers we really should be dealing with, it's useless if we're not dealing with real numbers in the real world. Whatever they are, they're important.

So I'd just respect that we could work in the same ballpark and same universe of reality.

Mr. COBLE. Thank the gentleman from Illinois. Thank you. I didn't have to cut you off that time, Mr. Shull.

The distinguished gentleman from New York, Mr. Reed, is recognized for 5 minutes.

Mr. REED. Well, thank you very much, Mr. Chairman.

Mr. Shull, I'm trying to understand your testimony, but what strikes me is, you know, I listened to my colleagues on the other side. I listened to and reading the testimony from our side. I listened to the President acknowledging. Everyone seems to agree regulations are causing a negative impact on small business America, yet when I read your testimony, what I'm coming away with is you talk about there being a better way than H.R. 527 to deal with this issue, and my interpretation of your testimony is that it's essentially—it's a way—we should be increasing regulation, subsidizing small businesses to allow them to comply with that regulation, and then tax the people to pay for that subsidy for small businesses.

Isn't that the classic Ronald Reagan situation, you know, where it's essentially if it moves, tax it, if it keeps moving, regulate it, and then if it stops, subsidize it? I mean, do you agree that the regulation problem is causing the negative impact on small business?

Mr. SHULL. Well, I suppose I'm afraid of the other Ronald Reagan problem, which is delaying regulations to the point that children are dying or people are at risk. I mean, for example, the Reagan White House delayed a simple warning label on aspirin products to notify parents not to give this to young children when

they have flu or flu-like symptoms because of the risk of Reyes Syndrome.

The Reagan White House delayed that standard and in the course of that thousands of children were afflicted by Reyes Syndrome and suffered irreversible brain damage, liver damage, and some of them died.

You know, I suppose I'm also afraid of the other Reagan problem which is, you know, the cutting things to the bone and running major deficits and, you know, leaving the public at risk——

Mr. REED. Mr. Shull, I'm not talking about Reagan's problem. I'm talking about your concept that what we need to do to cure this problem is create more regulation and then the people that can't comply with the regulation, let's give them a tax subsidy in order to allow them to comply. I guess I just don't see how more regulation is going to correct this situation.

Mr. SHULL. Well, first of all, the subsidize concept was one that was jointly authored by Senator Snowe and Senator Kerry for legislation that would actually not subsidy small businesses but the small business development centers, I believe that's what they're called, to provide technical assistance to small businesses so that they can actually comply with the law.

I mean, if the challenge is that they don't know what the laws are and they need help learning what they are so that they comply, it seems to me that the solution's not to get rid of the law that there's to protect people, including the small business owners and their families, but the solution is to help them learn more about it.

Mr. REED. That's what we hear from the government. We're going to take care of you.

Mr. SHULL. Or, I mean, if they would rather hire, you know, private industrial hygienists or, you know, other folks to help them comply, I suppose that's fine. It's probably cheaper if they——

Mr. REED. The taxpayers have to foot that bill. I mean, I guess I'm a small business guy. I come from a small business and I've just dealt with these regulations and I can just tell you firsthand that, you know, there's a real cost and that destroys businesses that otherwise could use that money to invest, to capitalize their markets, to move on to the next innovation of tomorrow, and I guess, Mr. Gimmel, I mean, you're a small businessman.

What's your response to his proposal to—where do you see that going?

Mr. GIMMEL. I would ask him if he's ever run a business that had to comply with any of the array of regulations. I'd be surprised if he would make a statement like that in having a background of actually running a business.

Mr. REED. Mr. Shull, have you ever ran a business?

Mr. SHULL. My time has been spent in advocacy, working with families who've suffered incredible losses because of the lack of regulation.

Mr. REED. And I understand that. I mean, we live in a real world and I understand that many people come to this table, come to this hall for good intentions. We don't want to hurt people. As the Chairman said, nobody wants—you know, we want clean air, we want clean water, and I think I echo my colleague over on the

other side that said, you know, we want the regulations to have a good effect, but what the problem is is by creating more and more regulations, we're losing sight, in my opinion, as to what we're trying to do and all it becomes is, you know, guaranteeing a way to—more regulations so that if it's good for one situation, it must be good for all and that's my concern because, you know, as a small business guy myself, this gentleman here, people are suffering. Those are real jobs and those are real Americans.

I see that my time has expired. I'll yield back.

Mr. COBLE. I thank the gentleman from New York.

I just confirmed with Mr. Cohen, Mr. Ross will be the final witness, final examiner, and if no one else shows, in the interest of your schedule, we will adjourn after we hear from Mr. Ross.

Mr. Ross, the distinguished gentleman from Florida.

Mr. ROSS. Thank you, Mr. Chairman.

Mr. Sullivan, the question for you. When we talk about regulation for small business, I'm reminded of the Americans With Disabilities Act, the ADA, which has had some unintended consequences, but nevertheless which put a requirement on business for accessibility for those with disabilities, but in that ADA Act, it had what was known as a reasonable accommodation standard.

For example, if I was CEO of a Fortune 500 company, a reasonable accommodation for an employee with one type of disability may be something that I can afford to do with a modification of the workplace or access to the workplace, but if that same employee with that same disability came to me and I was an employer of four or five employees, that reasonable accommodation probably could not be made.

And so my question to you is, under the RFA, is there any such standard of a reasonable accommodation that would fit the regulatory environment to allow small businesses to meet the regulatory burden without having to have a broad brush approach for the larger ones?

Mr. SULLIVAN. Congressman, the situation that you laid out is exactly what H.R. 527 is trying to address because what we found is if agencies alone look at what constitutes reasonable accommodation, they may not get it right. But if they are forced through this law to sit down with small business owners, disclose what the direct impact of the proposal will be, disclose what the ripple effect of that proposal will be, and then actually listen to the input from small businesses and constructive ideas on how to get the regulation right, then that final rule that they come out with is much more likely to be a balance.

Mr. ROSS. Right. And it is about a balance, isn't it?

Mr. SULLIVAN. Yes, it is about that process and that's really what this bill does, is it forces that process.

Mr. ROSS. Thank you. Mr. Shull, when you talked about, in your opening statement, about how, if it were not for the regulatory environment, the auto industry thought it would not have had seatbelts or collapsible steering wheels, and you seem to indicate to me that if there not had been a regulatory environment, that some of the safeguards that consumers now enjoy would not be in place, but yet I have to look back to even the founding of our country when there was no regulatory environment and when Benjamin

Franklin was one of the investors of the first fire insurance company.

In order to manage that risk, they created the first fire department and as we've seen throughout history that our market forces have allowed us to find that balance and in fact in the auto industry we've seen a balance because of insurance companies insuring a product requiring certain manufacturer specifications, otherwise they wouldn't insure it, otherwise they wouldn't give you the appropriate coverage to manage that risk, and so my question to you is, is that, as a businessman, if I were going out there and wanting to start a business and I wanted to make sure that I could meet the needs and have a profit, I would want to look at such factors, such as the demand, and if there was no demand out there for my product, then I probably shouldn't go into business, is that correct?

Mr. SHULL. Sure.

Mr. ROSS. And if there were no natural resources or whatever it was I wanted to sell, if I could not produce the product, even though there was a demand, it would probably be indicative of the fact that I shouldn't be in business, would that be correct?

Mr. SHULL. Or it might be indicative of the fact that you haven't found the right buyers.

Mr. ROSS. Okay. But would you go into business if you didn't have—I mean, if you could not make a profit at it?

Mr. SHULL. Well, I've spent all of my time in the nonprofit sector, so it's not a fair question to ask me. I'm sorry.

Mr. ROSS. Well, then, the question to ask you would be if I were a business that——

Mr. SHULL. Sure.

Mr. ROSS [continuing]. That was burdened by regulation to the extent that I could no longer turn a profit, is that indicative of the fact that maybe I shouldn't be in business at all?

Mr. SHULL. Well, it might be a sign that you were under-capitalized to begin with or that——

Mr. ROSS. If I was under-capitalized, would that be because I could not afford to comply with the regulatory environment, despite the demands of the consumers for my product?

Mr. SHULL. Well, you know, this is a hypothetical, but, I mean, if you put this in the concrete terms, if a small automaker is trying to get in the business of producing vehicles but doesn't have the wherewithal to produce a vehicle that's actually safe and crashworthy on the Nation's highways, that's not necessarily an automaker we necessarily want in the business.

Mr. ROSS. So, in other words, irrespective of the market forces, the regulatory forces would be a good judge of why we should even be in business in the first place?

Mr. SHULL. You know, I guess I have to take issue with the concept that markets are conceptually and historically prior to government. I mean, they exist——

Mr. ROSS. Not a bad thing.

Mr. SHULL. Governments create markets and create the vehicles, the infrastructure that allow markets to flourish, from our roads to the fact of the legal status of corporations.

Mr. ROSS. One—I see my time's up. I must yield back.

Mr. COBLE. Thank the gentleman.

Mr. ROSS. Everything's fine, and I thank you, Mr. Chairman. I want to just thank the panel. It was excellent and while it wasn't reality TV, it was good.

Mr. COBLE. I want to thank the panel, as well. Mr. Ross, I'll say to you, if you had another question, we will keep this open. Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses which we will forward and ask the witnesses to respond as promptly as they can so that their answers may be part of the record.

Without objection, all Members will have 5 legislative days to submit any additional materials for inclusion in the record.

With that again, we thank you all. As Mr. Cohen said, it's been a good hearing. Thank you for your contributions, and we're letting you all leave early, as well.

The Subcommittee stands adjourned.

[Whereupon, at 2:50 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Response to Post-Hearing Questions from Karen R. Harned, Esq., Executive Director, National Federation of Independent Business, Small Business Legal Center

Response to Post-Hearing Questions from Karen Harned

Re: H.R. 527, the "Regulatory Flexibility Improvements Act of 2011"

Question 1: President Obama recently said "the Regulatory Flexibility Act . . . establishes a deep national commitment to achieving statutory goals without imposing necessary burdens on the public."

A. How profoundly do you believe the agencies have broken faith with that commitment in the decades since Congress passed the RFA?

B. Do you agree that legislative action—not just Presidential initiatives that can come and go—is necessary to finally make that commitment a reality?

C. Do you believe HR 527 takes important, meaningful steps to achieve that? Why?

Answer: We have not seen a full commitment from agencies to follow the letter and spirit of the RFA. Instead, the agencies tend to view the RFA as just another box to check in the regulatory review process. One statutory requirement that is often overlooked by the agencies concerns consideration of alternative regulatory approaches that are less burdensome on small businesses. Too often, agencies have issued a proposed rulemaking where they have not sought small business input in how to craft a less-burdensome alternative, and pay little regard to suggestions small businesses put forward in formal comments. Moreover, current law does not require agencies to assess the indirect effects of regulations on small business. All too often, some of the worst regulatory burdens small businesses face are the result of unintended consequences. While executive orders bring needed attention to the impact of regulation on small business, they lack judicial review mechanisms that can incentivize agencies to comply faithfully with the RFA. The judicial review provisions in H.R. 527 help in this regard. In addition, the bill would require agencies to assess the indirect effects of regulations and improve agency transparency on the front end of a rulemaking.

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