Testimony of
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Thank you for the opportunity to testify before you today. I am Robert Shull, Director of Regulatory Policy for OMB Watch. OMB Watch is a nonprofit, nonpartisan research and advocacy center promoting an open, accountable government responsive to the public's needs. Founded in 1983 to remove the veil of secrecy from the White House Office of Management and Budget, OMB Watch has since then expanded its focus beyond monitoring OMB itself. We currently address four issue areas: right to know and access to government information; advocacy rights of nonprofits; effective budget and tax policies; and the use of regulatory policy to protect the public.

We are very concerned about the bill being discussed here today, H.R. 682, 'The Regulatory Flexibility Improvements Act.' While H.R. 682 purports to address the burdens faced by small businesses, the bill will only serve to further drown regulatory agencies in needless analysis, preventing them from promulgating and enforcing the regulations created to protect working families. More effective avenues exist to help alleviate the burden on small businesses while ensuring that workplace, environmental, and civil rights protections stay intact.

I. The Regulatory Flexibility Improvements Act is overly broad and will result in wasted public resources and reduced public protections.

The Regulatory Flexibility Improvements Act amends the Regulatory Flexibility Act by requiring federal agencies to conduct comprehensive analyses of the impacts of federal rules on small businesses. The bill would effect substantial changes from current law, by

1. Expanding the RFA's coverage to include all regulations on the books, even long-proven safeguards such as the ban on lead in gasoline;
2. Inviting paralysis by analysis, by requiring agencies to examine both direct *and indirect* effects of the regulations;
3. Expanding the scope of the RFA to include agency guidance documents, human services rules and land management plans; and
4. Dramatically expanding the scope of rules subject to SBREFA panels.

This far-reaching proposal could have devastating effects, calling into question longstanding health, safety and environmental protections while needlessly burdening agencies and squandering agency resources. Specifically, the bill will do the following:

A. Wastes agency resources on highly speculative assessments.

The bill requires agencies to examine not only direct effects, which are currently assessed under the RFA, but also indirect effects. Agencies face substantial difficulties in attempting to calculate indirect effects. In fact, agency representatives at a recent Senate roundtable suggested this analysis would be so speculative as to be useless for policymakers. The courts have consistently held that RFA does not impose an obligation on agencies to analyze indirect economic effects on entities it does not regulate. Requiring consideration of indirect economic effects would drown agencies in burdensome and highly speculative analyses and paperwork that would impede their ability to promulgate needed protections, such as protections for workers against exposure to deadly chemicals, like crystalline silica.

B. **Burdens agencies with redundant and unnecessary analysis.**

The bill also requires reviews of all existing 10-year old rules affecting small business. These look-back studies needlessly spend 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. 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, IRS recordkeeping requirements, and regulations governing grants to state and local governments, as well as *agency guidance documents*.

C. **Threatens valuable protections.**

Expanding RFA analysis to include look-backs and indirect effects could put longstanding protections in jeopardy. Agencies would be forced to re-justify proven regulatory safeguards such as lead in gasoline or arsenic in the drinking water. Industry advocates have already singled out EPA's ambient air quality standards for life-threatening soot and smog as a primary reason for expanding regulatory flexibility analysis to include indirect effects. H.R. 682 also extends analytical burdens to a whole new universe of public protections — human services rules, such as those protecting abused and neglected children in federally-funded child welfare programs — by including nonprofits in the definition of small entities and expanding the scope of the RFA to regulations governing grants to state and local governments.

D. Puts corporate special interests ahead of the public interest.

H.R. 682 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. 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.

II. Regulation does not always harm U.S. competitiveness and may actually improve it.

Burdensome anti-regulatory measures like H.R. 682 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 to 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.[1]

(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

1. *See* 2006 Draft Report on the Costs and Benefits of Federal Regulation, (available on-line at <http://www.whitehouse.gov/OMB/inforeg/reports/2006_draft_cost_benefit_report.pdf> Previous reports on the costs and benefits of regulation available at <http://www.whitehouse.gov/OMB/inforeg/regpol-reports_congress.html>).

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 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.[3]

One particular estimate of costs, the discredited Crain and Hopkins study commissioned by the Small Business Administration, is significantly overblown.[4] For example, the familiar estimates that the manufacturing sector in 2000 "shouldered $147 billion of the $497 billion onus of environmental, economic, workplace, and tax-compliance regulation"[5] suffer the same problems just discussed and actually magnify those errors significantly, based on the assumption that regulatory compliance costs should be doubled to account for industry's public relations campaign against regulatory protections and the expenses of lobbying this very Congress.[6]

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2. *See* Press Release, Public Citizen, "New Report on Auto Industry Data Shows Automakers Misled NHTSA and Public When Denying Link Between Roof Strength and Injuries" (Mar. 30, 2005) (available on-line at <http://www.citizen.org/pressroom/release.cfm?ID=1909>).

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

4. *See* W. MARK CRAIN & THOMAS D. HOPKINS, THE IMPACT OF REGULATORY COSTS ON SMALL FIRMS (Office of Advocacy, Small Business Admin. RFP No. SBAHQ-00-R-0027) (2001).

5. Testimony of National Assoc'n of Manufs.,*Hearing on Impact of Regulations on U.S. Manufacturing Before the House Subcomm. on Reg. Affairs*, *House Comm. on Gov't Reform*, 109th Cong. (April 12, 2005), at 5 (citing CRAIN & HOPKINS, *supra* note 11, at 27 Tbl.9A).

6. *See* CRAIN & HOPKINS, *supra* note 11, at 10.

(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." [7] 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.[8] 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."[9]

- 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

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7. 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.

8. *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)).

9. *Id*. at 5-6 (citing Jaffe et al., *supra* note 15, at 141).

> that pollution-intensive industries flee developed countries with relatively high (and costly) environmental standards)."[10]

III. The Regulatory Flexibility Improvements Act Will Not Meet the Need of Small Businesses.

H.R. 682 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.[11] Thus, we cannot simply give small businesses a free pass from regulation. At the same time, it can be relatively more expensive for small business to comply with regulations than large companies. 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,[12] 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.[13]

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.[14] 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

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10. *Id*. at 6 (citing KEVIN O. GALLAGHER, FREE TRADE AND THE ENVIRONMENT: MEXICO, NAFTA, AND BEYOND 26 (2004)).

11. *See* Richard J. Pierce, Jr., *Small is Not Beautiful: The Case Against Special Regulatory Treatment of Small Firms*, 50 ADMIN. L. REV. 537 (1998).

12. *See* 42 U.S.C. § 2000e(b).

13. *See* OSHA, *OSHA Small Business Assistance: OSHA Benefits for Small Business* (available on-line at <http://www.osha.gov/dcsp/smallbusiness/benefits.html>).

14. *See* 5 U.S.C. §§ 601 *et seq*.

in court against a federal agency.[15]

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.

IV. There Is a Better Way.

A. National Business Regulatory Assistance Act

There are better ways to help small business without sacrificing longstanding public protections. The National Small Business Regulatory Assistance Act (S. 1411) would be the first step to strengthening Small Business Development Centers (SBDCs) around the country by launching a pilot in which SBDCs would provide compliance assistance to small businesses. This bill 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; instead, it would actually help some businesses to comply with the regulations that are in place to protect the public.

B. Strengthening Petitions for Rulemaking

Processes already exist that allow both businesses and the public interest to ask federal agencies to address particular regulatory problems. Small businesses are already well aware of the regulations that 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. Strengthening the petition process by making agencies more responsive to requests from the public would use existing mechanisms to open the door to reforms without drowning agencies in reviews of existing regulations. Moreover, rather than serving a particular constituency, strengthening petitions for rulemaking would benefit all members of the public. It can be used to identify both gaps in public protections as well as areas where reform may be needed.

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15. *See id.* § 504.

Problems of H.R. 682

Regulatory Flexibility Act	Regulatory Flexibility Improvements Act (H.R. 682)
· Applies only to rules with direct effects on small businesses	· Applies to rules, policy statements and guidance documents, land management plans, revisions or amendments to land management plans, recordkeeping requirements and formal rulemakings with direct and indirect effects to small businesses.
· Includes regulations impacting small businesses and local governments	· Includes regulations impacting small businesses, local governments, Tribal organizations, local labor organizations and professional and trade associations
· Requires agencies to prepare a regulatory flexibility analysis for all proposed rules and for all final rules, summarizing why the action is being taken and description of how small entities will be impacted.	· Regulatory flexibility analysis must contain all provisions of original regulatory flexibility analysis, but must also include a description of alternatives that might maximize benefits and an estimate of "the additional cumulative economic impact of the proposed rule on small entities beyond that already imposed on the class of small entities." Final analysis is no longer required to be "succinct," and explanations are amended to be "detailed explanations."
· The agency is required to respond to public comments.	· The agency is required to specifically respond to comments filed by the Chief Counsel of Advocacy, including details of any changes made as a result of the comments.
· Allows analysis to be either quantified or general.	· If agency gives a general description instead of a quantified analysis, it must include detailed explanation of why quantification is not "practicable or reliable." · Eliminates procedures for agency heads to delay the analysis before promulgating proposed or final rule.
· Requires small business panel to review all rules by EPA and OSHA with a significant impact on small entities.	· Requires small business panel to review 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."
· Periodic review of all rules, "which have or will have a significant adverse impact on a substantial number of small entities," going back to ten years before the enactment of the RFA.	· Periodic review of all rules, regardless of whether they have had or will have a significant impact on a substantial number of small entities. Agencies will submit a report to Congress regarding their findings. The review must include comments by the Regulatory Enforcement Ombudsman and the Chief Counsel of the Office of Advocacy and "the contribution of the rule to the cumulative economic impact of all Federal rules on the class of small entities affected by the rule."