

**Congress of the United States**  
**U.S. House of Representatives**  
**Committee on Small Business**  
2361 Rayburn House Office Building  
Washington, DC 20515-6315

To: Members, Committee on Small Business  
From: Committee Staff  
Date: March 16, 2015  
Re: Hearing: "Tangled in Red Tape: New Challenges for Small Manufacturers"

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On Wednesday, March 18, 2015 at 11:00 am in Room 2360 of the Rayburn House Office Building, the Committee on Small Business will meet for the purpose of receiving testimony on the effects of federal regulations on small manufacturers. While existing regulatory requirements impose significant burdens on small manufacturers, new regulations create challenges as well. The Committee will examine several federal regulations (either in development or implementation) and the impacts on small manufacturers.

### **I. Impact of Regulations on Small Manufacturers**

Due to their size and resources, small businesses are disproportionately burdened by regulations in comparison to their larger counterparts. Regulations with fixed compliance costs, such as environmental regulations that require a specific pollution control device, may have a particularly disproportionate impact on small businesses. Small firms have a smaller revenue and employee base over which compliance costs can be spread in comparison to large firms.<sup>1</sup>

According to a 2014 survey by the National Association of Manufacturers, 88 percent of manufacturers identified federal government regulations as a recent and future challenge.<sup>2</sup> Respondents to the survey further indicated that if regulatory compliance burdens were reduced, they would increase spending on investment, employee hiring and compensation, sales, research and development (R&D), debt reduction or improving return on investment.<sup>3</sup>

Recognition that one-size-fits all regulation can impose significant burdens on small business and that small firms were underrepresented in the federal rulemaking process spurred Congress to enact the Regulatory Flexibility Act, 5 U.S.C. §§ 6012-12 in 1980.<sup>4</sup> The RFA requires agencies to identify

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<sup>1</sup> OFFICE OF MANAGEMENT AND BUDGET, 2014 DRAFT REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 39 (2014) [hereinafter OMB 2014 Draft Report], available at

[http://www.whitehouse.gov/sites/default/files/omb/inforeg/2014\\_cb/draft\\_2014\\_cost\\_benefit\\_report-updated.pdf](http://www.whitehouse.gov/sites/default/files/omb/inforeg/2014_cb/draft_2014_cost_benefit_report-updated.pdf).

<sup>2</sup> W. MARK CRAIN AND NICOLE V. CRAIN, NATIONAL ASSOCIATION OF MANUFACTURERS, THE COST OF FEDERAL REGULATION TO THE U.S. ECONOMY, MANUFACTURING AND SMALL BUSINESS 8 (2014) [hereinafter NAM Report], available at <http://www.nam.org/Data-and-Reports/Cost-of-Federal-Regulations/Federal-Regulation-Full-Study.pdf>.

<sup>3</sup> *Id.* at 7.

<sup>4</sup> The RFA uses the term "small entities," which includes small businesses, small not-for-profit organizations, and small governmental jurisdictions. See 5 U.S.C. § 601(6). For the sake of simplicity, the memo will use the terms "small business" or "small manufacturer."

and account for the potentially excessive costs and disproportionate impacts of regulations on small businesses and examine ways to reduce unnecessary regulatory burdens.

## II. Regulatory Flexibility Act

Federal agencies must comply with the requirements of the RFA for every rule, both proposed and final, for which they must conduct notice and comment rulemaking<sup>5</sup> as required by § 553 of the Administrative Procedure Act (APA) or any other law. The RFA requires agencies to evaluate their regulatory proposals to ensure that, while accomplishing their statutory mandates, the ability of small businesses to invent, produce, compete, and expand is not hindered.

Before an agency issues a proposed rule, it must conduct a threshold analysis of the economic impact of the proposed rule. If the agency determines that the proposed rule will have a “significant economic impact on a substantial number of small entities,” it must prepare an “initial regulatory flexibility analysis” (IRFA).<sup>6</sup> If the agency determines the proposed rule will not have a “significant economic impact on a substantial number of small entities,” the agency head may certify to such a conclusion and need not prepare an IRFA.<sup>7</sup> The certification statement must include a “factual basis for the certification.”<sup>8</sup> An agency is required to prepare a final regulatory flexibility analysis (FRFA) if it determines that a final rule will have a “significant economic impact on a substantial number of small entities.”<sup>9</sup>

The RFA also requires agencies to conduct outreach to small businesses when a rule will have a “significant economic impact on a substantial number of small entities.”<sup>10</sup> The Environmental Protection Agency (EPA), the Occupational Safety and Health Administration (OSHA), and the Consumer Financial Protection Bureau (CFPB) have an additional outreach requirement for any proposed rule that requires preparation of an IRFA. Pursuant to § 609(b) of the RFA, the

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<sup>5</sup> Notice and comment rulemaking is the process by which regulated entities can provide input to regulators on rules that are under development. The agency must publish a notice of proposed rulemaking in the Federal Register that includes relevant information including: how individuals can submit written data, view or arguments; deadlines; the legal authority under which the rule is proposed; and the proposed rule itself. 5 U.S.C. § 553(b)-(c). The number days for comment are not specified and the period can go from 7 days to 4 months. Agencies must provide at least 30 days after a final rule is published before it becomes effective. *Id.* at § 553(d). There are exceptions to these requirements that are not relevant for this hearing.

<sup>6</sup> 5 U.S.C. § 603. An IRFA must describe the small businesses that will be affected, the impact of the proposed rule on small businesses, the compliance burdens imposed and any significant alternatives that could minimize any significant economic impacts. *Id.* at § 603(a)-(c).

<sup>7</sup> *Id.* at § 605(b).

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

<sup>9</sup> The FRFA must describe the small businesses that will be affected, the impact of the proposed rule on small businesses, the compliance burdens imposed, the significant issues raised in public comments in response to the IRFA, any comments by the Chief Counsel for Advocacy on the proposed rule, and any changes the agency made to the rule in response to the Chief Counsel’s comments. *Id.* at 604(a)(1)-(5). It also must describe the steps an agency has taken to minimize the significant economic impact on small businesses and why each alternative that would lessen the economic impact was rejected. *Id.* at § 604(a)(6). A certification at the proposed rule stage does not mean that the agency is entitled to certify at the final rule stage. Data obtained during the notice and comment process may force an agency to rethink its decision to certify. If sufficient information is submitted to the agency that demonstrates a significant economic impact on a substantial number of small businesses, then the agency is required to prepare a FRFA.

<sup>10</sup> *Id.* at § 609(a).

aforementioned three agencies must convene a small business advocacy review (SBAR) panel<sup>11</sup> before the rule is published in the Federal Register to receive input from small businesses.<sup>12</sup>

The Chief Counsel for Advocacy of the United States Small Business Administration (SBA) is responsible for monitoring agency compliance with the RFA and must annually report to the President and the Committees on Small Business and the Judiciary of the United States House of Representatives and Senate.<sup>13</sup> Although agencies have been required to comply with the RFA for nearly 35 years, compliance is still inadequate. According to the Chief Counsel for Advocacy, the two most frequent problems with RFA compliance that prompted his office to file public comments on regulations in fiscal year 2014 were inadequate analyses of small business impacts and inadequate consideration of regulatory alternatives.<sup>14</sup> This is particularly problematic because evaluating small business impacts and regulatory alternatives provides agencies with the information necessary to increase the cost-effectiveness of their regulatory proposals through reduction of unnecessary burdens on small businesses, including small manufacturers.

### III. Regulatory Challenges For Small Manufacturers

Small manufacturers are affected directly and indirectly by a variety of regulatory requirements from a number of agencies. While the Committee is concerned with all rules that have impacts on small business, it would be impossible to conduct such a hearing. As a result, the hearing will focus on a few rules either in the development or implementation stages that exemplify the issues facing small manufacturers.

#### A. Hazard Communication Standard

In 1970, Congress enacted the Occupational Safety and Health (OSH) Act to “assure safe and healthful working conditions for working men and women.”<sup>15</sup> The OSH Act authorizes the Secretary of Labor (Secretary) to set mandatory occupational safety and health standards that are “reasonably necessary or appropriate to provide safe or healthful employment and places of employment.”<sup>16</sup> Furthermore, the OSH Act permits the Secretary to modify standards that prescribe the use of labels and forms of warning for hazards as new information and technology are developed.<sup>17</sup>

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<sup>11</sup> The panel is comprised of a representative of the covered agency (EPA, OSHA or CFPB), a representative of the Small Business Administration’s Office of the Chief Counsel for Advocacy, and a representative from the Office of Management and Budget’s Office of Information and Regulatory Affairs. *Id.* at § 609(b)(3).

<sup>12</sup> *Id.* at § 609(b)-(d). The panel provides small entity representatives (SERs) with a draft of the proposed rule as well as any analysis of small entity impacts and regulatory alternatives, and collects advice and recommendations from the SERs. The panel then must report on the SERs’ comments and its findings. The report is made part of the rulemaking record. *Id.*

<sup>13</sup> *Id.* at § 612(a).

<sup>14</sup> REPORT ON THE REGULATORY FLEXIBILITY ACT, FY 2014: ANNUAL REPORT OF THE CHIEF COUNSEL FOR ADVOCACY ON IMPLEMENTATION OF THE REGULATORY FLEXIBILITY ACT AND EXECUTIVE ORDER 13272, at 25 (2015), available at <https://www.sba.gov/sites/default/files/advocacy/FY2014%20RFA%20Report.pdf>.

<sup>15</sup> Pub. L. No. 91-596, § 1, 84 Stat. 1590, 1590 (1970).

<sup>16</sup> 29 U.S.C. §§ 651(b)(3), 652(8).

<sup>17</sup> *Id.* at § 655(b)(7).

On March 26, 2012, the Occupational Safety and Health Administration (OSHA) of the Department of Labor published a final rule to update to its Hazard Communication Standard (HCS).<sup>18</sup> The HCS requires chemical manufacturers and importers to evaluate the chemicals they produce or import and provide hazard information to downstream employers and employees by preparing safety data sheets and putting labels on containers.<sup>19</sup> The HCS's major changes to the existing standard include: changes to the hazard classification requirements;<sup>20</sup> changes to the label requirements;<sup>21</sup> changes to the format of the safety data sheets;<sup>22</sup> and a requirement that workers be trained on the new safety data sheet format and label elements.<sup>23</sup> The compliance deadline for training employees was December 1, 2013. By June 1, 2015, all chemical manufacturers, importers, distributors, and employers must comply with all provisions for preparing the safety data sheets and labels. However, distributors may ship products with labels that meet the old standard until December 1, 2015. By June 1, 2016, all employers must update their hazard communication program or any other workplace signs.<sup>24</sup>

The rule affects five million workplaces,<sup>25</sup> and the most significantly affected companies are 72,040 small firms that produce chemicals.<sup>26</sup> OSHA estimated that the rule's compliance costs would be \$2.1 billion over the four-year transition period,<sup>27</sup> and of that, affected small businesses would incur \$1.3 billion (or \$333 million each year for four years) in compliance costs.<sup>28</sup> The major cost elements identified were: classifying chemical hazards according to the revised criteria; revising safety data sheets and labels to meet the new content and format requirements; training employees on the new safety data sheets and warning symbols; management familiarization and management-related costs of the new standard; and costs to purchase upgraded label printing equipment and supplies.<sup>29</sup>

Although OSHA determined and certified that the HCS would not have a significant economic impact on a substantial number of small businesses, it prepared a "voluntary" FRFA that was

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<sup>18</sup> OSHA, Hazard Communication, Final Rule, 77 Fed. Reg. 17,574 (Mar. 26, 2012). The purpose of the rule was to conform the United States' standard to the United Nations' Globally Harmonized System of Classification and Labeling of Chemicals (GHS). *Id.* at 17,577-79.

<sup>19</sup> *Id.* at 17,574.

<sup>20</sup> The new standard uses harmonized physical and health hazard criteria for classifying chemicals and requires safety data sheets and labels to have specific hazard communication elements. <https://www.osha.gov/dsg/hazcom/HCSFactsheet.html>. In the past, manufacturers and importers had the discretion to present hazard information in the format they preferred. *Id.*

<sup>21</sup> Labels must have the following standardized elements: a signal word; pictogram(s); hazard statement(s); and precautionary statement(s) for each hazard class and category. *Id.* at 17,586. All labels, domestic and international, must also have red frames. *Id.* at 17,581.

<sup>22</sup> The safety data sheet has a new format that includes 16 specific sections. <https://www.osha.gov/dsg/hazcom/HCSFactsheet.html>. Previously, the HCS detailed which information had to be included in a safety data sheet but did not specify the format or the order in which the information needed to be presented. 77 Fed. Reg. at 17,728.

<sup>23</sup> *Id.* at 17,581.

<sup>24</sup> *Id.* at 17,582. The majority of OSHA's standards for specific substances require hazard warning signs in regulated areas but the warning language required differs. *Id.* at 17,684. While the new standard keeps the requirement of specific warning language for specific signs, it modified the language to be consistent throughout OSHA's standards and compatible with GHS. *Id.*

<sup>25</sup> *Id.* at 17,605.

<sup>26</sup> *Id.* at 17,678.

<sup>27</sup> *Id.* at 17,643.

<sup>28</sup> *Id.* at 17,668.

<sup>29</sup> *Id.* at 17,575.

published with the final rule.<sup>30</sup> In the FRFA, OSHA summarized numerous comments it received that raised concerns including: the failure to conduct a SBAR panel to get input from small businesses; the underestimation of costs for small businesses; and the need for a longer compliance schedule.<sup>31</sup>

Downstream manufacturers that make mixtures from raw materials must rely on upstream suppliers to provide the information needed to update the labels and safety data sheets. OSHA did not provide a staggered compliance schedule for upstream raw material suppliers and downstream manufacturers. The failure to provide a staggered compliance schedule has proved problematic, as a number of downstream manufacturers have not yet received the information needed to comply with the June 1, 2015 deadline.

This problem has forced OSHA to issue a February 9, 2015 guidance memo which states that the agency will exercise enforcement discretion for downstream manufacturers and importers that have used reasonable diligence and good faith to comply with the terms of the standard.<sup>32</sup> Had OSHA conducted a SBAR panel and carefully considered the impact of the rule on small manufacturers and alternatives, it may have crafted a rule with a staggered compliance schedule and avoided this compliance conundrum.

### ***B. Occupational Exposure to Respirable Crystalline Silica***

On September 12, 2013, OSHA issued a proposed rule to amend its standards for occupational exposure to respirable crystalline silica to substantially reduce adverse health risks associated with workers inhaling very fine particles of crystalline silica.<sup>33</sup> Materials that contain crystalline silica are used in a variety of industries including: construction; dental laboratories; foundries; brick, ceramic, glass, and paint manufacturing; and boat building and repair.<sup>34</sup>

The proposed rule includes two standards. One standard is for the construction industry. The other standard is for general industry and maritime.<sup>35</sup> OSHA has proposed a new permissible exposure limit (PEL) for respirable crystalline silica, which is a regulatory limit on the amount of a substance in the air.<sup>36</sup> OSHA has also proposed an “action level,” which is half of the PEL.<sup>37</sup>

Any business whose workers are, or may reasonably be expected to be, exposed to respirable crystalline silica at the action level, must perform an initial exposure assessment.<sup>38</sup> If initial monitoring indicates workers are exposed between the action level and the PEL, businesses must periodically monitor and measure worker exposure to respirable crystalline silica.<sup>39</sup> Businesses also

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<sup>30</sup> *Id.* at 17,575, 17,660.

<sup>31</sup> *Id.* at 17,677-78.

<sup>32</sup> [https://www.osha.gov/dep/enforcement/hazcom\\_enforcement-memo.html](https://www.osha.gov/dep/enforcement/hazcom_enforcement-memo.html).

<sup>33</sup> OSHA, Occupational Exposure to Respirable Crystalline Silica, Proposed Rule, 78 Fed. Reg. 56,274 (Sept. 12, 2013). Quartz, the most common form of crystalline silica, is found in sand, stone, rock, concrete, brick and mortar. <https://www.osha.gov/dsg/topics/silicacrystalline/>.

<sup>34</sup> 78 Fed. Reg. at 56,411-14.

<sup>35</sup> *Id.* at 56,274. The agricultural industry is not covered. *Id.* at 56,442.

<sup>36</sup> *Id.* at 56,276.

<sup>37</sup> *Id.* at 56,281. The action level is an airborne concentration of respirable crystalline silica that triggers certain regulatory requirements. *Id.*

<sup>38</sup> *Id.* at 56,447. Certain construction practices are not subject to these requirements. *Id.* at 56,496.

<sup>39</sup> *Id.*

must provide information and training to their workers and maintain exposure assessment records. If workers are exposed above the PEL, businesses also must: limit worker access to high exposure areas; implement engineering and work practice controls; give respiratory protection to workers; provide medical exams for highly exposed workers; comply with hazard communication requirements; and maintain records on air monitoring data, objective data, and medical surveillance.<sup>40</sup> OSHA estimates the rule will cost \$637 million annually<sup>41</sup> and 470,000 small businesses will be affected.<sup>42</sup>

OSHA determined that the proposed rule will have a “significant economic impact on a substantial number of small entities” under the RFA and held a SBAR panel in 2003 to receive input directly from affected small businesses before proposing the rule and publishing an IRFA.<sup>43</sup> The IRFA, which assesses small business impacts, was published with the proposed rule. However, the use of ten-year-old data and input from small businesses raises serious questions about the adequacy of the rulemaking process, which the Committee addressed in a letter to OSHA in 2013.<sup>44</sup> Furthermore, comments submitted by the Chief Counsel for Advocacy raised concerns about the risk assessment, technological feasibility, significant alternatives considered for small businesses, and small business participation in the rulemaking process, including the failure to conduct a new SBAR panel.<sup>45</sup> OSHA is still analyzing the comments it received on the rule, and it is unclear whether the silica rule will be finalized this year.

### *C. Energy Conservation Standards for Commercial Refrigeration Equipment*

The Energy Policy and Conservation Act of 1975 (EPCA), as amended,<sup>46</sup> authorizes the Department of Energy (DOE) to prescribe energy conservation standards for certain products.<sup>47</sup> New or amended conservation standards must “be designed to achieve the maximum improvement in energy efficiency . . . which the [DOE] determines is technologically feasible and economically justified.”<sup>48</sup> Furthermore, DOE may not prescribe an amended or new standard if it does not result in significant conservation of energy.<sup>49</sup>

On March 28, 2014, the DOE published a final rule setting new energy conservation standards for commercial refrigeration equipment.<sup>50</sup> The amended standards consist of maximum daily energy

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<sup>40</sup> *Id.* at 56,447-75.

<sup>41</sup> *Id.* at 56,338.

<sup>42</sup> *Id.* at 56,411.

<sup>43</sup> *Id.* at 56,276.

<sup>44</sup> Letter from the Hon. Jim Risch, Chairman, Committee on Small Business and Entrepreneurship, United States Senate, and the Hon. Sam Graves, Chairman, Committee on Small Business, United States House of Representatives, to the Hon. David Michaels, Ph.D., Assistant Secretary of Labor for Occupational Safety and Health (Dec. 19, 2013) (on file with the Committee).

<sup>45</sup> Letter from the Hon. Winslow Sargeant, Ph.D., Chief Counsel for Advocacy, SBA, to the Hon. David Michaels, Ph.D., Assistant Secretary of Labor for Occupational Safety and Health (Feb. 11, 2014), *available at* <https://www.sba.gov/content/2112014-comments-ohsa%E2%80%99s-proposed-occupational-exposure-respirable-crystalline-silica-rule>.

<sup>46</sup> 42 U.S.C. §§ 6201-6422.

<sup>47</sup> *Id.* at § 6295.

<sup>48</sup> *Id.* at § 6295(o)(2)(A).

<sup>49</sup> *Id.* at §§ 6295(o)(3)(B), 6316(e)(1).

<sup>50</sup> DOE, Energy Conservation Program: Energy Conservation Standards for Commercial Refrigeration Equipment, Final Rule, 79 Fed. Reg. 17,726 (Mar. 28, 2014). For commercial refrigeration equipment, EPCA both prescribes

consumption values for 49 classes of commercial refrigeration equipment.<sup>51</sup> The equipment covered by the standard have various physical and design characteristics (e.g. operating temperatures, door types, orientation, and type of condensing unit);<sup>52</sup> the equipment is used by supermarkets, convenience and small specialty stores, restaurants, and other foodservice businesses to keep food and other perishable items such as flowers cold or frozen. Any equipment manufactured in, or imported into, the United States must meet the new standards by March 27, 2017.<sup>53</sup>

Because DOE determined that the rule would have a significant economic impact on a substantial number of entities, it published a FRFA with the final rule that describes the impact the rule will have on small manufacturers, which comprise 70 percent of domestic commercial refrigeration equipment companies.<sup>54</sup> The DOE concluded that the average small manufacturer would incur product conversion costs that are approximately double the typical annual R&D spending and capital conversion costs that are nearly five times typical annual capital expenditures.<sup>55</sup> Furthermore, the agency noted that small manufacturers would have a more difficult time meeting the amended energy conservation standards in comparison to large manufacturers in terms of redesigning products, the pricing of key components, re-tooling production lines, and access to capital.<sup>56</sup>

The DOE noted that it had considered some alternatives to the rule generally that may have mitigated some of the economic impacts on small manufacturers. However, it rejected all alternatives. Moreover, the alternatives considered were not crafted as significant alternatives aimed at minimizing the significant economic impact on small manufacturers as required by the RFA.<sup>57</sup> Due to concerns about the economic and technical feasibility of the rule and its cost impacts on both manufacturers and customers, the industry has a filed a lawsuit challenging the final rule.<sup>58</sup>

#### IV. Conclusion

While these regulations may be required by statute and well-intended, agencies are not adequately assessing the effects on small manufacturers nor considering significant alternatives that would still permit them to achieve their public policy objectives. As a result, small manufacturers encounter serious challenges complying with rules and rules may be subject to litigation. Improving the rulemaking process to ensure that regulations are well-designed and not unnecessarily burdensome would create an environment in which small manufacturer's are able to comply with regulations and remain competitive in the global marketplace.

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energy conservation standards and requires DOE to conduct rulemakings to amend the standards if it determines they should be amended. 42 U.S.C. § 6313(c)(2)-(6).

<sup>51</sup> 79 Fed. Reg. at 17,727-28.

<sup>52</sup> *Id.* at 17,743.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 17,813.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 17,814.

<sup>57</sup> *Id.*

<sup>58</sup> Air-Conditioning, Heating, and Refrigeration Institute (AHRI), AHRI Files Petition for Court Review of Department of Energy Commercial Refrigeration Energy Efficiency Rule (2014), available at [http://ahrinet.org/site/A\\_981/295/Modules/AHRI/Articles](http://ahrinet.org/site/A_981/295/Modules/AHRI/Articles).