Testimony of
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Before the
Subcommittee on Courts, Commercial and Administrative Law
Committee on the Judiciary
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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.

[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.