Statement of the U.S. Chamber of Commerce

ON: Regulating the Regulators- Reducing Burdens on Small Business

TO: House Committee on Small Business, Subcommittee on Investigations, Oversight and Regulations

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The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations.

More than 96% of Chamber member companies have fewer than 100 employees, and many of the nation's largest companies are also active members. We are therefore cognizant not only of the challenges facing smaller businesses, but also those facing the business community at large.

Besides representing a cross-section of the American business community with respect to the number of employees, major classifications of American business—e.g., manufacturing, retailing, services, construction, wholesalers, and finance—are represented. The Chamber has membership in all 50 states.

The Chamber's international reach is substantial as well. We believe that global interdependence provides opportunities, not threats. In addition to the American Chambers of Commerce abroad, an increasing number of our members engage in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on issues are developed by Chamber members serving on committees, subcommittees, councils, and task forces. Nearly 1,900 businesspeople participate in this process.

Mr. Chairman, Madam Ranking Member, thank you for inviting to testify this morning on the value of the Regulatory Flexibility Act in the regulatory process. I am Marc Freedman, and I serve as the Executive Director for Labor Law Policy at the U.S. Chamber. In that role I work on several important workplace and employment regulatory areas, most notably OSHA, the FMLA, and the FLSA. Before coming to the Chamber more than eight years ago, I was the Regulatory Counsel for the Senate Small Business Committee with the primary responsibility of overseeing agency compliance with the Regulatory Flexibility Act as modified by the Small Business Regulatory Enforcement Fairness Act (SBREFA).

This morning I would like to focus my remarks on examples where OSHA and other Department of Labor agencies under the current administration did not take advantage of the RFA and SBREFA in their rulemakings. Note that I said "did not take advantage." The Reg Flex Act and SBREFA can be potent tools for agencies to help them develop better, more tailored regulations. Instead of seeing these laws as opportunities to get insightful input, too often agencies see these laws as obstacles in the rulemaking process to be overcome.

The Regulatory Flexibility Act and SBREFA Enhance Rulemakings

The RFA and SBREFA are common sense additions to the rulemaking process which, at their core, just ask agencies to respect the small businesses that will be subject to their regulations. The RFA requires that agencies conduct analyses on the impact regulations will have on small entities, or in the case of OSHA, EPA, and now the CFPB, small business review panels, unless the agency can "certify" that the regulation will not have a "significant economic impact on a substantial number of small entities." Compliance with the Regulatory Flexibility Act enhances the rulemaking process—assuming that the goal is to produce regulations that will have the maximum beneficial impact with a minimal burdensome impact.

As I have reviewed agency rulemakings over the years, I have seen many agencies go to some lengths to avoid conducting these analyses. The dispute often arises in the context of the "factual basis" agencies are required to provide to support their certification. In some rulemakings I have reviewed, this factual basis is either absent, or the agency uses a declarative tautological statement that the proposed regulation will not have a significant economic impact on a substantial number of small entities to support the certification that the regulation will not have a significant economic impact on a substantial number of small entities. Often agencies seriously underestimate the cost impacts of a regulation. In some cases this can also mean ignoring industries affected. I should point out that these problems of agency adherence to the requirements of the RFA are not unique to any specific administration or party—they span several administrations of both political parties.

The key is that the RFA and SBREFA create channels for input from small entities that will be affected by the proposed regulations. When agencies seek this input, and respect those small entities that will be subject to the regulation, all parties come out ahead. Beyond the requirements for small business review panels that apply to OSHA, EPA, and the CFPB, the RFA's affirmative outreach requirement applies to all other agencies subject to the

Administrative Procedure Act's requirement for notice and comment rulemaking. Section 609 (a) directs agencies to "assure that small entities have been given an opportunity to participate in the rulemaking…through the reasonable use of techniques such as—(3) the direct notification of interested small entities." As the Regulatory Flexibility Act and even SBREFA were enacted before the advent of the internet, this requirement is considerably easier now than when these laws were passed, and accordingly there is even less reason why agencies should avoid doing this. Too many times agencies think that publishing a proposed regulation in the Federal Register constitutes some form of affirmative outreach.

In addition to requiring certain steps if an agency cannot certify a regulation, the RFA always allows an agency to voluntarily engage in the outreach and analysis steps specified by the RFA and SBREFA even if an agency is able to certify that the trigger threshold has not been met.

There is one more important point I would like to make about the impact of the RFA: it does not force an agency to change their rulemaking, nor does it authorize the SBA Office of Advocacy to change or block an agency's rulemaking, even if that agency is ignoring Advocacy's advice. The RFA merely sets out a process but it does not specify the outcome.

Examples of OSHA Rulemakings Where A SBREFA Panel Would Have Made A Difference

Unfortunately, OSHA under this administration has displayed a certain resistance to taking advantage of the SBREFA process. In various examples, OSHA could have clearly benefited if they had been willing to use the small business panel review process that the act lays out. And in each of these cases, there would have been no delay in moving the rulemakings forward.

Early in this administration, OSHA initiated several rulemakings without availing themselves of the benefits from the small business panel reviews. In each case they certified that these rulemakings did not trigger SBREFA but in each case the agency would have benefited from using the small business panel review even if the certification was valid.

One of the first rulemakings from this OSHA was one to "clarify" when small businesses who voluntarily enter into the on-site consultation program—that is they ask for help from OSHA in identifying hazards in their workplace—would be subject to enforcement. Traditionally, there is a fire wall between the consultation and enforcement programs. This cooperative agreements rulemaking sought to reinforce that OSHA was going to look for opportunities to pursue enforcement even for those employers who are truly doing the right thing.

OSHA certified that this proposed regulation would not trigger SBREFA, but as it explicitly and exclusively deals with small businesses, OSHA would have benefited from hearing directly from small businesses about their views on this rulemaking. Indeed, not conducting a small business review panel for this rulemaking reveals the lack of concern this OSHA has for the impact of their actions on small businesses. Had they done so, they would

have heard that small businesses would be less comfortable entering into the consultation program if this rulemaking is completed. Getting that message with that clarity at that time, might have steered OSHA from proposing this regulation. The Chamber filed comments making this point, as did the SBA Office of Advocacy.

Reducing participation in this program may be one of OSHA's goals as Secretary Solis and then Acting Assistant Secretary Jordan Barab made explicitly clear in speeches during that period that they wanted to emphasize enforcement and deemphasize cooperative agreements and other approaches that did not rely on enforcement.

The only regulatory agenda for 2012, issued in late December, indicates that this rulemaking is scheduled to be finalized in April.

Another rulemaking where OSHA suffered for not conducting a small business panel review is the high profile rulemaking to add a column to the OSHA 300 recordkeeping log to track musculoskeletal disorders (MSDs)—the injuries associated with ergonomics. OSHA certified this regulation as not having a significant economic impact on a substantial number of small entities, based on their claim that compliance with this would only take five minutes. OSHA severely underestimated the impact of this rulemaking by ignoring the fact that small businesses would now be held accountable for determining whether an MSD is work related—a potentially complicated and uncertain analysis. The Chamber urged OSHA to conduct the small business review panel, but OSHA declined to do so.

In July 2010, OSHA submitted a final regulatory package to OIRA for review but in January 2011, OSHA was forced to withdraw the regulation from OIRA and instructed to get more input from small businesses. This resulted in the agency conducting three teleconferences with small businesses to hear directly from them about their concerns with this rulemaking—exactly what would have happened if the agency had conducted the small business panel review at the early stages of the rulemaking. If OSHA had taken advantage of the SBREFA procedures, this regulation might very well be in place by now. Instead, it is languishing on the long term action list and is blocked from moving forward because of an appropriations rider.

The last OSHA rulemaking I want to bring up is the Globally Harmonized System for Classification and Labeling—GHS for short. This is a sweeping regulation that modifies how producers of hazardous chemicals and downstream users of those products must label them for hazards and train employees on those hazards. The rulemaking was actually started in the Bush administration. Again, OSHA declined to conduct a SBREFA panel claiming that any costs related specifically to complying with the new regulation would be onetime adjustments from compliance with the precursor Hazard Communication Standard and therefore, the impact was minimal and did not warrant the small business panel review. OSHA did claim to voluntarily comply with the other requirements of SBREFA by responding to the issues covered under an Initial Regulatory Flexibility Analysis or IRFA, but they stopped short of conducting the small business review panel.

In fact, OSHA claimed this regulation would result in substantial net savings to employers because it would eliminate the need to produce two sets of labels and safety data

sheets when selling products into international markets. OSHA claims that this regulation will save just over $550 million net of costs annually. [1] Even if this calculation is accurate, and we think there are several reasons why it is not, this amount when spread over OSHA's estimate of the number of affected establishments of 5.4 million produces an annual net benefit of about $100.

The sad point is that this was a regulation that everyone agreed should happen. The Bush administration initiated it, Republicans in Congress had called for it, and this was supposed to be the low hanging fruit. Unfortunately, when this administration decided to take on this rulemaking, they loaded up the regulation with various provisions that do not make sense or were not even in the proposal:

- OSHA created a new hazard category for Hazards Not Otherwise Classified—a catch all that means employers will never know if they have labeled and trained for all the hazards that OSHA expects.
- OSHA inserted coverage for combustible dust into the final regulatory text without putting it in the proposed text despite the fact that OSHA does not have a regulatory definition for this hazard and is actually conducting a separate rulemaking to develop a standard on combustible dust.
- OSHA specified that the deadline for employers to have their training program in place would be a year before the deadline for producers to update their labels and safety data sheets—the very material that will be the focus of the training programs.

These and other problems would have been made known to OSHA during a small business panel review if OSHA had not certified this regulation as not triggering SBREFA, or had decided to voluntarily conduct the panel. As several of these issues are now being litigated, learning about these problems before the regulation was proposed might have saved OSHA and the Department considerable resources and insured a smoother implementation.

The timing of the input that comes from a small business panel is an important feature of this process. Once a regulation is proposed, an agency is restricted in how much they can change it before it becomes final. Proposed regulations are not like proposed legislation which can be very fluid and go through several iterations and changes before being enacted. When an agency proposes a regulation, they are not saying "let's have a conversation about this issue," they are saying, "this is what we intend to put into effect unless there is some very good reason we have overlooked why we cannot." By giving an agency direct feedback about how a regulation will affect those covered by it, the agency can learn about problems before they get locked into the regulation.

Examples Where OSHA SBREFA Panels Are Helpful

As an example of the positive benefits from OSHA conducting a small business review panel, consider the rulemaking to revise the crystalline silica standard. In 2003, OSHA

[1] This rulemaking has also been cited by the Obama administration as part of the regulatory "look back" effort intended to review old regulations and modify or eliminate them. OSHA' claim that this regulation will save $2.5 billion over five years is a significant part of the overall savings claimed by this effort.

conducted a panel to take input on how this revision would affect small businesses. Silica is present in a very wide array of workplaces, in particular in construction which is dominated by small businesses. One point made by the small businesses in that review was that reducing the exposure limit would create tremendous burdens and is likely not even technologically feasible. Significantly, they told OSHA that the problem was not an exposure limit that was too high, but that the current exposure limit is too frequently ignored. Because of the review, interested parties were able to see what OSHA was considering and what is likely at OIRA under review as a proposed regulation which has triggered widespread alarm and concern. This administration claims to want to be the most transparent ever; conducting these panels is one of the best ways to achieve that goal.

Another example of where an OSHA SBREFA panel will be beneficial is the anticipated panel for OSHA's Injury and Illness Prevention Program, or I2P2, rulemaking. This will be OSHA's most sweeping rulemaking ever; it will require all employers to implement safety and health programs according to criteria OSHA will establish. To OSHA's credit, the agency has committed to conducting the SBREFA small business panel review. Several times last year OSHA indicated this process would be getting under way, but it has not yet. When it does, interested parties beyond just those participating in the panel review will be able to learn what OSHA has in mind and see their draft economic analysis. Former SBA Advocacy Chief Counsel Jere Glover has told me that this process of OSHA showing their cards is perhaps the most significant benefit of this process.

Examples Where OSHA Should Have Done Rulemakings Complete with SBREFA Panels

Not only has this OSHA given short shrift to the RFA/SBREFA process when it has conducted rulemakings, but there are also examples where the agency should have gone through rulemaking but did not. Had they done rulemakings in these examples, they would have been well served to conduct small business review panels.

In October 2010, OSHA proposed to change the interpretation for the term "feasible" as it applies under the Noise Reduction Standard. Before this proposal, employers had broad leeway to use personal protective equipment such as noise cancelling headphones or ear plugs, as long as they provided adequate protection. Under the interpretation, "feasibility" would be reinterpreted to mean anything that did not cause a business to go out of business. The result would be to force many employers to redesign their workplaces to install costly engineering controls or implement costly and inefficient administrative controls so that employees would only work short periods and be rotated in and out of the hazard.

As this was merely an interpretation, and not a rulemaking, it was not subject to the requirements of SBREFA. OSHA published the new interpretation for comment, but did not conduct any of the analyses associated with a rulemaking such as costs or impact on small businesses. Thankfully, in January 2011, OSHA was forced to withdraw this interpretation due to an uproar as more and more businesses learned about it and determined what the impact would be. An independent economic analysis, because OSHA had not done one, suggested the impact on the economy would be more than $1 billion.

The most recent example of a policy change where OSHA should have done a rulemaking but did not was the memo to regional administrators from Deputy Assistant Secretary Richard Fairfax on March 12, 2012. This memo laid out various scenarios that could constitute violations of the whistleblower protections. Included in these scenarios was the use of safety incentive program that focus on rates of injuries reported. This memo thus created a consequence to employers using these types of plans where neither the statute nor any regulation establish a prohibition on these plans or discuss when they are appropriate. Because this creates a new legal consequence for employers, this would have been better handled through a rulemaking where OSHA would reveal the data and evidence that supports this measure, rather than just stating blithely that "OSHA has observed that the potential for unlawful discrimination under all of these policies may increase when management or supervisory bonuses are linked to lower reported injury rates."

Examples of Other Agencies that Erroneously Avoided RFA Compliance

In addition to OSHA not taking advantage of the RFA/SBREFA procedures to enhance their rulemakings, other DOL agencies have similarly avoided the RFA. Most notable have been the Office of Labor Management Standards in its "Persuader" rulemaking and the Employment and Training Administration in its rulemaking changing how the H-2B visa program would work.

In the "Persuader" rulemaking, that would severely restrict the availability of the "advice" exemption for reporting under the Labor Management Reporting and Disclosure Act, OLMS certified that the proposed regulation would not have "a significant economic impact on a substantial number of small entities" based solely on the number of NLRB representation and decertification elections held. The proposed regulation would, however, greatly expand the requirement for employers and their consultants to file and thus the Department grossly under estimated the cost to employers. The Department estimated that the total cost before filing would be merely $825,866. The Chamber's more detailed economic analysis however showed that the proposed rule will impose a first year cost burden on the economy of between $910.1 million to $2.2 billion and subsequent annual costs of between $285.9 million to $793.1 million.

Similarly, the Employment and Training Administration dramatically under estimated the cost of the major changes they proposed to the H-2B visa program which is heavily used by small businesses. The Chamber's economic analysis shows that the Department's estimated first year cost of the proposed rule increases from the published amount of $2.1 million to a revised total of $53.1 million, and the subsequent years' annual costs increase from the published amount of $810,000 per year to a revised total cost of $50.81 million per year. The undiscounted total cost over ten years increases from the published total of $9.35 million to a revised ten-year total of $509.39 million. The ETA claimed that it did not have adequate data to provide a more accurate estimate of the costs. The only reason the ETA did not have this data is that it did not try to develop it. This was a case where the agency should have followed the instructions from Section 609 (a) to assure participation from small entities.

Conclusion

The Regulatory Flexibility Act and the Small Business Regulatory Enforcement Fairness Act exist to help agencies improve their rulemakings, not to impede them. If agencies welcomed the input of small businesses as a source of real world understanding these regulations would likely be more narrowly tailored without sacrificing the agency mission or regulatory objective. In the interest of transparency, OSHA should conduct more small business panel reviews and other agencies should look for more direct ways to develop the input of small businesses consistent with Section 609 (a).