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REGULATORY REFORM

The House has passed H.R. 527, the Regulatory Flexibility Improvements Act. The bill addresses shortcomings with the 30 year old Regulatory Flexibility Act (RFA) and the 15 year old Small Business Regulatory Enforcement Fairness Act (SBREFA). These two laws are the principal tools used by the small business community and the Office of Advocacy for Small Business to intervene in the federal regulatory process. (See the article at the end for a refresher on these laws.)

The improvements made by the House bill are technical in nature but include provisions that would put IRS rules under the RFA, require agencies to consider the indirect impact of a proposed rule and provide the Office of Advocacy more leverage to force agencies to be more accountable for complying with the terms of the RFA and SBEFA.

The House has passed H.R. 3010, the Regulatory Accountability Act of 2011. This bill amends the Administrative Procedure Act. It sets forth what the agency must do before promulgating major rules, high-impact rules, and major guidance.

Major rules or major guidance are ones that are likely to have an annual cost on the economy of \$100,000,000 or more, adjusted annually for inflation; a major increase in costs or prices for consumers, individual industries, Federal, State, local, or tribal government agencies, or geographic regions; a significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets; or significant impacts on multiple sectors of the economy.

A high impact rule is one likely to annual cost to the economy of \$1 billion or more.

The “must do before promulgation” assignments include making preliminary and final factual determinations that consider the following among other considerations:

*The specific nature and significance of the problem the agency may address with a rule (including the degree and nature of risks the problem poses and the priority of addressing those risks compared to other matters or activities within the agency's jurisdiction), whether the problem

warrants new agency action, and the countervailing risks that may be posed by alternatives for new agency action.

*Whether existing rules have created or contributed to the problem the agency may address with a rule and whether those rules could be amended or rescinded to address the problem in whole or part.

*Any reasonable alternatives for a new rule or other response identified by the agency or interested persons, including not only responses that mandate particular conduct or manners of compliance, but also the alternative of no Federal response; amending or rescinding existing rules; potential regional, State, local, or tribal regulatory action or other responses that could be taken in lieu of agency action; or potential responses that specify performance objectives rather than conduct or manners of compliance, establish economic incentives to encourage desired behavior, provide information upon which choices can be made by the public, or incorporate other innovative alternatives rather than agency actions that specify conduct or manners of compliance.

*The potential costs and benefits associated with potential alternative rules and other responses considered including direct, indirect, and cumulative

costs and benefits and estimated impacts on jobs (including an estimate of the net gain or loss in domestic jobs), economic growth, innovation, and economic competitiveness

*Means to increase the cost-effectiveness of any Federal response.

*Incentives for innovation, consistency, predictability, lower costs of enforcement and compliance (to government entities, regulated entities, and the public), and flexibility.

The House has passed H.R. 10, Regulations from the Executive in Need of Scrutiny Act of 2011. The Congressional Review Act (CRA) of 1996 requires federal agencies to submit final rules to Congress. Under the CRA final rules may be reversed by Congress if a joint resolution of disapproval is enacted into law and the President does not object. H.R. 10 would amend current law by requiring Congress to enact a joint resolution of approval before any major rule may take effect. The definition of a major rule, which was originally set by the CRA and is left unchanged by H.R. 10, is any rule that the Office of Management and Budget determines would have: an annual effect on the economy of \$100,000,000 or more; a major increase in costs or prices for consumers; individual industries; federal, state, or local government agencies; or geographic regions; or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

On balance these bills are good, although if H.R. 527 and H.R. 3010 were enacted, I don't think we would really need H.R. 10 since the problems would be resolved on the front end. While the ergonomics rule proved the value of a post-promulgation review by Congress (aka the CRA which is still on the books), flipping it from a "it's okay, unless Congress initiates a review" to a "it is a no-go until Congress okays the rule" is not necessarily a good thing. Congress cannot manage its workload now, so I don't know that we want the work of government stopped because it needs Congress' regular approval. I would take H.R. 527 and H.R. 3010 and be a happy camper.

SAVE THE DATE

SBLC's annual meeting will be Tuesday, February 14, 2012 from 8 a.m. to 10 a.m. The location will be a DC hotel to be announced in January. Thanks.

HAPPY HOLIDAYS

This will be the last Weekly of the year. Next one will be January 9, 2012. I am hoping for a much better year for Small Businesses and the trade associations that serve them in 2012. Happy Holidays and all the best to you in the New Year.

PAYROLL TAX RELIEF AND APPROPRIATIONS

Congress must fund the parts of the federal government they have not yet funded by Friday or pass another short term continuing Resolution (CR). Option B is they pass a bill that funds most of the remaining agencies and the controversial agencies are put on a

short or long term CR. At the moment, it does look like they will finish their work this week.

At the same time, Congress is trying to decide whether to extend the temporary two percent payroll tax relief that expires at the end of the year, for another year. (Most small business owners get the two percent too even if operating as a sole proprietorship, partnership or S Corporation, on at least some of their own personal income/compensation.)

Resolution of the payroll tax relief impasse is going to be painful. The House leadership released a bill on Friday. When I read the press release, I said to myself, "That's cool, they are adding another year for the temporary 100 percent depreciation bonus. It will probably be dropped by the time the Senate is done with it but a nice gesture." Then I looked at the other 369 pages of the bill and sighed. There are so many other issues in it including unemployment compensation reductions and reform, welfare changes, prohibitions on issuance of the EPA boiler rule, broadband spectrum release, flood program revisions, XL pipeline authorization, Medicare issues, energy recovery and conservation and...." Not that I have particular problem with most of these but...

These are the two biggest items that are keeping Congress in town. Everybody wants to make a statement; no one seems to want to actually legislate. Why can't they just extend the two percent relief and make this holiday season a little bit brighter for the rest of us without all the extra baggage?

RFA AND SBREFA

The RFA, enacted in September 1980, requires agencies to consider the impact of their regulatory proposals on small entities, analyze effective alternatives that minimize small entity impacts, and make their analyses available for public comment. The RFA applies to a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions. The RFA requires agencies to prepare and publish an initial regulatory flexibility analysis (IRFA) when proposing a regulation, and a final regulatory flexibility analysis (FRFA) when issuing a final rule for each rule that may have a significant economic impact on a substantial number of small entities. The purpose of the analysis is to ensure that the agency has considered the economic impact of the regulation on small entities and that the agency has considered regulatory alternatives that would minimize the rule's economic impact on affected small entities. The RFA allows the head of an agency to certify a rule in lieu of preparing a regulatory flexibility analysis if the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. Pursuant to the RFA, the agency must provide a factual basis for the certification.

SBREFA, enacted in March 1996, amended the RFA and provided additional tools to aid small business in the fight for regulatory fairness. The most significant amendments made by SBREFA were:

- Judicial review of agency compliance with some of the RFA's provisions.

- Requirements for more detailed and substantive regulatory flexibility analyses.

- Expanded participation by small businesses in the development of rules by the Occupational Safety and Health Administration (OSHA) and the Environmental Protection Agency (EPA) by requiring those agencies to convene Small Business Advocacy Review panels composed of representatives from the agency, OMB's Office of Information and Regulatory Affairs (OIRA) and the Small Business Administration's (SBA) Chief Counsel for Advocacy. The panels must collect the advice and recommendations of representatives of affected small entities about the potential impact of the draft rule. (The recently passed Dodd-Frank financial reform law added the Consumer Financial Protection Bureau to the list of agencies that have to convene small business panels)

- Made IRS interpretative rules subject to the RFA but only to the extent such interpretative rules impose on small entities a collection of information requirement."

GOING SOMEWHERE?

The Internal Revenue Service has issued the 2012 optional standard mileage rates used to calculate the deductible costs of operating an automobile for business, charitable, medical or moving purposes.

Beginning on Jan. 1, 2012, the standard mileage rates for the use of a car (also vans, pickups or panel trucks) will be:

55.5 cents per mile for business miles driven

23 cents per mile driven for medical or moving purposes

14 cents per mile driven in service of charitable organizations