



Testimony of J. Robert Shull,  
Deputy Director for Auto Safety & Regulatory Policy,  
Public Citizen,  
before the  
Subcommittee on Regulatory Affairs  
of the House Committee on Government Reform  
on  
H.R. 5242,  
“The Small Business Paperwork Amnesty Act”

Sept. 26, 2006

Thank you, Madam Chairwoman and members of the Subcommittee on Regulatory Affairs, for this opportunity to testify on the importance of information for protecting the public. I am Robert Shull, Deputy Director for Auto Safety and Regulatory Policy at Public Citizen, a national nonprofit public interest organization with over 150,000 members nationwide.<sup>1</sup> Public Citizen represents consumer interests through regulatory oversight, lobbying, litigation, research, and public education, and this mission has led us repeatedly to promote and preserve not just specific policies but also the federal government’s very ability to protect the public. Integral to the federal role in protecting the public health, safety, civil rights, environment, and consumers is the government’s ability to collect information.

Public Citizen cares deeply about issues related to the Paperwork Reduction Act and bills that would modify the PRA, such as the one we are here today to discuss, because the public has so much at stake in the nexus of information and substantive policy. The federal government plays a vitally important role in protecting the public health, safety, civil rights, environment, and consumers, identifying the public’s unmet needs for protection, and ensuring that long-addressed problems do not reemerge as new problems. Information is critical to the fulfillment of that responsibility. Effective use of government resources is dependent on information about the needs of the citizenry and the consequences of government decisions. Information is necessary in order to know how well existing government programs are functioning as well as what work is left to be done. Additionally, information is valuable for government accountability. Armed with information, the public can better identify needs for government action and hold its elected representatives accountable to address those needs. Sophisticated accountability systems, such as performance management tools, might also require rich information about real world conditions revealing the effectiveness or insufficiency of government programs.

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<sup>1</sup> Public Citizen does not take federal grants or contracts. In response to the subcommittee’s request, I certify that Public Citizen has not accepted any federal grants or contracts in the current fiscal year or the previous two fiscal years.

H.R. 5242 would stanch the flow of information and put the public at unnecessary risk. In general, the bill would prohibit federal agencies from fining small businesses for “first-time” violations of paperwork requirements as long as the company complies within six months of notice of the violation (with some enumerated exceptions, such as tax collection paperwork). Under the guise of benefiting small businesses, this bill would create perverse incentives for corporate special interests to refuse to provide the information we need to protect the public.

## **I. THIS BILL WOULD PUT THE PUBLIC AT RISK WITH SPECIAL RIGHTS FOR SMALL BUSINESS SCOFFLAWS.**

This bill threatens the public’s ability to demand the information we need to keep the public healthy and safe. What’s at stake is not simply mindless government “paperwork” — it is any information collection or reporting that affects 10 or more people, which means almost every requirement for reporting, labeling, or collecting the information we need to protect the public.

Gathering and reporting information is the very basis of public protection. The following are only a few of the many ways that information collection serves the public:

- For example, when a worker safety protection is issued, businesses often need to report information so that agencies know whether or not businesses are actually complying and whether workers are getting the full benefit of the new protective standard. Businesses might also be required to post information so that workers know about their rights or learn about potential hazards and protect themselves on the job. Under H.R. 5242, corporate special interests would be allowed to deny us this needed information without consequences.
- Firefighters rely on businesses to report on hazardous chemicals so that they can respond safely and effectively to potential chemical fires. The first-time violator immunity could reduce disclosure of chemical hazards and put firefighters at risk.
- Pension administrators must file annual reports on pension fund management under ERISA. An administrator mishandling funds could withhold the annual report, covering up the misdeed knowing that no fine could be levied under H.R. 5242.
- EPA relies on self-monitoring and reporting under the Clean Water Act and the Safe Drinking Water Act to head off potential dangers to the water supply. The information requirement is critical: EPA cannot inspect all 200,000 public water systems alone. Without reliable reporting, we cannot assure water quality. H.R. 5242 puts that important safeguard at risk.

H.R. 5242, however, is blind to the value of information. In fact, it establishes all the wrong priorities for information policy with incentives for small businesses to flout the law.

**A. This bill would reward lawbreakers and immunize repeat offenders.**

H.R. 5242 endangers the public's right to know by prohibiting federal agencies from fining small businesses for "first-time" violations of paperwork requirements as long as the company complies within six months of notice of the violation (with some enumerated exceptions, such as tax collection paperwork). Currently, agencies almost always waive fines for first-time violations. In fact, this bill could encourage even more violations, because small businesses would know they could avoid reporting requirements — without fear of fine — until they are caught for the first time. The bill would have the perverse effect of putting law-abiding businesses at a competitive disadvantage while denying the public the information we need to protect the public health, safety, civil rights, and the environment.

Businesses could have *many* "first-time" violations under this bill. As the "first-time" exemption is defined, an agency can only count violations from *that* agency's requirements — and cannot look at a small business's violations of requirements from *other* agencies. A business could fail to comply with a workplace safety requirement for OSHA, a toxic substance report for EPA, and a pension fund report under ERISA — each time getting the "first-time" violator exemption.

**B. Delaying information can be disastrous.**

The penalty exemption periods for correcting so-called "first time" violations — six months for most violations, and 24 hours for selected public health and safety violations — would allow small businesses to endanger us all with delays in releasing the information that we need. Time is of the essence with many information requirements. For example, the SEC needed to issue penalties to first-time violators in order to ensure rapid compliance with Y2K measures. In the case of chemical plants, we need information to protect workers and our communities by planning responses to potential accidents. For a plant to correct emergency information violations 24 hours after a chemical explosion may be too little, too late.

**C. The public health and safety clauses are too weak.**

The bill does set aside some special provisions for a "first-time" information violation that "presents a danger to the public health and safety." As a gesture to the public interest concerns that have been raised against this same language in previous Congresses, H.R. 5242 merely shortens the penalty exemption period from six months to 24 hours for this class of information violations. Keep in mind that the 24-hour clock does not start running with the violation, but only with notice from the agency that the violation must be corrected — which could be months after the violation.

Moreover, it can be difficult for an agency to know whether there is a danger to health or safety if it does not have the appropriate information to draw that conclusion in the first instance. Routine collection of information could alert public health or safety agencies to signs of developing problems that need to be addressed.

## II. THERE IS NO NEED FOR THIS BILL.

It is not clear what problem this bill is intended to address. As the public interest community has already pointed out repeatedly over the years as iterations of this bill have been introduced, it is already the case that agencies almost always waive fines for first-time violations. Additionally, if the problem to address is the burden of information collection requirements, it makes little sense for this bill to exclude IRS paperwork, given that the IRS is responsible for over 75% of current paperwork burden — and that *all other agencies combined still do not amount to even 25% of paperwork burden.*<sup>2</sup> (EPA accounts for a mere 2% of paperwork burden, and OSHA is responsible for even less.) Moreover, there is nothing in this bill that would reduce or eliminate paperwork at any rate; it merely grants immunity to violators of the law.

This extraordinary effort to give small businesses a special right to evade their responsibilities under the law will probably be justified by its proponents on the basis of two interrelated claims: that small businesses disproportionately bear the burden of regulatory compliance costs, and they must accordingly bear the brunt of an observed increase in burden-hours of information collection requirements. There are two flaws embedded in such arguments: (1) reported increases in burden hours do not compel the conclusion that small businesses need exemptions from information collection requirements; and (2) the claims of disproportionate compliance cost burden on small businesses are based on research that has recently been revealed to be unsound.

### A. Reported increases in burden hours do not justify special rights for small business scofflaws.

We will undoubtedly hear today that the Government Accountability Office recently testified that the 1995 PRA reauthorization's burden reduction goals would have resulted in approximately three billion fewer burden hours at the end of September 2001 than were actually imposed. Three billion: it is a striking observation, but it does not begin to tell us anything meaningful about government collection of information, much less paperwork "burden."

#### 1. *Reports of burden hour increases alone fail to reveal a problem.*

The observed increase in estimated burden hours does not necessarily mean that there has been an increase in *unnecessary* burden. As OIRA itself has observed, burden hour increases can reflect changing priorities, such as the post-9/11 imperative to improve national security in such key areas as the security of the food supply. Any burden increase resulting from efforts to address the new post-9/11 reality certainly is not a problem that demands more burden reduction initiatives.

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<sup>2</sup> Linda D. Koontz, GAO, *Paperwork Reduction Act: Burden Reduction May Require a New Approach* (GAO-05-778T), Testimony before the Subcomm. on Reg. Affs., House Cmte. on Gov. Reform, June 14, 2005, at 14 Fig.1.

The post-9/11 context is not the only limitation that precludes any meaningful inferences from observations of burden hour increases:

- A significant factor for burden hour increases may be factors completely beyond all government control. The burden hour is a function of not just the time spent complying with an information collection but also the number of people participating in it. In the aftermath of Hurricane Katrina, for example, larger than normal numbers of people will complete applications for the National Flood Insurance Program and public assistance programs. The result will be an observed increase in burden hours, *even if the forms themselves are unchanged*.
- Another significant factor is beyond agency control: new statutes passed by Congress, requiring new or revised information collections that result in burden hour increases. As GAO observed, agency burden reduction initiatives decreased burden by 96.84 million burden hours from 2003 to 2004, but that burden *reduction* was offset by a burden *increase* resulting of 119 million burden hours because of new statutory mandates.<sup>3</sup>

In the former case, burden hour increases do not result from increases in paperwork burden but, rather, from the burden of circumstances beyond anyone's control. In the latter case, there is an increase in the number of information collections but not an increase in *unnecessary* burden, because the public itself, acting through its elected representatives, declared the need for the information. OIRA helpfully distinguishes the first of these in its annual reports as "adjustment" increases, but the second kind is routinely noted but not carefully measured as distinct from other government-directed "program changes" in burden hours.

2. *The "burden hour" figure is a case of garbage in, garbage out.*

Another reason not to draw too many conclusions from estimates of increased burden hours is that the numbers themselves—the "burden hour"—are meaningless. There is no science or real-world experience applied to the quantification of a burden hour; accordingly, the burden hour figure does not reliably measure anything:

[B]urden hour estimates are not a simple matter. . . . [I]t is challenging to estimate the amount of time it will take for a respondent to collect and provide the information or how many individuals an information collection will affect. Therefore, the degree to which agency burden-hour estimates reflect real burden is unclear. . . .<sup>4</sup>

Burden hour estimates are, incidentally, *estimates*. Any empirical studies or surveys to measure the time burden of an information collection would themselves be subject to the PRA and burden hour estimation.

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<sup>3</sup> *Id.* at 8.

<sup>4</sup> *Id.* at 9-10.

For the benefit of the subcommittee, I am submitting with this testimony a detailed discussion of the deficiencies of quantifying burden hours, courtesy of OMB Watch. In short, the methodologies for quantifying burden hours differ not just from agency to agency but also within agencies. The only noteworthy consistencies are the flaws in burden hour quantification methodologies: among them, the failure to acknowledge that any new information collection, even a time-saving computerized process replacing an old paper form, will take a certain amount of time the first time it is used and then will require much less time to complete as users become familiar with the process. The estimates have historically been increased or decreased for no apparent reason at all.<sup>5</sup> In all probability these burden hours are skewed too high.

### 3. *Burden numbers tell only half the story.*

Even if reports of burden hour increases actually told us something meaningful, they still cannot be the basis of an informed discussion of reauthorization because they exclude too much about the value of the information at stake. The PRA mandates disclosure of only the estimated burden hour and is agnostic about both the benefits derived from the information and the democratic values that inhere in information collections mandated by law. As a result, when PRA debates are based on the burden hour estimate, the debates inevitably are one-sided. Those who supply information subject to the PRA can readily engage in debate against perceived weaknesses of the law, because all that is disclosed about information collection activity is the estimated *burden*. Congress seldom hears from those who benefit from the collection of the information, mostly because they know little about the PRA.

The observation of burden hour increases may tell us something about the amount of information flowing into government, but it tells us nothing about the enormous benefits the public gains from that information. It cannot tell us, for instance, how information aids important policy decisions or how information is used to keep us safe. Inspecting a nuclear plant for vulnerabilities or meat products for signs of mad cow disease involve collecting information. Government decisions to remove arsenic from drinking water or lead from gasoline rely on information about the levels of existing pollutants and their impacts on the population. Car safety features such as air bags and seat belts require extensive trials before going to market and then further information collections to gauge their impact. Collecting flood insurance benefits or deciding when and where to build a levee depends on information collections, as does forestalling against a natural disaster, disease epidemic, or terrorist attack. All of these require the collection of massive amounts of information, ranging from the preparedness of state and local governments to assessments of various risks. On this point, Public Citizen can actually agree with OMB, which routinely spends several pages in its annual Information Collection Budget report outlining the enormous benefits this information can provide.<sup>6</sup>

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<sup>5</sup> For example, in May 1989, OIRA decided to raise an IRS burden estimate—and then upped its own re-estimate. By the time OIRA finally decided to reject the information collection altogether, the burden estimate had grown nearly 2,000 percent, from 2.5 million burden hours to 39 million burden hours, with no accounting for the dramatically revised estimate. See OMB Watch, *Monthly Review*, June 30, 1989, at 3.

<sup>6</sup> See, e.g., OFFICE OF INFO. & REG. AFFS., OMB, 2002 MANAGING INFORMATION COLLECTION AND DISSEMINATION 5-10, available at <[http://www.whitehouse.gov/omb/inforeg/paperwork\\_policy\\_report\\_final.pdf](http://www.whitehouse.gov/omb/inforeg/paperwork_policy_report_final.pdf)>.

**B. The evidence of an unfair burden on small businesses is unreliable.**

If the objective of this bill is to serve small businesses, there is still a wide chasm between the motivation and the actual proffered solution. The small business community is a major source of innovation and employment in this country, but it is also a major source of social harms that need to be addressed.<sup>7</sup> It makes little difference to a worker injured on the job or a community contaminated by toxic exposure whether the source of the ill was a large or small business. Thus, there is a valid need to protect the public and the environment from harm caused by small businesses and, accordingly, a valid need to collect information from those small businesses. At the same time, it can be more relatively more expensive for small business to comply with regulations and information collection requirements than large companies. Given this confluence of circumstances, we need to find ways to both protect the public and lower the cost of compliance for such businesses.<sup>8</sup>

This, however, has already been done. 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.<sup>9</sup> Additionally, small business is treated to many exemptions or special treatment in the area of regulation. For example, employers with less than 15 people are exempt from the Equal Employment Opportunity Act,<sup>10</sup> and OSHA levies lighter penalties for smaller firms, exempts businesses with less than 10 people from recordkeeping requirements, and provides free on-site compliance consultations.<sup>11</sup> Perhaps more importantly, small business has its very own law, the Small Business Regulatory Enforcement Fairness Act (SBREFA) that 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.<sup>12</sup> Given these special benefits, it is unclear why small businesses would need even more exemptions from information collection specifically.

It is likely that we will hear today that small businesses need to be allowed to flout the law and evade responsibility for information collection requirements because they disproportionately bear the costs of regulatory compliance. The citation for this argument tends to be a series of deeply flawed studies, performed first by Thomas Hopkins in 1995, updated in 2001 by Hopkins and Mark Crain, and updated again last year by Crain.

One of the chief flaws of this series of studies is the familiar problem of garbage in, garbage out. Note, for example, that the 2001 Crain and Hopkins study plugs in estimates of the cost of

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<sup>7</sup> Richard J. Pierce, Jr., *Small is Not Beautiful: The Case Against Special Regulatory Treatment of Small Firms*, 50 ADMIN. L. REV. 537, 558-61 (1998) (identifying, *inter alia*, that small businesses are disproportionately responsible for worker injury, worker fatality, and water and air pollution).

<sup>8</sup> C. Steven Bradford, *The Cost of Regulatory Exemptions*, 72 UMKC L. REV. 857 (2004).

<sup>9</sup> See Pierce, *Small is Not Beautiful*, *supra*, at 542-43.

<sup>10</sup> 42 U.S.C. § 2000e(b).

<sup>11</sup> OSHA Small Business Benefits, <http://www.osha.gov/dcsp/smallbusiness/benefits.html>.

<sup>12</sup> 5 U.S.C. § 601 *et seq.*

workplace protections by relying on a Mercatus Center study by Joseph Johnson.<sup>13</sup> Johnson's numbers are utterly unreliable, for two important reasons. First, he relies entirely on *ex ante* estimates of compliance costs from OSHA's regulatory impact analyses, which use biased samples, fail to anticipate technological innovations that will drive down actual costs, and make other conservative assumptions that routinely overestimate actual compliance costs significantly.<sup>14</sup> Second, Johnson inflates these already inflated cost estimates: he actually *multiplied the estimates by 5.55!*<sup>15</sup>

Why this gross distortion of already distorted estimates? Johnson was emboldened by a previous article on the costs to corporate special interests of making workplaces healthier and safer. That study, by Harvey James, generates the 5.55 multiplier through a series of sleights of hand. To arrive at what he concludes to be the most reasonable estimate of \$33.5 billion, James compares the total annual cost of OSHA compliance estimated by a 1974 National Association of Manufacturers study against the total cost of 25 major rules in 1993, which he discovered was 5.55 times lower than the NAM figure. Here is the trick:

Assuming that the compliance burden of OSHA regulations in 1993 is at least as great as the compliance burden of OSHA regulations on business establishments in 1974 (and that the 1974 estimate is reasonably accurate), then the total compliance costs of all of OSHA's regulations enforced in 1993 is projected to be at least 5.55 times the total for the 25 major OSHA rules examined in this study.<sup>16</sup>

The assumption that the 1974 NAM estimate is "reasonably accurate" does not hold; the National Association of Manufacturers is a lobbying organization whose vested interest in overestimating regulatory costs makes its numbers immediately suspect, and there is no evidence that James made any effort at all to verify the NAM data.<sup>17</sup> Moreover, James, like Johnson, relies entirely on *ex ante* estimates of compliance costs from OSHA's regulatory impact analyses, which are significantly overestimated. (In fact, in the case of the cotton dust rule that is included in James's list of 25 major rules, the actual *ex post* result was rapid compliance that improved competitiveness.<sup>18</sup> James's estimates nonetheless include the cost estimates for that rule and others that have long since been proven to be significantly overestimated.) The additional assumption that 1993 costs must be at least as great as 1974 costs replicates these same errors by arbitrarily inflating 1993 costs to an already-inflated 1974 level and by failing to consider that innovations over time could indeed make compliance less costly over a 20-year time span.

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<sup>13</sup> See Joseph L. Johnson, *A Review and Synthesis of the Cost of Workplace Regulations*, Mercatus Center Working Papers in Regulatory Studies (Aug. 30, 2001), available at <<http://www.mercatus.org/pdf/materials/10.pdf>>.

<sup>14</sup> See Thomas O. McGarity & Ruth Ruttenberg, "Counting the Cost of Health, Safety, and Environmental Regulation," 80 *Tex. L. Rev.* 1997, 2030-33 (2002).

<sup>15</sup> See Johnson, *supra*, at 21 text accompanying note 38.

<sup>16</sup> Harvey S. James, *Estimating OSHA Compliance Costs*, 31 *Policy Sciences* 321, 329.

<sup>17</sup> McGarity & Ruttenberg, *supra*, at 2018 & n.120..

<sup>18</sup> Ruth Ruttenberg & Assocs., *Not Too Costly After All: An Examination of the Inflated Cost-Estimates of Health, Safety, and Environmental Protections*, Feb. 2004, at 27.



Aside from the problem that the inputs of the study are unreliable, it turns out that the entire enterprise is irremediably flawed. An important new analysis by Winston Harrington of Resources for the Future reveals that the overall conclusion of the Crain and Hopkins series is overstated — and that its methodology is thoroughly unsound.<sup>19</sup> Although the Crain and Hopkins reports have been purported to demonstrate economies of scale in regulatory compliance across the board, Harrington demonstrates that economies of scale in Crain and Hopkins’ data “can be entirely accounted for by environmental regulation . . . . It is true that modest economies of scale are also reported for tax compliance regulations, but . . . these are more than offset by small diseconomies of scale in workplace and economic regulations.”<sup>20</sup> As Harrington further demonstrates, however, even that claim is “utterly without foundation,”<sup>21</sup> because the econometric methodology used to arrive at that conclusion “is very *ad hoc*, with no basis in economic theory.”<sup>22</sup>

### III. THERE IS A BETTER WAY.

A special right for scofflaws is not the way to address the particular needs of small businesses. Congress should instead consider ways to make it easier and less expensive for small businesses to provide us all the information we need without reducing the quality, quantity, or utility of that information. For example, Congress could move ahead with the small business compliance assistance programs envisioned in H.R. 230 and S. 1411, which could lead one day to rich compliance assistance offerings in every district across the country. Additionally, Congress could provide increased funding for the development of small business “gateways” on the Internet, to give small businesses access to reliable and understandable information about their regulatory and information collection duties. In short, this subcommittee should be considering options that enable small businesses to continue to be the engine of economic growth in this country while helping them to be good corporate citizens, so that the public interest is not forsaken.

I thank you for this opportunity to testify, and I look forward to addressing your questions.

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<sup>19</sup> See generally Winston Harrington, *Grading Estimates of the Benefits and Costs of Federal Regulation: A Review of Reviews* (Resources for the Future Discussion Paper No. 06-39, 2006).

<sup>20</sup> *Id.* at 18.

<sup>21</sup> *Id.* at 19.

<sup>22</sup> *Id.* at 20.