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Reducing Federal Agency Overreach:
Modernizing the Regulatory Flexibility Act

Testimony of Craig Fabian
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Before the United States House of Representatives
Committee on Small Business

March 30, 2011

Chairman Graves, Ranking Member Velázquez, and members of the Committee, thank you for the invitation to testify this afternoon.

My name is Craig Fabian and I am the vice president of regulatory affairs and assistant general counsel to the Aeronautical Repair Station Association (ARSA). ARSA is the premier association for the international maintenance industry; it also represents certificated aviation design, production, and maintenance facilities before Congress, the Federal Aviation Administration (FAA), and other national aviation authorities.

The efforts of ARSA's certificated repair station members facilitate the safe operation of aircraft worldwide by providing expert maintenance services for general and commercial aircraft. Overall, these types of services generate over $39.1 billion of economic activity in the United States and, according to a recent study, employ more than 274,000 workers in all 50 states.[1] On a global scale, North America is a major net exporter of aviation maintenance services, enjoying a $2.4 billion positive balance of trade.

Although ARSA members represent a wide cross-section of the aviation industry, the vast majority of these companies are small businesses. In fact, recent surveys confirmed that nearly three quarters of our members employ fewer than 50 people and nearly half of the businesses are owned by a single individual or family. In light of that data, and due to the heavily regulated nature of the aviation industry, agency rulemaking activities have a significant impact on a substantial number of ARSA members. As a result, the protections afforded by the Regulatory Flexibility Act (RFA) are particularly meaningful to our members.

Today, I will discuss ARSA's experience challenging an agency rule under the RFA. I will also propose ways that Congress can improve the RFA and avoid creating barriers to a full and proper RFA analysis.

[1] For details, see the "Aviation Maintenance Industry Employment and Economic Impact" table, found on ARSA's Web-site at the following link: http://www.arsa.org/files/ARSA-StatebyStateOnePager-20100505.pdf. That information is also attached to this written testimony.

Rulemaking that failed to fulfill RFA requirements

When an agency engages in rulemaking, the RFA requires it to prepare an initial regulatory flexibility analysis describing the impact of the proposed rule on small businesses; the agency must make this analysis available for public comment. When the final rule is issued, the agency is required to prepare a final analysis describing the steps the agency took to minimize economic impact on small businesses, including reasons for selecting or rejecting alternatives to the final rule. Unfortunately, as ARSA has learned first-hand, agencies have at times ignored these RFA requirements.

ARSA's experience contesting a rule under the RFA began with a decision by the Federal Aviation Administration (FAA) to expand the scope of its drug and alcohol (D&A) testing requirements. The FAA's desired result was to mandate testing for not only air carriers and repair stations working on air carrier aircraft – as required by the D&A rules at that time – but also for the employees of maintenance contractors at any tier in the process. Once revised, the D&A rules would suddenly impact metal finishers, machine shops, electronic repair shops, and a host of other traditional small companies that repair stations rely on for ancillary services.

To effect this change to the D&A rules, the FAA published a notice of proposed rulemaking (NPRM) which contained a tentative RFA analysis on February 28, 2002. That NPRM was followed by a supplemental notice of proposed rulemaking (SNPRM) on January 12, 2004 which reasoned that most if not all repair stations and their contractors fit the definition of "small entity". The FAA received detailed comments from ARSA and other organizations throughout the rulemaking process raising significant concerns about the initial RFA analysis.

However, the agency decided in its final rule, issued on January 10, 2006, that no RFA analysis was required because repair stations and their contractors were not entities directly covered under the regulation. In reaching its conclusion that the rule was only aimed at air carriers - who by and large were not small entities - the agency believed it was relieved of its RFA obligations.

ARSA challenged the rule in court

The far reaching impact of the expanded D&A rule (ARSA had concluded that as many as 22,000 contractors were affected), and the fact that aviation work represented a small portion of the overall business for many of those firms, was of great concern to the industry. The choice faced by many small businesses was to either implement a U.S. Department of Transportation-approved drug and alcohol testing program for their employees or stop serving the aviation industry altogether. Although it was theoretically possible for contractors to be absorbed into an air carrier or repair station testing

program, that option was impracticable for many reasons, including the fact that the small businesses performed work for a multitude of repair stations and may not have even been aware of the ultimate users.[2]

Due to these concerns, ARSA filed a lawsuit in the U.S. Court of Appeals for the District of Columbia Circuit on March 10, 2006, challenging the new D&A rules on several grounds, including the FAA's violation of the RFA. In a 2-1 decision issued in July 2007, the court agreed with ARSA and found that the FAA violated the RFA by not properly considering the impact of its drug and alcohol testing rules on small businesses. The court stated that despite the FAA's assertions to the contrary, repair stations and their contractors were directly affected by the expanded rule. It reasoned that although the regulations are immediately directed at air carriers, the employees of their maintenance contractors and subcontractors at any tier are required to be tested. Thus, the rule imposed responsibilities directly on the small businesses to which the expanded rule applies. As a result, the FAA was instructed to perform an analysis to comply with the RFA.

Despite the mandate from the court, for over three years the FAA made no effort to perform the required analysis. This blatant disregard of the court's order once again forced the association to take action. On Feb. 17, 2011, ARSA filed a petition for *writ of mandamus* with the U.S. Court of Appeals for the District of Columbia Circuit to compel the FAA's compliance. In response, on March 1, 2011, the FAA was ordered by the court to show cause and explain why ARSA's petition should not be granted. The court's order noted that if the writ were issued, only a final regulatory flexibility analysis would be required within 90 days and the D&A rules applicability to contractor employees at any tier would be stayed pending completion of the analysis.

ARSA is currently in the process of reviewing what the FAA has characterized as a "supplemental regulatory flexibility determination" which was published in the Federal Register on March 8, 2011. That supplement purports to "preliminarily certify" that the D&A rule will not have a significant impact, and therefore a full and complete RFA analysis is not required.

[2] For instance, a certificated repair station may perform engine maintenance for several air carriers; in turn, when disassembling the engines received from those carriers, the gearbox assemblies may be shipped to another certificated repair station. The contracting chain may continue as a variety of assemblies are broken down into subassemblies and piece parts, which are sent to repair stations specialized in repairing the various items. Along the way, a small part may require metal plating and a shop dedicated to performing that specialized service may be used. The metal plating shop is most likely a small business and not a certificated repair station; the majority of its customers are probably not involved in aviation. Although a certificated repair station receiving the newly plated part will inspect, certify and install it into an aircraft component, which will then be received by another certificated repair station for inspection and installation on the engine, the small plating shop may be unaware of that contracting chain.

Improving the RFA

The foregoing example provides a sense of the challenges facing small business advocates who are seeking to improve the quality and effectiveness of federal regulations. We believe the time has come to improve the RFA.

ARSA's experience in dealing with federal agencies reveals that the RFA is treated as an annoying burden to the rulemaking process. The agency's objective seems to be finding a way to avoid engaging in the daunting task of compiling the economic data and considering alternatives to a proposed rule. Indeed, even when specifically commanded by a court of law to carry out an analysis, federal agencies are prone to engage in foot dragging in the apparent hope that the requirement will just go away. The following are a few suggestions on how to improve the RFA so agencies will be more compelled to comply.

- **Create consequences for failure to comply with the RFA.** Small businesses and the nonprofit associations that represent them have the greatest stake in seeing agencies comply with the RFA. However, unlike the government and large corporations, these groups often lack the resources to challenge agency action in court. Congress should therefore allow small businesses and nonprofit associations that *successfully* mount RFA challenges to recover court costs and legal fees. With this potential burden hanging over an agency (and its budgets), it is certain to be more mindful of the RFA obligations.

- **Ensure agencies account for indirect impacts.** The RFA requires agencies to analyze the direct impact a rule will have on small businesses. However, by merely evaluating the direct impact of a rule, agencies fail to account for the true repercussions of the regulation. Agencies should be required to assess direct and indirect costs for small companies in order to accurately measure the impact of a rule.

- **Prevent agency backpedaling on small business impact statement.** The RFA could be amended to prevent agencies from reversing determinations made during its threshold analysis as to what entities are affected by a proposed rule. During ARSA's battle with the FAA, the agency initially indicated that repair stations and their contractors at all tiers were affected by the rule and most were small businesses. Once the FAA realized the multitude of entities it had to account for in a full RFA analysis, it quickly reversed course in its final rule and stated that repair stations and their contractors were not even regulated. This sort of mid-stream reversal should not be an option. It gives the agency ample opportunity to devise a

plan to get out from under the RFA if it determines proper compliance is too daunting.

- **Better statement of congressional intent.** Congress could ensure that any legislation it passes contains language, either in the bill itself or in legislative history, that it does not intend the law to have adverse effects on small businesses. This would show Congress' clear and unambiguous intent to protect small companies from unintended costs associated with regulatory compliance.

- **Further empower SBA OA.** Throughout ARSA's struggle with the FAA's expanded drug and alcohol testing rule, the Small Business Administration's Office of Advocacy (SBA OA) always acted as a neutral party in its analysis of the rule. In the end it determined that the FAA was clearly attempting to abrogate its duties and called on the agency to conduct a full, proper RFA analysis. The SBA OA provided the agency with comments on the class of small businesses that would be affected and demonstrated how the prior RFA analysis the FAA provided was flawed. The agency still chose to ignore the SBA OA and performed absolutely no RFA analysis. This situation could be avoided if Congress empowered the SBA OA to make small business determinations for agencies. An agency would be forced to conduct an analysis when the SBA said one was warranted, it would be forced to consider the class (or classes) of affected small businesses the SBA determines is appropriate, and would have to clear the initial and final regulatory flexibility analysis with the SBA.

Congressional complicity in bypassing the RFA

In addition to the aforementioned adjustments to the RFA, Congress must refrain from setting strict timelines that agencies must meet to complete the rulemaking process. It is critical that small businesses, like ARSA members, have ample opportunity to respond to proposed rulemakings to help agencies understand the real impact of new regulations. Consequently, agencies must be permitted sufficient time to consider the impact these rules will have on regulated parties or the RFA will be undermined.

RFA analysis and compliance is a process that must be done right rather than fast. It takes time for small businesses to digest proposed regulations and efficiently determine the extent of potential impact. Therefore agencies must be allowed time to review, consider, and dispose of those small business comments while altering regulatory proposals accordingly. Unfortunately, Congress does not always make this possible.

Conclusion

Small businesses are a critical part of the aviation industry and the U.S. economy. When it enacted the RFA, Congress created an important mechanism to protect small businesses from unnecessarily restrictive and intrusive federal regulations. However, the small businesses in your districts will only benefit from the protections of the RFA if federal agencies obey the law. As I have described today, agencies have been reluctant to do so, even when specifically ordered by a federal court. That situation is not improved when congressional mandates force agencies to take shortcuts and circumvent rulemaking procedures.

As a small organization, ARSA knows that scoring a win for small business costs big money. Congress needs to step up to the plate, and not only add teeth to the RFA, but make a conscious effort to ensure that agencies are given the time and resources to conduct the proper analysis.

Thank you for your time, for holding this hearing, and for inviting ARSA to be a part of it. I would be happy to answer any questions.

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Aviation Maintenance Industry Employment and Economic Impact

State	Aviation Maintenance Industry Employment			Aviation Maintenance Industry Economic Activity ($M USD)	
	Maintenance, Repair and Overhaul (MRO)		Total Employment (MRO plus Parts Manufacturing/ Distribution)	MRO	Total Economic Activity (MRO plus Parts Manufacturing/ Distribution)
	FAA-Certificated Repair Station	Air Carrier (Base and Line Maintenance)			
AK	518	912	**1,435**	$147.9	**$149.6**
AL	5,836	112	**6,046**	$615.2	**$656.5**
AR	3,254	22	**3,351**	$338.8	**$363.8**
AZ	5,849	2,227	**13,445**	$835.3	**$2,700.0**
CA	30,670	2,709	**37,566**	$3,452.5	**$5,004.6**
CO	1,340	614	**2,008**	$202.1	**$220.1**
CT	7,503	89	**12,109**	$785.3	**$2,290.9**
DE	1,122	0	**1,170**	$116.1	**$132.1**
FL	16,658	1,659	**20,191**	$1,894.6	**$2,683.9**
GA	11,173	1,414	**13,741**	$1,301.9	**$1,704.9**
HI	140	718	**863**	$88.7	**$90.4**
IA	3,003	68	**5,156**	$317.6	**$1,019.3**
ID	471	103	**593**	$59.4	**$65.7**
IL	4,121	1,810	**6,833**	$613.5	**$937.5**
IN	3,127	180	**3,888**	$342.0	**$535.7**
KS	7,029	98	**9,792**	$737.2	**$1,647.2**
KY	709	904	**1,657**	$166.8	**$181.5**
LA	2,354	127	**2,589**	$256.6	**$292.6**
MA	1,740	746	**2,659**	$257.1	**$314.8**
MD	1,338	128	**1,622**	$151.6	**$203.6**
ME	884	25	**984**	$94.0	**$119.0**
MI	4,322	705	**5,676**	$520.0	**$749.6**
MN	2,235	561	**3,054**	$289.2	**$375.2**
MO	2,349	367	**2,852**	$280.9	**$326.3**
MS	838	45	**964**	$91.3	**$118.3**
MT	363	14	**393**	$39.0	**$44.3**
NC	3,601	1,131	**5,504**	$489.4	**$746.8**
ND	187	17	**261**	$21.1	**$40.1**
NE	1,205	69	**1,311**	$131.8	**$144.1**
NH	554	34	**690**	$60.8	**$94.8**
NJ	2,593	196	**3,522**	$288.5	**$564.3**
NM	604	67	**729**	$69.4	**$88.7**
NV	671	384	**1,122**	$109.1	**$131.5**
NY	6,112	2,260	**9,462**	$865.9	**$1,275.1**
OH	4,710	1,885	**8,382**	$682.1	**$1,277.8**
OK	13,090	99	**13,485**	$1,364.2	**$1,462.8**
OR	1,508	435	**1,978**	$201.0	**$212.6**
PA	2,904	1,219	**4,661**	$426.5	**$605.8**
RI	294	0	**402**	$30.4	**$66.4**
SC	2,358	185	**2,661**	$263.0	**$302.4**
SD	66	24	**188**	$9.3	**$42.0**
TN	2,049	2,520	**5,109**	$472.6	**$734.1**
TX	25,057	4,523	**32,673**	$3,059.5	**$4,430.0**
UT	338	722	**1,301**	$109.6	**$215.0**
VA	1,287	108	**2,635**	$144.3	**$588.5**
VT	169	22	**363**	$19.8	**$77.1**
WA	8,353	841	**13,898**	$951.0	**$2,585.6**
WI	1,728	212	**2,085**	$200.7	**$249.0**
WV	1,448	0	**1,470**	$149.8	**$157.1**
WY	81	14	**105**	$9.8	**$13.2**
Total	**199,913**	**33,324**	**274,634**	**$24,124**	**$39,032**

Last update: April 2010. Developed by AeroStrategy for ARSA based on analysis of 2009 federal government and industry data.
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