Statement of Frank Cania

Founder & President

driven HR—A USA Payroll Company

Pittsford, New York

On Behalf of the

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Evaluating the Paperwork Reduction Act: Are Burdens Being Reduced?

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Introduction

Chairman Chabot, Ranking Member Velázquez, thank you for the opportunity to provide my assessment of the Paperwork Reduction Act's (PRA's) effectiveness in reducing the paperwork burden on small businesses, as well as encourage all federal agencies to "beta" test all new form requirements. I am Frank Cania, founder and president of driven HR, a Pittsford, New York-based human resource (HR) consulting firm. I have more than 30 years of combined experience in human resource administration, management, employment law, and teaching. In addition, I am proud to have carried on my family's rich history of small-business ownership dating back more than three generations.

My human resource consulting firm, driven HR, provides a variety of human resource-related services to small businesses, primarily in New York state. The services we offer relevant to this hearing include human resource risk assessments (e.g., HR audits); United States Citizenship and Immigration Services (USCIS) Form I-9 (I-9) preparation, reviews, and compliance; Occupational Safety and Health Administration (OSHA) compliance and reporting; Equal Employment Opportunity EE0-1 Report preparation; Internal Revenue Service (IRS) Form 1095-B (Health Coverage) and Form 1095-C (Employer-Provided Health Insurance Offer and Coverage) preparation; Family and Medical Leave Act (FMLA) leave eligibility determination, compliance, and tracking; Americans with Disabilities Act (ADA) compliance; as well as a number of other compliance-related activities. I appear before you today on behalf of the Society for Human Resource Management (SHRM), where I have been an active member for 20 years and currently serve on SHRM's Advocacy Team and Labor Relations Special Expertise Panel.

SHRM is the world's largest HR professional society. For nearly seven decades, the Society has been the leading provider of resources to, and dedicated to serving the needs of, HR professionals, in support of our goal of continuously advancing both the HR professional and the human resource profession. Currently, SHRM represents 285,000 members who are affiliated with more than 575 chapters in the United States, along with subsidiary offices in China, India, and United Arab Emirates.

In the interest of time and mindful that there are hundreds of forms under the PRA we can discuss, my testimony will address the challenges associated with IRS forms 1095-B and 1095-C preparation, USCIS Form I-9 preparation, conflicting and overlapping federal and state regulations, and the benefits of gaining stakeholder involvement through comments to proposed regulations, roundtables and other types of engagement.

Ambiguity Involving Tax Form 1095

The Affordable Care Act (ACA) includes both an individual mandate and the employer mandate for health care coverage. The employer mandate requires employers with 50 or

more full-time, and/or full-time equivalent employees, to offer health care coverage to their full-time employees working more than 30 hours a week—as it is defined in the Act—or face a fine. To avoid IRS fines, employers must provide their employees with either Form 1095-B or 1095-C, depending on the number of employees an employer has and whether employers offer self-funded health coverage. Form 1095-B is provided by self-insured employers with fewer than 50 employees. Form 1095-C is provided by applicable large employers (ALEs) with 50 or more employees.

One of the challenges for ALEs in the completion of Form 1095-C is the requirement that 95 percent of full-time employees, and full-time equivalents working an average of 130 hours or more per month, be offered qualifying health coverage. More times than not, small businesses fail to understand that the percentage is not arrived at through an annual average. The requirement is for 95 percent of these employees to be covered each month. One client did not understand that he was required to report "employee offer of health coverage" on a month-to-month basis. He also failed to properly identify and code the months prior to an employee's date of hire and the months following an employee's date of termination. In order to avoid federal government penalties for incorrect forms, we worked with the client to correct and reissue the forms.

In another example, a client who relied on its payroll service provider to produce its 1095-C forms had converted to a self-funded health insurance plan at the beginning of the year. The client did not understand that it was required to include not only employee coverage but also employee dependent coverage on the 1095-C form. In the first year of the self-funded plan, the employer supplied the payroll service provider with the updated insurance rates, as well as employee enrollments and waivers. However, the employer failed to inform the payroll service provider that the health plan was now self-funded, and also failed to provide the required information regarding employee dependents. As a result, the 1095-C forms initially produced by the payroll service provider did not contain any of the required dependent coverage information. This mistake was only uncovered when some of the 30 affected employees questioned the employer about why their dependents were not listed on their 1095-C forms.

Although on its face the issuance of corrected forms does not sound burdensome, the costs add up quickly. The clients referenced above each paid an initial set-up fee of $250, a service fee of $600 annually for the secure maintenance of their employee information, and $5 per 1095-C produced. Not including administrative costs, an ALE with 50 employees using this service will pay a minimum of $1,100 to produce the annual returns for all 50 employees. While these costs may seem insignificant to some, small employers often have small operating margins, making $1,100 a significant expense for many small businesses.

One point many small-business employers find especially maddening is that, although they are required to issue 1095 forms to their employees, the employees are not required to

attach a copy of the 1095 to their individual tax return, whether they are filing paper returns or electronically. For example, an employee working for one company with health care coverage for the entire year can simply check a box on his or her income tax return indicating that he or she maintained coverage all year. Similarly, if an employee changed jobs during the year, but maintained coverage both under their former and new employers without a gap, he or she can also check a box on the income tax return indicating that he or she maintained coverage all year. This prompts the questions of if these forms are really necessary and what new information do the forms provide that the employee and IRS do not already have? It appears that the 1095 form does little more than increase both the paperwork burden and potential liability of small businesses, without any resulting benefit.

Challenges Associated with the USCIS Form I-9

Employers are required to properly complete and maintain a USCIS Form I-9 for every worker they employ. SHRM represents many of the people who complete the employment verification process at workplaces across all industries and sizes. Employers, including SHRM members, need the best possible tools to verify that their employees are authorized to work in the United States.

Employers who act in good faith to properly verify their workforce should not be subject to unwarranted liability, yet the current Form I-9 restricts an employer's ability to provide commonsense guidance to employees while still acting in good faith. The I-9 instructions clearly state, "Employers CANNOT specify which document(s) the employee may present to establish employment authorization and identity." Based on my many years of experience, and through discussions with several attorneys specializing in employment and immigration matters, this statement is broadly interpreted to mean not only that employers CANNOT require employees to provide certain documents, but that employers CANNOT even suggest or explain which documents are most commonly presented. As part of their onboarding process, however, many small employers provide new hires with a checklist of items and documents necessary on the first day of work. Very often, these checklists suggest that the employee bring documents such as a passport, or a driver's license and Social Security card or birth certificate—all acceptable documents for completing the Form I-9. Although most employees appreciate this information, the I-9 instructions prohibit an employer from providing this information, and doing so could lead to penalties for the employer. Even in instances where an employee asks which document(s) he or she should provide, or which are most commonly provided, the employer is best advised to reiterate that the employee should review the "Lists of Acceptable Documents" and provide one document from List A (documents that establish both identity and employment authorization) OR one document from List B (documents that establish identity) and one document from List C (documents that authorize employment).

The I-9 verification process becomes exponentially more complicated if the employee is not a citizen, national, or lawful permanent resident of the U.S. According to the instructions, if the employee selects the "alien authorized to work" status, he or she is required to provide an alien registration number/USCIS number OR Form I-94 admission number OR foreign passport number and country of origin, as well as the date his or her work authorization expires, unless it doesn't expire. The instructions go on to explain, "Refugees, asylees, and certain citizens of the Federated States of Micronesia, the Republic of the Marshall Islands, or Palau, and other aliens whose employment authorization does not have an expiration date should enter N/A in the Expiration Date field. In some cases, such as if you have Temporary Protected Status, your employment authorization may have been automatically extended; in these cases, you should enter the expiration date of the automatic extension in this space." Despite the potential confusion this section of the I-9 creates, employers are not allowed to verify any of the information by asking to see the documents. The instructions inform the employee that, "Your employer may not ask you to present the document from which you supplied this information."

To further complicate matters where the employee is an alien authorized to work in the U.S., the employer is required to track the expiration date(s) of the employee's work authorization—both the date the employee entered in Section 1, as well as the expiration date of the document provided by the employee from either List A or List C of the "List of Acceptable Documents" as further proof of work authorization in Section 2. The employer is also urged to remind the employee of the approaching expiration date and his or her need to provide additional documentation for reverification of his or her work authorization, at least 90 days prior to the expiration date. However, according to the USCIS, "The employment authorization expiration date provided by your employee in Section 1 may not match the document expiration date recorded by you under List A or List C in Section 2. The earlier date should be used to determine when reverification is necessary."[1] This requirement presents a dangerous trap. An employer tracking the wrong date may be accused of failing to complete a timely reverification, which is all but certain to be construed as knowingly continuing the employment of an alien who lacks authorization to work. Such a finding often leads to costly fines that I will describe shortly.

Small businesses with diverse geographic footprints can also face significant difficulties when attempting to properly complete I-9 forms and, more specifically, when attempting to verify the authenticity of the documents provided by the employee during the completion of Section 2. Here the instructions clearly state, "the employer or authorized representative must physically examine, in the employee's physical presence, the unexpired document(s) the employee presents from the 'Lists of Acceptable Documents' to complete the Documents fields in Section 2." There is often a difficult balance between following this

[1] U.S. Citizenship and Immigration Services. (2016, February 25). Completing section 3, reverification and rehires. Retrieved from https://www.uscis.gov/i-9-central/complete-correct-form-i-9/completing-section-3-reverification-and-hires

requirement and risking potential errors for companies that have multiple shifts, multiple locations, remote employees, etc., since several different employer representative must be trained to examine these documents.

Take for example, compliance challenges faced by one of my clients who owns a chain of 24/7 business locations. My client has attempted several methods to comply, including training multiple employees at each location on how to complete Section 2 and requiring a trained manager to be present whenever a new employee starts work. Employees trained to correctly complete Section 2 were paid a bonus for each form submitted with no errors. Yet most were submitted with information missing or some other error. Requiring managers to travel to the various locations to complete the I-9 forms in the required timeframe took them away from other important responsibilities and ultimately was cost-prohibitive.

Another client has a workforce primarily composed of remote, home-based employees in several states. With no business need to bring any of these employees to the main office at any point, the only reasonable solution is to attempt to identify someone located near the employee's home who is willing to act as an authorized representative—preferably someone with at least a basic understanding of how to properly complete Section 2.

I have personally spent more than 25 hours over a 15-month period contacting HR consultants, attorneys, and other professionals in various locations on the client's behalf. Most of the people I've contacted have refused to even entertain the idea of serving as an authorized representative, with many completely unaware of the "physical presence" requirement and questioning why I would go to such trouble for one form.

As small businesses contend with these compliance challenges, they need to be mindful of the detrimental impact that honest mistakes may have on their bottom line. Although most small-business employers make a good-faith effort to properly complete the I-9 form, and few are unlawfully employing undocumented immigrants, they still face potentially catastrophic fines when paperwork errors are made. For instance, it is easy for newly hired employees and their employers to be confused by, or misinterpret, the information on the Form I-9 and/or its accompanying 15 pages of instructions, plus the 69-page M-274 guidance handbook that is intended to, among other things, provide detailed instructions and examples for both the common and more complex situations and documents an employer may encounter when completing the I-9 form, verifying an individual's identity and employment eligibility, and reverifying employment eligibility.

In my experience, the average error rate on I-9 forms by small-business employers exceeds 75 percent. That means three out of every four I-9 forms my company has reviewed contain at least one error. Depending on the circumstances, and based on the most recent fine schedule for Technical/Substantive errors, the penalty for even a single mistake on the

Form I-9 ranges from $216 to $2,126 per form. Penalties are normally assessed based on the percentage of I-9s with Technical/Substantive errors, including the failure to prepare an I-9 for an employee. For example, consider an employer presenting 100 I-9 forms for audit. With a relatively low error rate of 9 percent, the minimum fine likely to be assessed adds up to $1,944 (9 x $216); with an error rate of 50 percent, penalties may total $106,300 (50 x $2,126); and an error rate of 75 percent would result in fines of $159,450 (75 x $2,126) or more. It's also important to note that employers making a good-faith effort to correct errors on their I-9 forms—but failing to follow the prescribed method for doing so—face additional fines. Similarly, employers who don't follow the prescribed retention schedule, "either 3 years after the date of hire (i.e., first day of work for pay) or 1 year after the date employment ended, whichever is later," also face additional fines. It is counter-productive that a business making a good-faith effort to complete a two-page form should face such catastrophic repercussions.

Small businesses that contract with the federal government, and those in states that require the use of E-Verify, face another level of complexity regarding the I-9. The federal government uses E-Verify to enhance enforcement of federal immigration law and makes its use mandatory for federal contractors through the required Federal Acquisition Regulation (FAR) E-Verify clause. E-Verify allows employers to electronically verify the employment eligibility of their newly hired employees. Small businesses sometimes mistakenly view E-Verify as a safe harbor against worksite enforcement. The fact is, employers using the E-Verify system have the same requirements for properly completing, maintaining, and retaining paper I-9 forms for all employees as do nonusers. Employers who erroneously believe they have satisfied the I-9's requirements once an employee's eligibility to work has been confirmed by E-Verify may face significant liability.

The current Paperwork Reduction Act estimate for completing the Form I-9, as reported on the last page of instructions, is 35 minutes to complete the form manually or 26 minutes when using a computer to aid in the completion of the form, despite that using the computer lengthens the forms' instructions and data collection fields. The 35-minute estimate is unchanged from the previous version. The 26-minute estimate is new and based on the use of an electronically fillable form that USCIS provided for the first time. Nonetheless, the instructions for both types of the I-9 form are 15 pages long (compared to the six pages of instructions for the previous version). By more than doubling the instructions, , it is logical to conclude that it will take both the employee and employer more than twice as long to read and understand the instructions and complete the form manually. Therefore, at a minimum, the estimate for completing the I-9 form should be increased proportionately due to any increased length of the form or its instructions.

The Burden Continues for Small Business

Although I've limited my testimony today to the IRS Forms 1095-B and 1095-C, and USCIS Form I-9, there are countless other federal and state paperwork requirements that burden small businesses. In my home state of New York, when most small business employers hire a new employee, the forms necessary for completion include, but are not limited to the I-9, the New Health Insurance Marketplace Coverage Options and Your Health Coverage (ACA Model Notice), IRS Form W-4, Employee Withholding Allowance Certificate (federal income tax), New York State Department of Taxation IT-2104 Employee's Withholding Allowance Certificate (NY income tax), and New York State Notice and Acknowledgement of Pay Rate and Payday Under Section 195.1 of the New York State Labor Law (LS-54, LS-55, LS-56, LS-57, LS-58, or LS-59 depending on the type of employee). These are in addition to the various health insurance and other benefits applications and/or waiver forms that must be completed at the time of hire.

Other paperwork requirements include Occupational Safety and Health Administration (OSHA) Forms 300, 300A, and 301 regarding workplace illnesses and injuries; and Family and Medical Leave Act (FMLA) forms WH-380E, WH-380F, WH-381, WH-382, WH-384, WH-385, and WH-385V, and additional forms that will be required in implementing the recently announced New York Paid Family Leave law, which covers all New York employers regardless of size.

From the perspective of a small business, there seem to be a new federal or state form or paperwork requirements each month, often with corresponding fines and penalties for paperwork violations, even honest mistakes. While the growing paperwork requirements of employers is difficult for virtually all businesses to manage, the burden falls especially hard on small businesses. Large employers often have staffs of accountants, attorneys, and other trained professionals dedicated to complying with government paperwork and reporting requirements. Small businesses, on the other hand, particularly those of 15 or less employees simply cannot afford to do that. Thus, the burden falls on either the owner or, if they have one, the HR manager to spend hours outside of the normal workday to do paperwork. And when it comes to HR, that's in addition to their normal duties of finding and hiring new employees, administering benefits and payroll, general employee relations and discipline, and being responsive to the needs of their organization's management, as well as employees. These are the people that need your help reducing the paperwork burdens we're here to discuss today.

User Input Prior to Implementation

In today's economy, employers of all sizes utilize field, or "beta," testing for new software, technology, and products and services before making them available to the public. This is most often done to ensure a successful user interface. As a small-business employer and

consultant, I see the obstacles that employers, especially small employers, face when attempting to comply with government regulations. Federal agencies creating the forms and processes I've discussed today, as well as literally thousands more, often overlook the user experience as they seek to set standards and processes for data collection. In my experience, seeing only one side of any issue rarely, if ever, results in the most effective or efficient solutions. For example, when someone on my team creates a new form and/or process for a client, he or she never does so in a vacuum. Once we've completed our internal work, we ask the client to test and comment on what we've developed. Without exception, this extra step has increased our ability to better meet the reporting and data-gathering needs of our clients.

Often the federal agency comments process is not enough—employers need an opportunity to test the forms and data collection tools in the real world. For this reason, the federal government should look to partner with organizations like SHRM to field test paperwork requirements before they are imposed on the employer community. I'm sure I can speak on behalf of SHRM, and many of its 285,000 members, when I say that HR professionals have the expertise to understand not only the time it will take to complete a certain form but also to identify whether a new or revised form is redundant and show where common mistakes are likely to occur. Making the effort to field test new paperwork requirements would increase clarity and compliance while reducing the potential for unnecessary employer liability. Those are things SHRM and the HR community as a whole would fully support.

Conclusion

Mr. Chairman, small-business employers often fall into the "they don't know what they don't know" category. There are no required classes for small businesses on all the forms and requirements of the federal and state governments. Many of my driven HR clients started and continue operating today because someone had an entrepreneurial spirit and an idea. Further, although none are experts in, or sometimes even familiar with the full panoply of employment laws and regulations, they have always made a good-faith effort to be in compliance. As I sit here today, I can think of several clients who were only one regulatory agency audit away from significant hardship or ruin before we started working with them. I say that not to pat myself on the back, but to show that, for far too many small businesses, and far too many well-intentioned and hard-working small-business owners, government forms and data collection may unnecessarily pose their biggest threat to continued success and prosperity.

SHRM and its members will continue to work with the federal government to provide outreach and educational efforts to the employer community on these important issues. Thank you for your time. I appreciate the opportunity to share my perspective with you today and would be happy to answer any questions.