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Reducing the Regulatory Burden on Small Business:
Improving the Regulatory Flexibility Act

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Before the United States House of Representatives
Committee on Small Business

November 15, 2007

Chairwoman Velázquez, Ranking Member Chabot, and members of the Committee, thank you for inviting our association to testify this morning about the Regulatory Flexibility Act (RFA) (5 U.S.C. § 601 et seq.) and the association's experience with the rulemaking process.

My name is Christian Klein and I am the executive vice president of the Aeronautical Repair Station Association (ARSA). ARSA is a 670 member-strong international trade association with a distinguished 22-year record of representing certificated aviation design, production, and maintenance facilities before Congress, the Federal Aviation Administration (FAA), the European Aviation Safety Agency (EASA), and other national aviation regulators and legislative bodies.

ARSA regular members are certificated repair stations that perform maintenance, preventive maintenance, and alteration of civil aircraft and related components throughout the world. The association's members also design, produce, and distribute aircraft parts.

Certificated facilities provide expert, quality service for general and commercial aircraft owners and operators. Through the skill and care of their employees, ARSA member companies help ensure the safety of aircraft worldwide. And through its publications, training programs, and Annual Repair Symposium, ARSA educates regulators, legislators, and industry on aviation design, production, and maintenance regulatory compliance issues.

While we represent a wide cross-section of the aviation industry, the vast majority of our members are small businesses. A spring 2007 survey of ARSA's membership confirmed that approximately two out of three members employ fewer than 50 people and nearly half of the businesses are owned by a single individual or family. These numbers are confirmed by Appendix A, which is a listing derived from FAA data of the certificated repair stations in each state and the total number of workers each employs. Given the demographic representation and the fact that the aviation industry is so strictly regulated, the RFA and agency rulemaking activities have a substantive impact on our association and our members.

This morning I will discuss our association's recent experience challenging an FAA rule under the RFA. I will also propose ways that Congress can improve the RFA and the way federal agencies conduct rulemakings.

FAA's D&A rulemaking fails to fulfill RFA requirements

In 2006, ARSA filed a lawsuit challenging an FAA rule that dramatically expanded the agency's drug and alcohol (D&A) testing requirements. The prior rule required testing for maintenance personnel at air carrier and independent, FAA-certificated maintenance companies (repair stations) that work on air carrier aircraft. The expanded rule extended the testing requirements to employees at subcontractor companies (and indeed to subcontractors of subcontractors to any tier) that repair stations rely on for specialized services. Businesses such as dry cleaners, metal finishers, machine shops, electronic repair shops, and a host of other traditional small businesses provide maintenance-related services to the aviation industry.

As a result of the expanded rule, these small businesses have to implement a U.S. Department of Transportation-approved drug and alcohol testing program for their employees or agree to be covered by an air carrier or repair station's program, or stop serving the aviation industry altogether. For most of these subcontractors, aviation work was a small portion of their overall business. Many simply stopped serving the industry and took the loss in business. This forced repair stations to bring the work back in-house or search for new outside specialists willing to accept the burden of implementing a D&A testing program or stop providing the repairs for the air carrier customer. We are speaking in the past tense here because the rule is in effect and the damage has been done; but, more on that later.

When an agency engages in rulemaking, the RFA requires it to prepare and make available for public comment an initial regulatory flexibility analysis that describes the impact of the proposed rule on small businesses. When the final rule is issued the agency must prepare a final analysis that contains a description of the steps the agency took to minimize economic impact on small businesses, including reasons for selecting or rejecting the alternatives to the final rule.

In an effort to avoid having to do a full regulatory flexibility analysis, the FAA stated that its expanded rule would only affect 297 subcontractors being used by repair stations. From these numbers it reasoned that an RFA analysis was not necessary because its rule did not have a significant economic impact on a substantial number of small businesses. It did not judge the impact on the repair stations since it reasoned most were already subjected to the testing requirements; therefore, any residual effects were already being felt.

To address the FAA's estimates, ARSA conducted a member survey and noted aviation economist Daryl Jenkins, Ph.D. estimated that the number of subcontractors affected

was actually between 12,000 and 22,000. This information was submitted to the FAA as part of the association's comments to the proposed rule. The discrepancy caused the Small Business Administration's Office of Advocacy (SBA OA) to weigh in against the FAA's analysis. SBA OA reasoned that the FAA's analysis did not consider all the industries actually affected by the expanded rule and that therefore the agency's economic analysis was flawed due to the use of inadequate data. SBA OA recommended the FAA conduct a full regulatory flexibility analysis, expanding the analysis to small entities outside of the aviation industry. It also recommended the agency provide more specific data on the economic impact and further explain the criteria it actually used to determine the rule would not have a significant economic impact on a substantial number of small entities. Members of the House Aviation Subcommittee also sent a letter to the FAA echoing SBA OA's concerns.

The FAA ultimately refused to consider either ARSA's or SBA OA's opposition to its economic analysis and issued a final rule on January 10, 2006 (71 Fed. Reg. 1666.) Ironically, during the initial notice and comment rulemaking period, the agency stated that some repair stations and most of their contractors were small entities that needed to be considered under the RFA. However, in issuing the final rule, the FAA changed course 180 degrees and stated that repair stations and their contractors were not even regulated by the rule and therefore were not the targets. As a result the agency concluded that an RFA analysis was not needed because the only persons impacted by the expanded rule were air carriers, the vast majority of which were not small businesses.

ARSA challenges the rule in court

On March 10, 2006, ARSA filed a lawsuit in the U.S. Court of Appeals for the District of Columbia Circuit challenging the new rule on several grounds, including the FAA's violation of the RFA.

In a 2-1 decision issued this past summer, the court agreed with ARSA that the FAA violated the RFA by not properly considering the impact of its drug and alcohol testing rule on small businesses. The court ruled that despite the FAA's contentions to the contrary, repair stations and their subcontractors are directly affected by the expanded rule. It reasoned that although the regulations are immediately addressed to air carriers, the employees of their contractors are actually required to be tested. Thus the rule imposes responsibilities directly on the contractors and the small businesses to which the expanded rule will apply. Therefore, the FAA must to consider the impact of the rule on those entities.

Since it abrogated this duty, the court instructed the FAA to conduct a proper analysis under the RFA. It further stated that the analysis conducted during the rulemaking stages was not enough to satisfy the requirement because it was not a final regulatory flexibility analysis and did not properly consider any alternatives to the final rule.

However, the court ruled against ARSA's challenge that the FAA had exceeded its statutory authority in issuing the rule and allowed the agency to continue enforcing the final rule against small entities (the only ones affected by the RFA issue) while it conducts the full RFA analysis. This reasoning was based on the public's manifest interest in aviation safety and the final rule's impact on this interest.

The implications of ARSA's win in court
After the decision was handed down, leaders in the small business community agreed that three important lessons could be taken from the decision:

- The RFA imposes real obligations on federal agencies, which must harmonize the interests advanced in a proposed rule with the interests of small business;
- Agencies must take the precise, specific steps outlined in the RFA – there is no RFA-like compliance or substitute; and
- If the regulation "directly imposes" responsibilities on small entities, the rule and the RFA apply to those entities.

Perhaps the most important lesson learned was the need for trade associations and small businesses themselves to be thoroughly involved in every step of the rulemaking process. ARSA's insistence on challenging and commenting on the FAA's reasoning throughout the process helped build the administrative record that ultimately won the day in court.

There is the distinct possibility that this victory may in the end be hollow when dealing with an agency such as the FAA that is responsible for "safety." This point is alluded to in the court's decision. Despite the fact that the agency wholly failed to comply with the RFA mandate, the court was still unwilling to stay enforcement of the expanded rule on remand because of perceived significance of the rule to aviation safety. The agency blatantly flouted the congressional mandate to conduct an RFA analysis even when "reminded" of its obligations to do so by SBA OA. And despite the FAA's disregard for the law, the court was still unwilling to strike down the underlying rule.

Thus, when agencies assert that safety or security are at stake (regardless of the veracity of those assertions) they apparently feel free to ignore the RFA. This undermines the rule of law and ability of the legislative branch to impose checks on the executive branch.

What's the price of going to battle?
At the end of the day, many associations that represent small entities are themselves small "businesses." The costs of fighting an agency from the outset of its rulemaking and ultimately dragging the agency into court can be staggering. The court costs and legal fees alone make this sort of fight impossible for many associations.

Indeed ARSA will be paying for its “big win for small business” for years to come. ARSA is a small association with an annual operating budget of under $1 million. The court case alone cost over $300,000 in legal fees. To date, the association has collected $28,125 as part of its drug and alcohol legal defense fund to help recoup some of its expenditures. Such costs with so little return would sink many small businesses, making similar cases purely pyrrhic victories.

These facts suggest one of the holes in the RFA: A statute designed to protect small business from oppressive regulations could cripple small businesses that seek to enforce the requirements of the law.

Congressional complicity in bypassing the RFA

Because our members effectively receive their licenses to do business from the FAA, they are greatly impacted by regulatory policies which may at first blush seem insignificant to the agency rule makers. Thus, it is critical that small businesses like ours have ample opportunity to respond to proposed rulemakings to help agencies understand the real impact of new regulations. Likewise agencies must be permitted sufficient time to consider the impact these rules will have on regulated parties.

This is where Congress and the agencies intertwine. Legislative mandates must solve specific problems without creating new difficulties or unintended consequences. There have been several recent instances in which Congress has effectively directed agencies to circumvent the RFA by artificially limiting the time available for rulemaking. In so doing, Congress itself will further undermine the RFA.

RFA analysis and compliance is a process which 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 and alter regulatory proposals accordingly. Unfortunately, Congress does not always make this possible.

In 2003, during the last FAA reauthorization, Congress mandated that the Transportation Security Administration (TSA) enact repair station security rules within 240 days of enactment of the law (i.e., by August 9, 2004) (see § 611 of Public Law 108-176.) Once the rules were enacted, the agency had 18 months to audit foreign repair stations for compliance with the “new” regulations. If the TSA failed to meet the deadline for conducting the audits, the FAA would be barred from issuing new foreign repair station certificates. The repair station security rules are now more than three years past due and Congress has grown increasingly impatient with TSA’s foot-dragging.

Thus, in a recently enacted law implementing the recommendations of the 9/11 Commission, Congress included a provision designed to prod TSA into issuing the rules

(see § 1616 of Public Law 110–53). Enacted on August 3, 2007, the new law directs TSA to adopt final repair station security regulations within one year (i.e., by August 3, 2008) and to complete audits in accordance with those regulations within six months (instead of 18 as originally provided for in 2003.) If it does not meet those deadlines, the FAA Administrator is barred from certifying any foreign repair stations unless an existing repair station is being re-certificated or a new application is in process.

Although the new law is a direct result of bipartisan congressional frustration with TSA, the aviation industry is the victim. The law threatens existing and pending U.S. treaty obligations, may precipitate a trade war in the market for aviation maintenance services (in which the U.S. has traditionally had a strong competitive advantage), and will hurt U.S. air carriers, particularly those operating overseas.

Of great concern is the fact that small businesses are being punished for the failure of a government agency to follow Congress' directions. While the TSA has set a spring 2008 date for publication of a notice for proposed rulemaking, the possibility of the agency fully complying the requirements of the RFA while also meeting the new deadline is slim. The new rules will be binding on foreign and domestic maintenance providers alike, regardless of size. Thus, small businesses in the U.S. aviation industry are in the unenviable position of desiring both expedited government action in this area *and* thorough analysis of the impact the new rules will have on small companies.

Following the promulgation of the final rule, the TSA, in a period of just six months, must audit nearly 700 foreign repair stations with over 265,000 employees to ensure compliance. (A complete listing of international repair stations and their locations is listed in Appendix B.) Given these demands, it is highly unlikely that the agency will be able to meet the deadlines Congress has imposed.

The foregoing is merely one example of the conflicting messages sent by Congress. On the one hand, Congress created the RFA to force agencies to thoroughly consider the impact on small business and less burdensome alternatives. On the other hand, agencies are told to rush out rules. When crafting a rule with such far-reaching consequences, input from the nation's small businesses is an essential element. However, in some cases, congressional pressure has supplanted the RFA with a "do it fast rather than doing it right" mentality.

The House is currently considering legislation that would similarly limit the ability of a federal agency to consider the impact of new rules on small businesses. The Supplemental Mine Improvement and New Emergency Response Act (S-MINER) of 2007 (H.R. 2768), seeks to reinforce safety measures established under the Mine Improvement and New Emergency Response Act (MINER) of 2006 (Public Law 109-236.)

S-MINER includes provisions mandating that the National Institute of Occupational Safety and Health (NIOSH) forward all Recommended Exposure Limits (RELs) for air contaminants to the Secretary of Labor, who must then require the Mine Safety and Health Administration (MSHA) to adopt the RELs as Permissible Exposure Limits (PELs), which are enforceable health standards. The bill mandates that MSHA issue the PELs without modification. A significant problem arises because NIOSH RELs are subject neither to public comment nor tests for economic and technological feasibility. The result is a process that circumvents input from the industry's small businesses and deprives them of a thorough analysis under the RFA.

Groups representing businesses regulated by MSHA have expressed concern that in S-MINER Congress is subverting the goals of the RFA. While I am no expert on mine safety and commenting on the underlying goals of the S-MINER legislation is beyond the scope of my expertise, I do believe that the provisions of the bill referenced above threaten to undermine established administrative procedures, including the RFA.

Improving the RFA
The foregoing examples provide some sense of the challenges facing small business advocates who are seeking to improve the quality and effectiveness of federal regulation. We believe it is time 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. The following are just 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 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 sword of Damocles hanging over them (and their budgets), agencies are certain to be more mindful of their RFA obligations.

- **Prohibit the use of nonconsensus standards.** In order to ensure more transparency in the regulatory process, Congress should prohibit regulatory agencies such as the Occupational Safety and Health Administration (OSHA) and Mine Safety Administration (MSHA) from promulgating or incorporating by reference nonconsensus standards developed by non-governmental standard setting organizations. These standards can be incorporated by reference into regulations and circumvent the typical notice and comment rulemaking process.

As a result, the effect these standards have on small business is never considered and the intent of the RFA is completely voided. Legislation to accomplish this objective was introduced in the 109th Congress as the Workplace Safety and Health Transparency Act (H.R. 5554).

- **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. This was the case in ARSA's battle with the FAA, where the agency at one stage indicated that repair stations and their contractors at all tiers were affected by the rule and most were small businesses. In the case of the D&A rule, once the FAA realized the vast number 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 businesses 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 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.

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 can be reluctant to

do so. And the 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.