# SBREFA COMPLIANCE: IS IT THE SAME OLD STORY?

## HEARING

BEFORE THE

## COMMITTEE ON SMALL BUSINESS HOUSE OF REPRESENTATIVES

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**WEDNESDAY, MARCH 6, 2002**

HOUSE OF REPRESENTATIVES,
COMMITTEE ON SMALL BUSINESS,
*Washington, DC.*

The Committee met, pursuant to call, at 10:05 a.m. in room 2360, Rayburn House Office Building, Hon. Donald A. Manzullo (chairman of the committee) presiding.

Chairman MANZULLO. I would like to call this hearing to order.

Let me give you some good news. It is always good to have some good news. We held a hearing at the Los Alamos in Santa Fe in Congressman Tom Udall's district because of the extremely poor procurement policies, miserable procurement policies, on the part of the DOE. We had brought in there—here is this national ad that is getting $1 billion in procurement a year or in federal tax dollars each year. We had one witness who testified that six of the local Pueblos—those are the Indian tribes—only got a total of $5,000 in contracts.

I spoke this morning at the National Hispanic Chamber of Commerce, which was founded by Mr. Barreto's father. I ran into a lady there who was one of the witnesses in Los Alamos. She said you will not believe what happened. The Small Business Committee raised so much cain down there that the people at the Department of Energy decided to have some energy, and they set up a committee to oversee contracts going to small businesses.

One of the aggrieved parties, a small business lady—did you meet her there, Anna, at the breakfast this morning—got put in charge of this committee to make sure that the small businesses got their fair share of contracts. She said I would like the same type of subpoena powers that Mr. Manzullo has. They said you have them.

The first shot out of the gate is $40 million in construction contracts set aside for the small business people out in Santa Fe. That is why we have lots of oversight with this committee. The purpose is to shake up the bureaucrats and shake out those contracts so the small business people get their fair share. Is that right? You bet.

Today's hearing is the first in a series that the Committee will hold addressing compliance with the Small Business Regulatory Enforcement Fairness Act or SBREFA. SBREFA modified and strengthened the Regulatory Flexibility Act. The hearings will identify problems with the Regulatory Flexibility Act and SBREFA. Our goal is to draft legislation that will remove the loopholes agen-

cies have discovered for not complying with the Regulatory Flexibility Act and SBREFA.

In 1980, Congress responded to the cries from the small business community for help with the constantly growing regulatory burdens imposed by the federal government. Congress intended the Regulatory Flexibility Act to alleviate the disproportionate federal regulatory burden imposed on small businesses and other small entities. The authors intended the RFA to have the same effect on agency decision making that the National Environmental Policy Act had on agency decisions that would affect the environment. The concept was to force the agencies to think through the problem before using the knee jerk response of imposing regulations.

For 15 years, agencies largely ignored the RFA. This is not my supposition, but rather the conclusion of the annual reports issued by the Chief Counsel for Advocacy during that time. Congress also held hearings highlighting agency failure to comply with the RFA.

SBREFA was enacted in 1996 as a response to federal agencies ignoring the mandates of Congress. SBREFA strengthened the RFA. The authors expected that the changes would induce agency compliance. However, as we will hear today, agencies have found new loopholes they can use to avoid compliance with the Regulatory Flexibility Act.

The premise underlying the RFA is simple. If an agency has two methods of achieving its statutory objective, the rational choice would be to select the one that imposes less burdens on small businesses and other small entities. However, the agencies have used interpretive gymnastics, even after Congress thought it closed them with the enactment of SBREFA, to avoid conducting the required analyses and identifying less burdensome alternatives that would achieve their statutory objectives.

I look forward to working with the witnesses and others on legislation to close those loopholes, and I will now recognize the Ranking Member, the gentlelady from New York, for her opening statement.

[Chairman Manzullo's statement may be found in the appendix.]

Ms. VELÁZQUEZ. Thank you, Mr. Chairman, and good morning.

Regulatory and paperwork burdens are one of the greatest challenges that confront this nation's small businesses. Firms that employ fewer than 20 workers face an annual regulatory burden of almost $7,000 per employee, a burden nearly 60 percent greater than that of corporate America.

Today, many times small business owners do not have a legal department or a regulatory expert to help them understand and comply with federal rules. The hurdles created by regulations can mean the difference between a business sinking or surviving.

In an effort to level the playing field for small businesses, Congress enacted the Regulatory Flexibility Act in 1980. This groundbreaking legislation mandated that federal agencies consider the impact their regulatory proposals would have on small businesses. This law was created to insure that such proposals did not have unintentional and detrimental effects on small firms.

While the Reg Flex Act was the first step in providing some fairness in the regulatory process, much more still needs to be done. Reg Flex was able to put small business concerns on the radar

screen of federal agencies, but compliance has proven both uneven and elusive.

In 1996, President Clinton signed the Small Business Regulatory Enforcement Fairness Act, also known as SBREFA. This raised the regulatory stakes for agencies by putting legal teeth into the regulatory fairness process by allowing small businesses adversely affected by a proposed rule to challenge it in the courts. SBREFA has gone a long way to improving the regulatory process and has helped to protect the interests of small business.

I believe that today it is an appropriate time to go back and reexamine where we are in terms of the state of small business regulations. What we are now seeing is very much a mixed bag. Some agencies actively engage small business in the regulatory process, while others like the FCC, which is probably responsible for the most regulations affecting small businesses, have one of the worst track records for leaving small business out.

Another agency that has an inconsistent track record is the Center for Medicare and Medicaid Services. Today, CMS came out with its prescription drug card proposal. This rule is a perfect example of an agency's failure to comply with the law. It also demonstrates a lack of understanding of the Reg Flex Act and why it exists—to protect small businesses and incorporate their views into the rule making process.

CMS heard from Democrats on the House Small Business Committee who encouraged agency officials to speak to small businesses before they proceeded with the proposal process. Associations that represent small business such as the National Community Pharmacists Association and the National Association of Chain Drug Stores also voiced their concerns to CMS. Still, the agency ignored this request for small business inclusion and pushed forward.

CMS, like other agencies, must realize that Reg Flex and SBREFA were created for a reason. They serve an important purpose—to protect the interests of small businesses and to insure that they are not negatively affected or overly burdened by an agency rule that is in the pipeline.

The regulatory process is a complex and sometimes burdensome undertaking, but regulations can also be fair, balanced and provide necessary protections for our health, welfare and our environment. Federal agencies must work to determine the impact their regulations have on small businesses, explore the regulatory options for reducing that impact and be held accountable for the final choice of a regulatory approach.

Thank you, Mr. Chairman.

Chairman MANZULLO. Thank you.

Our first witness is the Honorable Tom Sullivan, Chief Counsel for Advocacy. Tom was with NFIB for years and has a great background. He has been on the job officially for about three weeks now. Is that correct, Tom? We look forward to your testimony. I think you know how the lights work. At five minutes we would like to have you have your testimony concluded.

All of the statements of the witnesses will be made part of the record, along with any statements of Members of Congress. Any in the audience that wish to put a statement in the record, if you

want to do so you have ten days to do so, but try to keep it under two pages.

Mr. Sullivan.

**STATEMENT OF THE HONORABLE THOMAS SULLIVAN, CHIEF COUNSEL FOR ADVOCACY, UNITED STATES SMALL BUSINESS ADMINISTRATION**

Mr. SULLIVAN. Good morning, Mr. Chairman. Chairman Manzullo, Ranking Member Velázquez, Members of the Committee, thank you for the opportunity to appear before you today to discuss the Small Business Regulatory Enforcement Fairness Act, SBREFA. I am pleased that my complete written statement is already accepted into the record, and I will briefly summarize the key points.

First, let me tell you what an honor and privilege it is for me to have been appointed Chief Counsel by President Bush. This is my first statement before a congressional Committee since my confirmation, and I am grateful for the tremendous support I have already had from this Committee, from other Members of Congress, from Administrator Barreto, from the staff in the Office of Advocacy, from government leaders and from our many small business organization and trade association friends.

SBREFA has made a difference, a big difference, both in opening the rule making process to greater scrutiny and in reducing unduly burdensome mandates on small businesses. We estimate that during fiscal years 1998 through 2001, modifications to federal regulatory proposals in response in part to Advocacy's recommendations resulted in cost savings totaling more than $16.4 billion or more than $4.1 billion per year on average.

I mention in my written statement that SBREFA is helping change the regulatory culture in at least some government agencies. It is important to note this morning, however, that this cultural change is by no means uniform among all regulatory agencies. One of the largest hurdles to be overcome remains resistance in some agencies to the concept that less burdensome regulatory alternatives may be equally effective in achieving their public policy objectives. Other agencies simply have not internalized their Reg Flex responsibilities and do not seem to view its requirements as germane to their mission.

I would like to offer a few remarks on Section 212 of SBREFA, which requires agencies to publish compliance guides to assist small entities in understanding their regulations. Frankly, I find it embarrassing that government agencies must be forced to publish guides to help small businesses comply with their rules, but recognizing that Section 212 is not working as intended, Advocacy wants to work with this Committee and Congress and regulatory agencies to make sure this problem is resolved. If additional legislation is needed to clarify Congress' intent, an annual report to this Committee from each agency with respect to its compliance guide efforts might be productive.

In conclusion, I would like to refocus our discussion on why we have SBREFA, the Reg Flex Act or why, for that matter, we have an Office of Advocacy. Why do we go to all this trouble? Perhaps the best answer is the simplest. The bedrock importance of small

business to our economy, both at the national and community levels.

Small business is and has historically been our nation's primary source of innovation, job creation and productivity. It has led us out of recessions and economic downturns. Small firms have provided tremendous economic empowerment opportunities for women and minority entrepreneurs. Small employers, as this Committee well knows, spend more than $1.5 trillion on their payroll.

All these are good reasons for us to work to insure a healthy and competitive small business sector. Small business wants a level playing field. The cost of regulation is a good case in point. Our recent study on this subject disclosed that the cost of federal regulation to firms with fewer than 20 employees was almost $7,000 per employee. Congresswoman Velázquez mentioned in her opening statement that that is more than 60 percent higher than their larger business counterparts. This disproportionate burden is a huge impediment to small business realizing its full potential.

Although small business has done a remarkable job in coping with this problem, it is tantalizing to think of what productive and innovative energies would be unleashed if we could reduce this burden even further. That is why we do what we do at Advocacy, and that is why Congress wrote the Regulatory Flexibility Act and the Small Business Regulatory Enforcement Fairness Act—to help small business realize their full potential.

I pledge the full cooperation and assistance of the Office of Advocacy in your deliberations of how best to accomplish this worthy goal.

[Mr. Sullivan's statement may be found in the appendix.]

Chairman MANZULLO. I want to give you one more minute, Tom. Could you read into the record your statement talking about CMS starting on page 10?

We are going to have CMS accountability round three coming up. I want everybody to realize that it is still HCFA as far as I am concerned. You do not change an old horse by giving it a new name. Read in there the continuous abuses that are carried on by CMS.

Mr. SULLIVAN. I would be happy to.

Chairman MANZULLO. I hope someone from CMS can hear this and take this back and let them know it is HCFA as far as I am concerned.

Mr. SULLIVAN. I would be happy to, Mr. Chairman. In my written statement, as the Chairman mentioned, I did mention some agencies that have been less accommodating in their compliance with the Reg Flex Act.

CMS is one of those agencies. An advisory committee on regulatory reform has been formed at the Department of Health and Human Services to identify overly burdensome Medicare regulations promulgated by that agency. This is a positive development, but, frankly, a number of these overly burdensome regulations would not be on the books today if CMS had complied with the Reg Flex Act.

For example, in the case of the Medicare reimbursement methodology for portable x-ray providers, CMS has ignored Advocacy's comments and recommendations since 1998. Advocacy commented on the proposed rule, indicating that the overall reduction in Medi-

care reimbursement for portable x-ray services amounted to as much as 54 percent in some cases and that the agency had not prepared an adequate analysis of the impact on small entities.

GAO also published a report in 1998 acknowledging, with some uncertainty, that portable x-ray providers may not be able to continue supplying services as a result of the reduced payments.

CMS, formerly known as HCFA, published a final rule in this case which essentially ignored the comments of Advocacy and industry, so Advocacy submitted additional comments indicating that, under the Regulatory Flexibility Act, CMS was required to address comments received in response to the initial regulatory flexibility analysis.

Eventually, a transition period for implementation was allowed after a post final rule discovery that a transition payment provision had been left out. This "fix" still did not address the overall issue of the need for an impact analysis.

In December, 2001, Advocacy was again forced to comment on a new payment regulation, this time a direct final rule where the agency waived the Administrative Procedure Act requirement for a notice of proposed rule making. Once again, CMS failed to assess adequately the impact of the rule on small portable x-ray providers.

Chairman MANZULLO. Thank you, Tom. I appreciate that.

The next witness is Victor is it Rezendes?

Mr. REZENDES. Yes. That is correct.

Chairman MANZULLO. He is the managing director of the U.S. GAO, Strategic Issues Team. I look forward to your testimony.

**STATEMENT OF VICTOR REZENDES, MANAGING DIRECTOR, STRATEGIC ISSUES TEAM, GENERAL ACCOUNTING OFFICE**

Mr. REZENDES. Thank you, Mr. Chairman. It is a pleasure to be here today to discuss both the——

Chairman MANZULLO. Could you put the mike a little bit closer? You might have to bring it up.

Mr. REZENDES. Sure. How is that? Is that better?

Chairman MANZULLO. Push it up like this. Let us try that.

Mr. REZENDES. Okay. Great.

Although the Regulatory Flexibility Act and SBREFA have clearly affected how agencies regulate, their full promise has yet to be realized. Over the last decade, we have called for greater clarity to help agencies implement these laws.

The questions that remain unanswered are numerous. For example, should the economic impact of a rule be measured in terms of compliance costs as a percentage of annual revenues or work hours? If so, is three percent of revenues or one percent of revenues or work hours the appropriate measure?

These questions are not simply a matter of administrative conjecture. They go to the heart of determining the regulatory relief for small businesses. This lack of clarity is clearly illustrated in EPA's current guidance that provides the substantial discretion, but also provides numerical guidelines for making these decisions.

These numerical guidelines establish what appears to be to us a high threshold for what constitutes a significant impact. The rule could theoretically impose $10,000 in compliance costs on 10,000 small businesses, but still be presumed not to have a significant

impact as long as those costs do not represent one percent of the revenues of those firms.

We have issued several other reports over the decade that reached similar conclusions. In 1991, we examined the implementation of the Regulatory Flexibility Act as it related to small government jurisdictions and concluded that each of the agencies that we reviewed at that time had a different interpretation of the Act.

In 1994, we examined 12 years of annual reports prepared by SBA's Office of Counsel for Advocacy and said the reports indicated variable compliance. In 1998, we said that the lack of clarity regarding whether EPA should have convened panels on two proposed rules was traceable to the lack of agreed upon government wide criteria as to when a rule had a significant impact. In 1999, we noted a similar lack of clarity on the requirement that agencies review their existing rules that have significant impact imposed over the last ten years of their promulgation.

Last year, we issued two additional reports. One examined the requirement that agencies establish a policy for the reduction of civil penalties on small entities. All of the agencies' penalty relief policies that we reviewed were within the discretion that Congress provided, but the policies varied considerably. Some covered only a portion of the agency's enforcement actions, and some provided small entities with no greater relief than they did to larger firms.

The last report we just issued examined the requirement that the agencies' publish a small entity compliance guide for any rule that requires a final regulatory flexibility analysis. We concluded that the requirement did not have much of an impact, and implementation also varied across the agencies. Some of the requirement's ineffectiveness and inconsistency is traceable to a definitional problem. Other problems were traceable to the discretion provided under the Act. Under the statute, agencies can designate a previously published document as its small entity compliance guide or develop and publish a guide with no input from the small entities years after the rule takes effect.

The bottom line, Mr. Chairman, is that these statutes provide agencies with a great degree of discretion. While flexibility allows agencies to address unique situations, it also results in wide variation between agencies and in some cases within agencies.

If Congress is unhappy with how these Acts are being implemented, it needs to either amend the underlying statute to provide greater clarity or give some other entity the authority to issue guidance on these issues.

Thank you, Mr. Chairman.

[Mr. Rezendes' statement may be found in the appendix.]

Chairman MANZULLO. We have a general vote, so I think we are going to break now. We will be back here in a couple minutes, probably about ten or 15 minutes.

[Recess.]

Chairman MANZULLO. Our next witness is David Frulla from Brand & Frulla. We look forward to your testimony.

You might want to put the mike a little bit closer to you.

**STATEMENT OF DAVID FRULLA, ESQUIRE, BRAND & FRULLA**

Mr. FRULLA. Thank you, Chairman Manzullo. The Ranking Member is not yet back, but I do appreciate the opportunity to address the Members of the Committee today.

I am with a ten person law firm in Washington, D.C. We have handled I think nine pieces of RFA litigation since the law was changed against the Commerce Department, EPA, HCFA and the Army Corps of Engineers. We have won some, lost some, settled some, which I would like to talk about briefly, and had some stayed, some pieces of litigation stayed while efforts to work out more flexible solutions have been undertaken with some success. We also have some litigation still in play, including for the National Federation of Independent Business Legal Foundation where Mr. Sullivan just left.

What I would like to do today is three things. First, give you a little bit of a history on a success story under SBREFA; second, to address briefly some problems that we still discern; and, third, to offer some concrete solutions from a litigator's perspective. They may not be broad reaching policy suggestions necessarily, but they are things that we think are discrete and achievable and could help those that have to litigate in the Regulatory Flexibility Act forum.

First on the success story briefly. We represented in one of the Reg Flex cases that we undertook a coalition of commercial shark fishermen from the Atlantic Ocean and the Gulf of Mexico. Smaller businesses you could not imagine. We brought a broad ranging challenge to the scientific bases for quota reductions they faced. The National Marine Fisheries Service had also stubbornly insisted that a 50 percent quota reduction would not have a significant impact on a substantial number of small businesses. They were all small businesses, and they were all subject to a 50 percent cut.

The Judge did not necessarily understand fully the science. He did understand the Reg Flex part. There were a series of Orders issued. Finally, three years later, the case was settled. Part of the settlement included a stay of the most draconian levels of quota cuts, coupled with an independent review of the science that was used to justify some of the further quota reductions.

The good news I can report is that the independent review of the science showed that the underpinnings for these further quota reductions was not sufficient to support them. That is good news because it hopefully means that we can start on a more constructive regulatory track for these clients. We also received in settlement a measure of our attorneys' fees, which was also much appreciated.

I would like to turn now quickly to some of the ways that agencies still attempt to get around the Reg Flex Act. Some claim that binding actions do not represent regulations. We still see from time to time inadequate certifications of no significant impact. Agencies do still claim that their statutes do not provide them any flexibility to consider constructive alternatives. Sometimes agencies will state that the regulations do not directly impact small businesses. Sometimes they structure their regulations that way so they can avoid Reg Flex.

Interestingly, we are seeing that one of the defenses now is that agencies will dump a whole lot of economic information into the record and not analyze it, which makes it pretty much impen-

etrable for the judge. The judge says well, if there is that much information there must be a kernel of analysis in there somewhere, so we do face that. Sometimes, finally, agencies do not have sufficient information or resources and fail to collect it. For that reason as well, the Reg Flex analysis of impact and, more importantly, of alternatives can fall short.

I would like to offer some suggestions in my final time. Jere Glover, who was the former Chief Counsel of Advocacy who has joined our firm, warned me that I should not tell you how to fix it perfectly because neither he nor I are ready to retire yet. Here are some suggestions.

We should extend the successful SBREFA panel process to other agencies. One that I am familiar with is the National Marine Fisheries Service. It is a small segment of the Commerce Department, but the people that it regulates are almost all small entities, and the profusion of regulations is pretty intense.

We think it would be important, and again these are quite technical, sort of litigator perspectives, to clarify the applicable standards of review for SBREFA litigation. On questions of whether the Reg Flex Act applies, that should be considered by the Court as a matter of law, for instance. Agency analyses on economic impacts and alternatives could then be considered under the arbitrary and capricious standard.

The Regulatory Flexibility Act should be clarified either through an amendment or direct Committee language to impose an affirmative obligation on an agency to base its Reg Flex analyses on reasonably adequate economic and social information. We can discern that obligation from NEPA under the case law. We believe that there is even a stronger reason for it under Reg Flex, which is set forth in my testimony. The Reg Flex Act should state that courts should defer to Mr. Sullivan and his staff in terms of legal questions relating to the Reg Flex Act and its application to a rule or an agency. We would like to see the attorneys' fees provisions addressed under the Equal Access to Justice Act, and, finally, you should continue to fund the Office of Advocacy for the great work that it does.

Thank you, sir.

[Mr. Frulla's statement may be found in the appendix.]

Chairman MANZULLO. Thank you.

We are going to be working on some amendments to RFA and SBREFA. Mr. Frulla, I would like you to be in contact with Barry Pineles here. The SBA Ombudsman is in the room back there somewhere, but work with him. There he is. Thank you for coming.

Work with the ombudsman and obviously with Tom Sullivan and with staff on both sides of the aisle here. Let us start working on some remedial legislation and go get them.

Mr. FRULLA. Thank you, sir.

Chairman MANZULLO. Thank you for your testimony.

The next witness will be Norman Goldhecht. He is the vice-president of Diagnostic Health Systems located in Lakewood, New Jersey. We look forward to your testimony.

**STATEMENT OF NORMAN GOLDHECHT, REGULATORY CHAIRMAN, NATIONAL ASSOCIATION OF PORTABLE X–RAY PROVIDERS**

Mr. GOLDHECHT. Thank you, Chairman Manzullo, Congresswoman Velázquez and Committee Members, for the opportunity to testify before you again today. My name is Norman Goldhecht, and I appear before you today as the regulatory chairman of the NAPXP. I am also a former owner of a portable x-ray company in New Jersey who recently sold his company after 16 years largely because I felt that the federal rule making was dooming our industry, and I could no longer afford to remain in business.

Selling my family owned business was particularly difficult for me and my partner, who is my brother-in-law, because we had both hoped to pass our company along to our children. Sadly, we realized that if we remained in this business we would not pass along the legacy of a proud company, but the burden of an impossible situation in which quality patient care and service was not feasible under increasingly onerous federal rule making.

I have been asked to provide the perspective of our small business dominated industry regarding CMS compliance with RFA. We agree with the SBA Office of Advocacy in finding that CMS has failed to comply for over three years relative to the rule making process for our industry. When asked by the press to comment on the most recent plea by Advocacy to obey this law, CMS graciously offered to consider complying next year.

The question before us is does the RFA work? One federal agency, the SBA, informs another, CMS, that they are in violation of federal statute. This is not a situation where our industry or our attorneys offered this analysis. This is the SBA Office of Advocacy. CMS refuses to even respond to the SBA.

When we ask this Committee or the SBA what we can do to force CMS to obey the law, we are told we can sue. Sue the federal government because as small businesses we are being driven into extinction through illegal rule making and are unable to survive financially. Sue the federal government because they refuse to respond to a federal agency of jurisdiction.

If we sue under RFA, we cannot receive any damages if we win. All we can do is force CMS to obey the law. We might consider this because we are small businesses who are facing bankruptcy over illegal rule making. Rather than pay our employees, our creditors or ourselves, we might pay lawyers to sue the federal government to force them to obey the law. We are informed that we might receive funds to reimburse our legal costs of up to $125 an hour.

Let me see if I have this straight. One federal agency has confirmed that another federal agency is breaking the law. The offending agency refuses to comply with the law in spite of clear counsel from the agency charged with oversight opinion that the offending agency is in violation. SBA cannot bring suit. It is the job of small businesses who are, because of law breaking, going bankrupt to bring this to the court and hope that they can compel the offending agency to obey the law at their own expense, minus what one pays a plumber to come fix a leak on a Saturday and no compensation for the harm done to small businesses.

The question before us is does RFA work? Mr. Chairman, I do not mean to be disrespectful, but my industry has cried foul for years and received steadily worse treatment for our trouble. We now have what to a normal citizen, a taxpayer, a Medicare patient or a constituent, would appear to be an open and shut case. The SBA says we are right, and CMS is wrong.

That and a few hundred thousand dollars over a few years to sue the government might force CMS to agree to what they should have done in the first place. No more. The reality is we will not be around to see the case through because the rule making in question is bankrupting us.

The issue before us today is agency compliance with the RFA. I believe that our experience provides a textbook example of why this admirable law deserves the teeth required to allow it to achieve the intent this Committee and the Congress intended.

If our situation does not frustrate and anger this Committee as it frustrates and angers us, then your work on this matter is done. If this Committee feels that the small businesses served by that law at best allows them to take a federal agency to court to force compliance with no hope of compensation for damage, let alone the true cost of acting as a government watchdog, then your work is done. However, if this Committee is outraged by the callous refusal of CMS to obey the law and respond appropriately to Congress, the Executive Branch and the public in this instance, then I am afraid that your work is not complete.

If this Committee does not believe that small businesses should have to sue to force agency compliance, particularly when Congress and the SBA are in accord regarding the lack of agency compliance, then we are here to work with you to strengthen the law and protect American small businesses from federal agency abuse.

Our case against CMS does provide an illustration as to how the current RFA might be strengthened. We begin with the premise that by definition small businesses are those least able to pursue legal remedies against federal agencies and the courts. This is all the more true when the law does not allow for any damages, which might offer incentive for private small businesses to hold agencies accountable through suit.

As we are discussing a suit that is aimed solely at compelling the agency to comply with the law, the time and money spent pursuing such a suit should not be a further deterrent against wronged parties seeking justice. At the most obvious level, if the SBA Office of Advocacy finds a violation there should be some level of compliance required or penalty assessed short of legal action in the court of law.

The Office of Inspector General for each agency serves as a watchdog for that agency. Could the IG be employed to force compliance from an agency? At the very least, we must find a way to enforce the existing law, if not improve upon it, by expanding the Office of Advocacy's jurisdiction or otherwise placing agencies——

Chairman MANZULLO. How are you doing on time, Norm? Your red light is on.

Mr. GOLDHECHT. Summing up.

Chairman MANZULLO. Okay.

Mr. GOLDHECHT [continuing]. On notice that compliance will not be tolerated.

In summation, I must stress that you represent our last and best hope for fairness. Without your assistance, our services will continue to vanish, and the elderly nursing home patients will be denied our care. The most damaging effect, however, may not be to small businesses and patients alone, but to all of our nation's small businesses that count on regulatory fairness and believe that laws like the RFA protect them.

The NAPXP stands ready to assist the Committee in any way in devising a workable solution to this serious problem.

Chairman MANZULLO. I am going to have to cut you off.

Mr. GOLDHECHT. That is fine.

[Mr. Goldhecht's statement may be found in the appendix.]

Chairman MANZULLO. Thank you.

Our next witness is Damon Dozier, who is the director of Government and Public Affairs of the National Small Business United.

You know what the red light means?

Mr. DOZIER. Yes, I do, Mr. Chairman.

Chairman MANZULLO. You bet. Thank you, Damon.

**STATEMENT OF DAMON DOZIER, DIRECTOR, GOVERNMENT AND PUBLIC AFFAIRS, NATIONAL SMALL BUSINESS UNITED**

Mr. DOZIER. My name is Damon Dozier, and I serve as the director of Government and Public Affairs for National Small Business United, which is the nation's oldest bipartisan advocate for small business. NSBU represents 65,000 small businesses in all 50 states.

The goal of our organization is to protect and promote our members and all of our nation's small businesses before Congress and the Administration. We at NSBU work towards this goal by working with Congress, the media, our direct members, affiliates and a national audience as a small business advocacy organization.

I am pleased to appear before the Committee to share my views concerning the Reg Flex Act of 1980, as amended by SBREFA. I would like to add that my views expressed today are based on my direct experience in working with the RFA as a former Assistant Advocate for Environmental Policy in the Office of Advocacy in the Small Business Administration and as staff with regulatory affairs responsibilities for the Senate Committee on Small Business and Entrepreneurship. These views do not necessarily reflect those of NSBU.

The bulk of my experience with the RFA has centered on monitoring Environmental Protection Agency compliance with the law, which, during my tenure at the Office of Advocacy, included insuring that proposed rules were properly certified as not having a significant economic impact on a substantial number of small entities. My duties also included, among other things, reviewing federal agency initial and final Regulatory Flexibility Act analyses, filing comment letters on proposed and final rules and, of course, providing assistance to the Chief Counsel in his role as one of the three members of the SBREFA panel.

It has been my experience that, comparatively speaking, the EPA has been particularly active in its small entity outreach efforts in

relation to the SBREFA panel process and has made some tremendous steps over the past six years in insuring that the small entity representatives participating in such process have enough quality data and information to make educated comments regarding rules and development.

As of March 20, 2002, the agency will have completed 25 SBREFA panels. While completion of SBREFA panels is not and should not be the only standard by which RFA compliance is measured, the record bears mentioning nonetheless.

For most of its major rule makings that affect small business concerns, the agency has done adequate outreach. Through the exceptional efforts of the Small Business ombudsman, Karen Brown, and the Small Business advocacy chair, Thomas Kelly, the agency has put in place the right mechanisms to hear from small business. A level of involvement, as we have heard here today, is desperately needed at other federal agencies.

However, when I started at Advocacy in 1996, the SBREFA law was very new, and it seemed that no federal agency was exactly sure how to comply with the non-panel related provisions of SBREFA and were not, quite frankly, very motivated to learn. Six years later, this still seems to be the case. In my opinion, the RFA, and later SBREFA, were desperately needed because federal agencies were refusing to do adequate outreach, in most cases any outreach at all, to small firms.

While one of the issues to be addressed at this hearing includes perhaps adding additional agencies to the SBREFA panel process, an option that I enthusiastically support, the problem of the lack of outreach will still remain no matter how many are added unless agencies are forced to change the belief that they can get away with simply refusing to comply with the law.

There is more to SBREFA than the panel process. Just a few short months ago, the General Accounting Office, in a report entitled Regulatory Reform: Compliance Guide Requirement has had Little Effect on Agency Practices, found that six federal agencies, including Commerce, EPA, FCC and SEC failed to produce small business guidance documents as required by SBREFA, as required by law.

GAO found that Section 212 of SBREFA has had little impact, and its implementation has varied across and sometimes within the agencies. Most alarmingly, not only did the six agencies fail to provide compliance guides; some of the documents provided by the agencies appeared to have been identified as small entity compliance guides only in response to our inquiry. As Mr. Sullivan said, that is truly an embarrassment.

The findings of the GAO seem to be a microcosm for a larger problem. Most federal agencies are simply not committed to agency outreach and thus fail to comply with most of the RFA's provisions. If the agencies cited in the GAO report had been committed to doing outreach to small firms and small business associations, even if the agency found that a particular rule failed the significant and substantial test, the small business community could have provided pressure on these agencies to comply with 212 or at least make them aware that the provision existed.

I see that my time is going. I do note that in my testimony I suggest specific fixes to the RFA law, and I would be happy to answer any questions that you may have.

[Mr. Dozier's statement may be found in the appendix.]

Chairman MANZULLO. We obviously want you to be part of the input on the amendments, et cetera, Damon, when we start working on that.

Our next witness is Jeff Gibson, director of Support Operations for the Halotron Division of American Pacific Corporation. We look forward to your testimony.

**STATEMENT OF JEFFREY GIBSON, DIRECTOR OF SUPPORT OPERATIONS, HALOTRON DIVISION, AMERICAN PACIFIC CORPORATION, NATIONAL ASSOCIATION OF MANUFACTURERS**

Mr. GIBSON. Thank you, Mr. Chairman and the Committee, for the opportunity to testify.

My name is Jeff Gibson. I am the director of Support Operations for the Halotron Division of American Pacific Corporation. I am here today representing the National Association of Manufacturers and its 10,000 small and medium sized companies. I welcome the opportunity to testify before you today on the necessity for SBREFA compliance by federal agencies.

As a small business, we are reminded daily of the onerous and unintended effects regulations can have on our and other small businesses. While my testimony will focus on one particular regulation that has a direct impact on our company, I am submitting for the record a list of regulations, both proposed and final, that affect small manufacturers.

American Pacific Corporation employs 220 people in Utah and Nevada. We manufacture specialty chemicals, and our sole manufacturing facility is located in Cedar City, Utah. Since 1958, we have manufactured chemicals that are used in the space shuttle and DOD solid rocket motor programs, and in the past decade we have diversified into the air bag and fire protection market.

During the past three years, we have spent an inordinate amount of time and an extraordinary amount of money to oppose a proposed rule to establish an allocation system for controlling hydro chlorofluorocarbons or HCFC production import and export in the U.S. This proposed EPA rule would negatively impact our company and many other NAM small businesses.

This rule proposes an allocation system for a key ingredient in our fire protection chemical, which is also widely used in other products from foam insulation to commercial chillers. We believe that the EPA has not done due diligence in weighing the negative impact to small businesses against the potential minimal environmental gain.

In 1992, realizing the need for alternatives to ozone depleting fire suppression chemicals, we entered the fire extinguisher business. Our company developed Halotron I, an EPA approved replacement for halon 1211. Halon 1211 is a potent ozone depleter that is no longer produced in the United States. Alternatives to this substance are in great demand.

Our product is the most widely approved and used clean agent for portable fire extinguishers in the U.S. However, our survivability is in jeopardy. The promulgation of this rule would benefit the 27 producers and importers of HCFCs by establishing an EPA created commodity market and would hurt many small businesses through increased costs due to contrived shortages. These small businesses should not be punished for following EPA rules and bringing these innovative and more environmentally friendly products to market.

It took millions of dollars to research, develop and test our product and many years to meet all the criteria mandated by government agencies. We were finally able to bring this product to market in 1996, and we are starting to see a return on our investment.

At the time the EPA prepared to initiate this rule four years ago, the consumption of HCFCs was 92 percent of the Montreal Protocol regulated cap. The EPA was concerned that the U.S. would exceed its agreed upon maximum level. Subsequently, the EPA conducted stakeholder meetings on a potential new rule to allocate HCFC rights. Initially it was represented by EPA to be a placeholder that would not go into effect unless U.S. consumption did near the cap. Should that happen, a trigger mechanism would be invoked, and the rule would go into effect. If the threshold was not reached, there would be no rule.

In 1999, the EPA released an advance noticed of proposed rule making to establish the allocation system to control the production, import and export HCFCs in the United States. This rule was reproposed and released for public comment on July 20, 2001. As this rule has evolved over the years, the HCFC consumption trend has actually gone down instead of up as EPA has anticipated. The threat of exceeding the cap is gone. Nonetheless, the trigger mechanism has been removed, and the EPA continues to push for this rule to be enacted immediately.

HCFC consumption is down to 83.75 percent and will decrease once HCFC 141b is no longer produced and imported at the end of 2003 as mandated by the Protocol. While we support compliance with the Montreal Protocol, this rule as written is patently anticompetitive, ill conceived, unnecessary and disastrous to our and many other small businesses.

The regulation, which will have little environmental gain, will raise the price of HCFCs, creating a new bureaucracy of EPA reporting requirements and establishing a new commodity market limited to only 27 companies that are slated to receive allocations. Small businesses are bound to suffer price increases due to contrived shortages and lack of competition at the hands of a government created oligopoly.

In the preamble of the rule, EPA stated that there are no economic effects to a significant number of small businesses, yet they do not know this because they have not conducted a regulatory flexibility analysis to determine if small businesses are affected.

Chairman MANZULLO. How are you doing on time there, Jeff?

Mr. GIBSON. I will wrap up.

The Small Business Administration has worked with us on the issue for several months. They have acted as a liaison between us and EPA to find a solution. They have done an admirable job for

our and other businesses' concerns. Unfortunately, the EPA persists in its quest to see the rule come to fruition no matter what the cost, no matter what the ancillary effects, no matter that the rule is no longer necessary.

Small businesses are important to this country's economy, job creation and innovation. These regulations have a disproportionate impact on small businesses. The intent of SBREFA was to mandate the federal agencies and thoroughly analyze——

Chairman MANZULLO. That is a good point to end on that sentence.

Mr. GIBSON. Okay.

[Mr. Gibson's statement may be found in the appendix.]

Chairman MANZULLO. Thank you very much. I appreciate your testimony. I do not want the bell to go off here.

You know, there is another outreach that we should add to the tools, and that is the outreach of this Committee. We reached out to the Veterans Administration when they went into the commercial laundry business and threatened to destroy 100 jobs in my district. We like to do pairs here. We like to sit the aggrieved party next to the government bureaucrat that is responsible for that nonsense. VA went out of business that day in commercial laundry.

Right next to them we had an aggrieved owner of a campground at Denali National Park when the National Park Service decided to go into the hotel business. We matched the person in charge from the National Park Service, and all of a sudden they decided not to go into the hotel business.

What we are going to do is this, especially with CMS and the portable x-ray people. We have Mr. Scully here, and we will have accountability time, round three, with HCFA. The other agencies that are beating up on the small businesses, it is accountability time, folks.

I have the gavel. I have the power to subpoena. We may have a hearing that will start at 8:00 on a Monday morning and run all night until we get every single small business that is being screwed in this nation up to this table with the bureaucrats in Washington sitting on it.

Tom, if you could start working on that list of potential people, we will load this place up. I will get the biggest room here, and we will go all night and all weekend until these agencies come into compliance. We had to bring the SBA here along with OIRA. They sat around for six months on the standard for travel agents. It took 24 hours to get the new regulation in. OIRA is coming out with its ruling tomorrow that will open that up.

I am prepared to do that, and I want that message to go deep. If there are any bureaucrats in here representing any agencies, watch out. My patience is at a total end, and I am not going to tolerate businesses such as what happened to you, Norm.

My mother was a victim of what HCFA did. She had a leg amputated. From time to time, when she was at the assisted living center the portable x-ray guy would stop by, take her x-ray and one time found out that she had pneumonia and had to be treated for that. Well, he went out of business. Do you know what happened next time? They had to call an ambulance. They put her in an ambulance and took her to the hospital to perform an x-ray. That is

shameful that HCFA would waste money like that. Somebody needs to be at this table, perhaps sworn under oath, as to why HCFA is wasting money like that. It is accountability time.

Barry, would you work with Tom Sullivan?

Mr. PINELES. I always do.

Chairman MANZULLO. And also with the ombudsman and anybody else out there. You want to have a pair. The pair will be the aggrieved small business person and the key person in government. We will set it up, and we will go at it big time. Big time. No one will get away from the room until that issue is resolved.

Well, Nydia, why do you not lead off the questions?

Ms. VELÁZQUEZ. You do not want to ask questions?

Chairman MANZULLO. No. I made a statement here.

Ms. VELÁZQUEZ. Okay. Mr. Rezendes, does SBA have the authority to issue regulations to federal agencies for the implementation of the procedural provisions of the RFA?

Mr. REZENDES. We think that they have the authority to issue clarifying guidance to them. I do not think there is a prohibition from them doing that, although we have advocated since they have not been too enthusiastic to do that that Congress may want to direct them or some other agency to do that.

Ms. VELÁZQUEZ. Okay. Let me ask you. Could the Administration somehow direct SBA to institute these regulations?

Mr. REZENDES. Yes. There is really no question about that. I think, you know, having the Office of Advocacy having to file a friend of the court brief on federal agency compliance with the federal rule in a federal court does not seem the easiest way to solve this problem since this is all at the federal level. We are talking about federal agencies implementing the federal law on themselves.

Basically, you know, greater clarity from SBA and having OMB back that up and having some kind of oversight of the agencies in terms of reporting and insuring compliance would seem a much easier way to go about doing this.

Ms. VELÁZQUEZ. Mr. Sullivan, do you agree or disagree?

Mr. SULLIVAN. I agree that we have an opportunity to work with government agencies to actually make sure that they are doing what they are supposed to do under the Regulatory Flexibility Act.

Elaborating on Mr. Rezendes' comment on guidance to agencies, we would welcome this Committee's help to impress upon government agencies that that guidance already exists. Not only does that guidance exist, but the Office of Advocacy has a training module to actually help government agency rule writers comply with their requirements under the Reg Flex Act. We want to help agencies learn their requirements and do it correctly.

Any help which this Committee can provide to impress upon government agencies the need to take Reg Flex training seriously would be greatly appreciated.

Ms. VELÁZQUEZ. I guess that we will spend the whole year here meeting with federal agencies.

Mr. Rezendes, you have testified that defining a significant small business impact lies at the heart of the RFA. What I assert here is this. The heart of the Regulatory Flexibility Act lies in its flexibility.

Agencies also have to tailor their regulatory alternatives and regulatory relief to their own regulations. Can you comment on what we might be losing in regards to flexibility during the process of attempting to further define the terms of the Reg Flex Act?

Mr. REZENDES. Yes. What I want to clarify is we are not looking for a dogmatic, simple, clear definition that everybody has to comply with. We like flexibility. It provides the agencies with the authority to deal with the situation at hand, which is good. I think, you know, for example, at SBA they define what is a small business based on almost the industry. It is not necessarily one definition fits all, so that is really good.

What we have seen is wide variation and wide discretion on the part of the agencies in how they have interpreted this Act. Obviously the fact that the Advocacy Office had to file friend of court briefs on this is clear evidence that there is probably an exaggerated use of this discretion. What is needed is some kind of enforcement mechanism, although I want to emphasize that this is all within the Executive Branch. I mean, OMB working with the SBA could easily insure that this happens.

Ms. VELÁZQUEZ. Mr. Sullivan, do you believe that SBA should be given the authority to regulate agency activity regarding certain aspects of the RFA and SBREFA?

Mr. SULLIVAN. I believe that the Office of Advocacy should be used as a resource to provide consistency in agency compliance with the Regulatory Flexibility Act. If that means it has to be done through regulation, then I am willing to work with the Committee, and, as Mr. Rezendes mentioned, Dr. John Graham's office and others, to go that route.

I should point out to the Committee, because some of our federal partners are represented in the room today, that there is some movement on consistency and compliance with the Reg Flex Act. For instance, the Department of Labor now has written guidance on how to comply with the Reg Flex Act, and how to comply with the SBREFA panel process. This has been done with the full engagement of our office, as it should be for all the federal agencies.

Ms. VELÁZQUEZ. Mr. Sullivan, if the SBA or Congress begins to fill in the spaces around the RFA terms, we will presumably gain some clarity, but we will also lose some flexibility. Specifically, the SBA Office of Advocacy could lose the power of negotiation. From what I understand, this is why previous Chief Counsels have been reluctant to provide strict guidance.

What will agencies have to engage SBA on if all the provisions of the RFA are specifically defined?

Mr. SULLIVAN. Congresswoman, we have been very concerned in the past, and I continue to be concerned, about imposing a specific set of mandates on how to comply with the Reg Flex Act.

I am encouraged this morning by Mr. Rezendes' comments that we can provide consistency without eliminating the flexibility to comply with the Regulatory Flexibility Act. We are getting there. To the extent that guidance can be consistent to all federal agencies, that will help. For instance, there should be a checklist on what an agency should look at to comply with the Reg Flex Act.

With such tools in place and with the commitment that we see here this morning by this Committee, I think this will be persua-

sive among the regulatory agencies. If further persuasion is still needed, then we would like to work with the Committee to address this problem.

Ms. VELÁZQUEZ. Mr. Sullivan, if you could change one thing about RFA or SBREFA, what would it be?

Mr. SULLIVAN. If the Congresswoman is asking whether the Office of Advocacy needs additional legislative changes, there are discussions about this all the time. Legislation or legislative fixes should be a last option because we prefer to try first to convince the agencies to comply with the Reg Flex Act, using fully the gavel, the subpoena and other resources.

If we do need to change the law, I think that we should explore whether agencies be required to respond to Advocacy's concerns, specifically addressing questions on small business economic analysis early in the regulatory process.

Ms. VELÁZQUEZ. Thank you, Mr. Sullivan.

Mr. Damon Dozier, Section 610 of the Reg Flex Act requires each agency to review all existing rules within ten years of promulgation. Does the lack of 610 entries in recent regulatory agendas seem suspicious to you?

Mr. DOZIER. Absolutely. I cannot think of any 610 review or actually any regulation being changed as a result of 610 review; that is, a ten year old rule now being changed to accurately reflect a substantial economic impact on a substantial number of small entities.

I think that 610 is one of the particular sections of SBREFA that—well, it seems today that all of it has been ignored to some degree, but especially 610. I think agencies have a tough time going back to the coffers, if you will, pulling up the old regulations and actually doing new analyses to find out if they are complying with that provision of the law.

Ms. VELÁZQUEZ. Would you like to see SBREFA amended to make the 610 review process more transparent?

Mr. DOZIER. I would. I think that one of the great things about the law that I think could have helped a lot of these small business people is looking back at things that had been on the books and had been hindering them for some time and then looking again to see if there is any possibility, as Mr. Sullivan said, for flexibility or for review.

A lot of the rules that come out now that are harming small firms are rules that have been on the books for a number of years. It is not just a new rule or a proposed rule. It is rules that have been there for some time.

Ms. VELÁZQUEZ. Thank you.

Mr. Frulla, when you draw a parallel between NEPA and the RFA, your testimony seems to indicate that it would be unreasonable for an agency to promulgate a rule that could be made more flexible for small businesses, yet the foundation of the Regulatory Flexibility Act is that it does not require an agency to adopt the least burdensome regulatory alternative, but simply to examine them.

Could you please explain that further?

Mr. FRULLA. Yes. The distinction that I was attempting to draw is that under NEPA an agency is required to consider a sufficient

array of alternatives. The agency can pick whatever alternative, provided the analysis is complete under NEPA.

We think that the standard is different and probably—not probably, but is stronger under the Regulatory Flexibility Act. We look to some congressional materials and some court decisions where if you go through a regulatory flexibility analysis and you see that there is a better way to build the mousetrap, then it ought to be really hard to say well, we do not want to do that.

By contrast with NEPA, there may be a reason why you would not pick the most environmentally beneficent alternative, but I think you would be awfully hard pressed to explain how or why you would do that under Reg Flex. Does that help?

Ms. VELÁZQUEZ. Thank you.

Chairman MANZULLO. Dr. Christian-Christensen.

Ms. VELÁZQUEZ. Thank you, Mr. Chairman.

Mrs. CHRISTENSEN. I just have a couple of questions. Mr. Chairman, I think before I ask my questions I think on the CMS issues we could use another year.

Chairman MANZULLO. You are a physician. You know well.

Mrs. CHRISTENSEN. Yes. Thanks.

Chairman MANZULLO. We will have another hearing. We shall have another hearing.

Mrs. CHRISTENSEN. Thanks. Attorney Frulla, in the ten cases that you mentioned I think that you filed, I think you said——

Mr. FRULLA. Nine.

Mrs. CHRISTENSEN. Nine or ten. In how many of those cases was an amicus brief filed by the Office of Advocacy?

Mr. FRULLA. They filed in one of our cases on the standard of review. There were two litigations regarding the commercial shark fisheries. They filed an amicus brief on the standard of review because originally the agency was trying to get away even from the arbitrary and capricious standard. The agency or the Justice Department, their lawyers, came back and said we will live with the arbitrary and capricious standard. At that point, the SBA I guess backed off is the right word. That is one case.

We are cognizant of the resource constraints that the agency faces and in many instances has not sort of broken its arm to get in. We could always use help, though.

Mrs. CHRISTENSEN. I was going to ask Attorney Sullivan the next question on the number and types of briefs that the office has filed.

Mr. SULLIVAN. Actually, we used the amicus authority, the full-blown amicus authority, only once, but that does not tell the whole story. The whole story on how Reg Flex litigation is successful includes the exchange of letters and information between government agencies and the Office of Advocacy.

The comment letters that the Office of Advocacy sends to regulatory agencies—let us take CMS, for instance—do set out a record, a public record, that says if an agency is or is not complying with the Reg Flex Act. The open and deliberate exchange of letters and information does help a court decide ultimately on a case's merits, so even though we may not be filing amicus briefs in each and every case, the record that is created and reviewed benefits from the letters and the comment letters coming from the Office of Advocacy.

In fiscal year 2001, there were 47 of those letters that built a critical record of agency decision making coming out of the Office of Advocacy.

Mrs. CHRISTENSEN. Thanks for that. I am still a bit concerned because even when the letters are filed they do not seem to respond. I mean, it does not force any response. I am going to ask another question, but if you want to respond?

Mr. SULLIVAN. I would like to respond because I share your——

Chairman MANZULLO. Could you yield for a second? When you send in your letters, if you do not get a response in 15 days would you contact my staff? We will send a letter to the agency telling them to respond to your letter.

Mr. SULLIVAN. Actually, I would like to respond.

Mrs. CHRISTENSEN. Do you copy us? Do you copy us on the letters?

Mr. SULLIVAN. We are absolutely in contact with this Committee and with the Senate Committee when we do not get responses to our letters.

You know, we talk about the resources that are available to get a point across and whether an agency is complying with the law. This Committee, in its commitment to making sure agencies comply with the law, is a valuable resource. There are also resources represented on this panel with both the attorneys and trade and membership small business organizations.

The collective strength of all those voices pointed in the same direction should accomplish our goals without necessarily going to an extremely expensive and time consuming legal process.

Mrs. CHRISTENSEN. Did you want to say something?

Mr. GOLDHECHT. Yes.

Mrs. CHRISTENSEN. Let me ask this question first, and then you might want to incorporate it in your response.

One of the suggestions is that every agency has an ombudsman and that that would help. In responding to the previous comment, would you also include, and maybe Mr. Gibson would also like to include. Do you think that that is going to be as effective as it needs to be to help move these cases along?

Mr. GOLDHECHT. I cannot particularly comment to that point, but I just wanted to further Mr. Sullivan's point. The letters did go out. In the case of portable x-ray, a letter went out.

Mrs. CHRISTENSEN. I understand.

Mr. GOLDHECHT. I am sitting here four years later waiting for some kind of response. Although we appreciate the efforts that they did, CMS, HCFA, whatever you want to call them, basically ignored it and has no desire, from what I can tell, to listen to what Advocacy has said.

Mrs. CHRISTENSEN. Personally, I know how difficult it is to even think about suing the federal government, so what do you do? It just sits there unless someone has the resources, which most small businesses do not. They are trying to still provide services.

I want to ask probably just one more question, unless someone wants to comment. Mr. Gibson, did you want to comment?

Mr. GIBSON. With regard to the ombudsman, I think it would be helpful in our case because I think in our particular issue it is a matter of communicating with EPA the real issue. I think the re-

sult was an unintended result. There was no intent to have the effect that the proposed rule would have. It is a matter of explaining to them in more detail the market as it is, the situation as it is and the various sectors that would be affected by the proposed rule.

Chairman MANZULLO. Could I go on to Mr. Grucci and then come back to you for a short question?

Mrs. CHRISTENSEN. It is a short one.

Chairman MANZULLO. Go ahead. Go ahead. I do not know when the bell is going to go off.

Mrs. CHRISTENSEN. It follows up on what Mr. Gibson said.

Mr. Dozier, on page 8 you were talking about one of the panels that you worked on. There was a whole lot of data and economic information. It was very cumbersome, but there were some representative groups that provided input.

I think what you were trying to say is that that was more effective in trying to reach a determination of impact than economic data, and I think that is what Mr. Gibson was saying. Do you want to comment on that?

Mr. DOZIER. One of the concerns that I personally have with Advocacy coming up with a significant and substantial definition is that agencies typically, if they are responsive, have more resources to serve a particular industry. In that particular case, EPA could go out and do site visits, get data from the industry and cull it together in a manner in which we wanted to see it, quite frankly, and then we could come up with the result.

I have a fear, and it is just a fear, that if Advocacy has to come up with the significant and substantial test that they would have some responsibility to try to either get that data or cut it in ways that they do not necessarily have the resources to do.

Chairman MANZULLO. Thank you.

Mr. Grucci.

Mr. GRUCCI. Thank you, Mr. Chairman. Mr. Chairman, I will ask for unanimous consent to have my opening remarks made part of the record.

Chairman MANZULLO. All the remarks will be made a part of the record without objection.

Mr. GRUCCI. Thank you, sir.

Mr. Sullivan, the GAO report entitled Compliance Guide Requirement, has had little effect on agency practices. I am concerned about the way that our government applies its regulations and conducts its enforcement on small businesses.

I was asked to address the SBREFA workshop. I believe you were there as well. One of the things that I tried to impart upon those who were at the meeting was that when you go into a small business, you are going into a business where the owners are the chief executive officer, they are the accountants, they are the stock clerks, they are the manufacturers, they are the sales people, they are the bookkeepers. In short, they are everything to a small business.

When an agency comes to visit them, it is a frightening experience. If they have EPA oversight. I can assure you from being in a business where EPA has a role to play it is a frightening experience when they come in because they are not coming in to give you any kind of an award. They are there to find something and to give

you as much grief as they possibly can. I am not just picking on EPA. It seems to be the attitude of most who come in to regulate.

We all know, and the statistics will certainly verify this, that small businesses, the mom and pop operations, are the backbone of our economic system. They are the engine that drives the job growth, et cetera.

If SBREFA is not working to the fullest extent, how do we fix it to make it better, and how do we continue to enforce the laws, because I am not suggesting that we weaken the laws for small businesses or for any business, for that matter. How do we continue to assure the American public that the businesses that they either work in or shop at or are in their communities are abiding by the law, and yet we are not impacting small businesses to such an extent that they must close their doors because the regulatory requirements are so onerous and so strenuous that they simply just cannot afford to keep up with them?

I know in my own business, when I was there, we had to hire several people in administrative positions just to keep up with what regulations may or may not be coming down the pipe line that would have an effect on us. There is no way to incorporate that in the cost of your goods, so it costs you to your bottom line. Eventually the more and more that impacts your business, the quicker you close your doors.

I do not think our goal here collectively is to make that happen. Should counsel, and I guess it is you as Chief Counsel of the Office of Advocacy, promulgate rule making to further define the terms substantial number of small businesses and significant economic impact? I think those have been stumbling blocks for your agency, and I would like to hear your comments.

Mr. SULLIVAN. Congressman Grucci, first of all, let me thank you for coming over to the Small Business Administration and helping Michael Bererra host the regulatory fairness kind of instructional session amongst other federal agencies a few weeks ago. Your sharing your experience as the owner of an impressive small fireworks company was certainly well timed and I think impressed upon the federal agencies how difficult it is for a small business owner to keep up with a morass of federal regulations.

You asked, I think in a broad question, how do we improve SBREFA? Well, we are doing it right now. We get regulatory agencies to pay attention. That does not mean getting them to send more enforcement folks out to small businesses, but it does get them to understand what you articulated, and that is that when a federal regulatory officer, whether they are writing a regulation or enforcing a regulation, knows that money saved from a small business owner goes to hiring new employees. Money saved goes to providing health care or buying new equipment. It does not go into breaking a law or polluting the environment or creating an unsafe workplace. If federal agencies get it, then they get the basis of SBREFA.

How do we improve it? We get federal regulatory agencies to pay attention. We do it through accountability time through this Committee. We get it through the Office of Advocacy providing guidance and instruction to regulatory agencies on how to comply, and we do it working in partnership with Michael Bererra's shop, the small

business ombudsman at the Small Business Administration. He is out there.

Once a regulation is written and the enforcement officers are visiting small businesses across the country. Mr. Bererra makes sure that those regulatory officers treat small business fairly. The collective group, this Committee or other small business stakeholders, the Office of Advocacy, simply have to go in again and again and again and tell them how important SBREFA is and that lack of compliance with the Regulatory Flexibility Act will not be tolerated.

If we have to do that through additional legislation, then we will work with this Committee to make sure that that happens and that it is written in a way to accomplish our goals. If it has to do with our office writing guidelines or rules, then we will do that with the help of this Committee to make sure there is a consistent application and a fair application government wide.

Mr. GRUCCI. Thank you, Mr. Chairman.

Chairman MANZULLO. I have a question for Mr. Rezendes. It is at the request of Mrs. Kelly. She had written the Truth in Regulating Act. Has GAO made a request for appropriations to establish the office to examine the regulations established by the Truth in Regulating Act?

Mr. REZENDES. Yes, we have, Mr. Chairman.

Chairman MANZULLO. You have?

Mr. REZENDES. Yes.

Chairman MANZULLO. Do you recall the amount?

Mr. REZENDES. We have never received funding for it.

Chairman MANZULLO. Okay. Is that in your request this year?

Mr. REZENDES. I am not sure if it is in this year.

Chairman MANZULLO. It is? It is? Do you have an idea what the amount is?

Mr. REZENDES. $5.2 million.

Chairman MANZULLO. Okay. We will work on that with the Cardinals.

Did you have a question? We have a little bit of time. Go ahead.

Ms. VELÁZQUEZ. Yes. Can any of you talk about what kind of incentives you believe could be built into the Reg Flexibility Act?

Mr. SULLIVAN. Congresswoman Velázquez, we talk about incentives that can be built in. I think one incentive, and I am entirely serious, is for regulatory agencies not to be called before this Committee for accountability time.

The idea that agencies are lax in complying with the Reg Flex Act and one letter or two letters in 1998 just does not convince them. An incentive to convince them to respond to our letters from the Office of Advocacy and to the greater concerns expressed I think here this morning is for them not to be subpoenaed, not to be called before this Committee and not to be embarrassed by not complying with the law.

Ms. VELÁZQUEZ. Mr. Rezendes.

Mr. REZENDES. One issue on which we have had recommended legislative change is civil penalty relief. We took a look at how the agencies were applying civil penalty relief to small businesses, and our basic bottom line was that they were not collecting the infor-

mation to even know how much relief was provided. So we were advocating that they maintain data so they would know.

Some could not even differentiate in their enforcement actions, whether it was a small business, or if they did get a penalty how much relief was provided, so that is one area we would like to see changed.

Ms. VELÁZQUEZ. Thank you.

Mr. Frulla.

Mr. FRULLA. Thank you. This may be a little more stick than carrot, but let me try. It also goes to another question of Ms. Christian-Christensen and Mr. Sullivan's testimony.

We would suggest, and we have, that the Equal Access to Justice Act attorneys' fees go to a small business that prevails or settles favorable SBREFA litigation. There is another threshold in the law that you must not only prevail; the agency's position must be shown to be not substantially justified.

If the small businesses knew and agencies knew that if they lost one of these they would have to cover at least some of the small businesses' or the small business association's attorneys' fees, that is a stick and not a carrot, but it is a carrot if you do not have to pay it.

There is another point that I think is important there, and I will be brief because I know you all do not have that much time, and that is that you should write into the law something so that when Mr. Sullivan and his shop comment on a matter particularly within their expertise that courts are required to treat that agency as the expert and that the agencies and the courts are to defer to their expertise. As it is now, that is an open question under the law.

I think that would help substantially, and it would make the comment letters stronger because there would be force because somebody could go and sue on them.

Mr. DOZIER. Madam Congresswoman, if I may?

Ms. VELÁZQUEZ. Yes.

Mr. DOZIER. I think that one thing that can be changed in the law, and I write this in my testimony, deals with Section 609 of the Act. Specifically, Section 609 requires outreach to be done if the significant and substantial trigger is actually hit.

What I propose is that you change that requirement so that it is just not the significant and substantial trigger, but that if you are doing any regulation that could affect small entities, understanding that there are some procedural regulations that we do not want to fall into, you know, that gap. We do not want every time someone changes a flood plain designation or the Coast Guard rules on bridge openings. They do a lot of procedural things.

We do not want that to happen, but if you get it into the agencies' minds that small entity outreach is just common sense, if you are going to regulate a small business or you are going to regulate an industry rather that includes small businesses, you should be talking to them. I mean, that is simple common sense. You should not be regulating a community if you do not know anything about that community; not just certain sectors of the community, but the community as a whole.

Ms. VELÁZQUEZ. Thank you.

Thank you, Mr. Chairman.

Chairman MANZULLO. Mr. Grucci, you had another follow up question?

Mr. GRUCCI. Yes, Mr. Chairman. Thank you. I have a question for Mr. Gibson and then a follow up for Mr. Sullivan if my time permits.

Mr. Gibson, the intent of SBREFA was to provide relief to small businesses that face unfair financial burden as a result of the federal regulations. You suggest benefit analysis. What do you see as the benefit of this cost analysis that you are suggesting, and how much weight do you think it should have in the final issuing of the rule?

Mr. GIBSON. Well, we think that the cost benefit analysis is very important because obviously the number of businesses that are affected in our case and in the rule is very large. The overall objective of the rule that has to be taken into account clearly is to protect the environment and to make sure that the usage of those chemicals is in compliance with the Clean Air Act.

I think that our position is that they can do both. They can achieve the goal of being in compliance with the Clean Air Act and also be fair to the smaller businesses that are affected by the rule.

Mr. GRUCCI. Thank you.

Mr. Sullivan, in following my line of questioning just a moment ago one of the things that I found, and I sat on several of our association boards as either a board member or vice-president. We always tried to have a voice in the rule making process. That often fell on deaf ears.

I will point to a specific agency because they were very unkind to the suggestions being made to improve the safety of the industry that I used to be in, and that is Consumer Products Safety Commission, CPSC. In their eyes, we, and I am sure other industries felt the same way, were guilty before we even had an opportunity to have a voice in the process. That made it very difficult.

The consumer industry was being singled out, members of that industry, some of them deservedly, but most of the time others not deservedly, receiving the wrath of CPSC in the sense that small businesses were being fined as much as several hundred thousand dollars, and taking their right to do business away. It was not in the end of the business that I was in. I was in the display side of the business, in the consumer sales side of the business.

The question that I have is why we can not in the rule making process that is going to unfold, make SBREFA a better place, why can't the voice of industry have a louder voice than it currently does, and how would you suggest that we craft legislation to do that?

Again, I am not suggesting that business should dictate unto itself how it should be regulated. That is what government is there for, but government is also there to understand, as was pointed out a moment ago, the industry that it is regulating and overseeing. What are your thoughts on that?

Mr. SULLIVAN. Congressman Grucci, your explanation of having a voice, a small business voice, in the regulatory process is the foundation of the Office of Advocacy, so I could not agree with you more in that statement and the need for the voice.

One thing that we have been trying to impress upon regulatory agencies is not necessarily how loud the voice, although once in a while a big, loud voice helps, but it is how early that voice is inserted in the process and how effective that voice is.

When I talk about early and effective, I mean because the Regulatory Flexibility Act currently suggests that agencies seek out input from small entities in the regulatory process. That is an open communication, and that communication is used by other businesses, whether they be across the country or through trade associations and others so that at the end of the day the regulation that comes out of a department if they do choose to go the regulatory route does reflect the common sense brought to the table by the voice of small business.

In answer to the question of how do we make it better, we actually look at the law that is written, the Regulatory Flexibility Act, and we look at those provisions that say small entities should have a voice early in the regulatory process, and we make sure that the agencies understand that that is in fact one of the considerations in the Regulatory Flexibility Act.

If the agencies repeatedly ignore those responsibilities, then we consider legislative strengthening opportunities or regulatory opportunities, but those suggestions, the legislative suggestions of having a voice, a small business voice in the regulatory process, are on the books. We are there to try and convince agencies to follow it, and we want to work with this Committee and all of our partners to make sure that they get——

Mr. GRUCCI. I agree that they are on the books, but I think you would agree with me that they are not often enforced stringently enough for the small business community to have a true voice in the industry that they choose to be in.

What I am suggesting that you all do is to turn up the volume a little bit so you can hear the voices of those people who dot the main streets from one side of this country to the other who do not come to Washington, who do not have the lobbyists, who do not have the resources to spend to come in and talk to your offices.

When your field inspectors go out, they should be going out armed not only with bringing the bad guys to justice, but helping to make the good guys even better by listening to what they have to say because the best way to understand that industry, whatever that industry may be, how to make it a better industry, how to make it a safer industry, how to make it a cleaner industry, is to listen to the good guys because they know what they are doing.

I would just encourage you to put that into the thought process as you send out your folks across the country to take a look and see what is going on out there.

Mr. SULLIVAN. Congressman, I actually would like the record to reflect a frequent nodding to everything that Congressman Grucci was talking about.

Chairman MANZULLO. The record will reflect your frequent nods.

Mr. SULLIVAN. Sometimes the written record does not do justice to my agreement with what the Congressman said.

Chairman MANZULLO. Those are nods of affirmation. Okay.

Listen, I want to thank you all for coming. You know, the standard has to begin at home. The reason I got so upset last week with

the SBA is that the SBA has to set the standard on how to treat small businesses. The hearing last week showed that the small businesses had been shut out of the process of revising the size standards, even though Mr. Barreto had been out on the streets himself gathering that information. I know that as a fact.

Somehow, even the material that he was feeding into the agency itself never found its way to the people that wrote the rules. That is why Hector is doing a great job because I know where his heart is.

The SBA has to set the standard. Tom, I know that Reg Flex applies to the SBA. If the SBA does not follow Reg Flex, I do not know who is going to do it because it is for the small businesses to do that. We have here one business that has already gone under.

Ms. VELÁZQUEZ. Mr. Chairman, if I may?

Chairman MANZULLO. Yes, Nydia.

Ms. VELÁZQUEZ. Mr. Sullivan, I guess you have some work to do because SBA is in violation of the Reg Flex Act when it issued its new regulations on 8(a). I hope to see a letter sent to the SBA and Mr. Barreto.

Chairman MANZULLO. Have you sent the letter on that, Ms. Velázquez?

Ms. VELÁZQUEZ. We are submitting comments on the regulations.

Chairman MANZULLO. I know the folks from SBA are here. We surely do not want to have another hearing as we did yesterday or last week, but I would expect that letter to be answered.

Thank you all for coming. Stay in contact with Mr. Pineles and our staff for two things. Number one is drafting these amendments to whatever statutory remedy is necessary. Number two, for agency accountability days starting off with an appearance not by CMS, but by HCFA.

As I said six months ago, I will not recognize your new name unless I see a change in what is going on, and I see no change whatsoever at this point. We will start off with round three of HCFA accountability days.

Thank you for coming. This meeting is adjourned.

[Whereupon, at 11:55 a.m. the Committee was adjourned.]

# Congress of the United States
## House of Representatives
107th Congress
## Committee on Small Business
2361 Rayburn House Office Building
Washington, DC 20515–6315

Statement of Donald A. Manzullo
Chairman
Committee on Small Business
United States House of Representatives
Washington, DC
March 6, 2002

Today's hearing is the first in a series of hearings that the Committee will hold addressing compliance with the Small Business Regulatory Enforcement Fairness Act or SBREFA. SBREFA modified and strengthened the Regulatory Flexibility Act or RFA. The hearings are will identify problems with the RFA and SBREFA. My goal is to draft legislation that will remove the loopholes agencies have discovered for not complying with the RFA and SBREFA.

In 1980, Congress responded to the cries from the small business community for help with the constantly growing regulatory burdens imposed by the federal government. Congress intended the RFA to alleviate the disproportionate Federal regulatory burden imposed on small businesses and other small entities. The authors intended the RFA to have the same effect on agency decisionmaking that the National Environmental Policy Act had on agency decisions that would affect the environment. The concept was to force the agencies to think through the problem before using the knee-jerk response of imposing regulation.

For 15 years, agencies largely ignored the RFA. That is not my supposition but rather the conclusion of the annual reports issued by the Chief Counsel for Advocacy during that time.

Congress also held hearings highlighting agency failure to comply with the RFA. SBREFA was enacted in 1996 as response to federal agencies ignoring the mandates of Congress. SBREFA strengthened the RFA. The authors expected that the changes would induce agency compliance. But as we will hear today, agencies have found new loopholes they can use to avoid compliance with the RFA.

The premise underlying the RFA is quite simple. If an agency has two methods of achieving its statutory objective, the rational choice would be to select the one that imposes less burdens on small businesses and other small entities. However, the agencies have used interpretive gymnastics, even after Congress thought it closed them with the enactment of SBREFA, to avoid conducting the required analyses and identifying less burdensome alternatives that would achieve their statutory objectives. I look forward to working with the witnesses and others on legislation to close those loopholes.

I will now recognize the Ranking Member, the gentlelady from New York, for her opening statement.

Congressman Felix J. Grucci, Jr.
Small Business Committee
Hearing on SBREFA
March 6, 2002

Thank you Mr. Chairman.

I would like to thank you for holding this hearing today on the Small Business Regulatory Enforcement Fairness Act – commonly known as SBREFA. This important legislation has given a voice to small business and has opened an avenue of communication between federal agencies and small businesses across the country.

Too many small businesses have fallen victim to well-intended regulations that have an adverse impact on small enterprises. It is important that these small businesses have an opportunity to highlight any unfair burdens as a result of the implementing of new regulations.

Opening a line of communication between small businesses and the agencies that regulate them also serves to educate the small businessman. As you may know, I owned a small family business on Long Island that produced fireworks. I can assure you that no industry is more heavily regulated than the fireworks industry. It was a full time job to simply keep up with the regulations that affected the business.

Educating small businesses on specific regulations allows the business to better understand and comply with those regulations. Many small business owners are not fully aware of the intense regulatory process and we need to do a better job at educating them.

SBREFA has come a long way since its enactment in 1996. The small businessman now has a forum to express their concerns about federal agencies and the conduct of officials representing those agencies. This is important. Many small businesses across the nation look at federal agencies as a distant body – there only to enforce tough policy. This is quickly changing.

Federal agencies and small businesses are working together. A relationship has evolved that has provided relief to small businesses and helped foster a true partnership during the regulatory process. SBREFA has directly created this partnership.

While SBREFA is greatly helping the small businesses across our nation, I appreciate this opportunity to review the legislation to determine what changes, if any, need to be made in order to better serve the small businessman.

I look forward to the testimony of the witnesses and I appreciate your willingness to join us today.

Thank you.

U.S. Small Business Administration

# Office of Advocacy

409 3rd Street, SW • MC 3114 • Washington, DC 20416 • 202/205-6533 ph. • 202/205-6928 fax •
www.sba.gov/advo

**Testimony of**
## Thomas M. Sullivan
**Chief Counsel for Advocacy**

**U.S. House of Representatives**
**Committee on Small Business**

| | |
|---|---|
| **Date:** | March 6, 2002 |
| **Time:** | 10:00 A.M. |
| **Location:** | 2360 Rayburn House Office Building |
| **Topic:** | Hearing on Agency Compliance with the Small Business Regulatory Enforcement Fairness Act (SBREFA) |

*Created by Congress in 1976, The Office of Advocacy of the U.S. Small Business Administration (SBA) is an independent voice for small business within the federal government. The Chief Counsel for Advocacy, who is appointed by the President and confirmed by the U.S. Senate, directs the office. The Chief Counsel advances the views, concerns, and interests of small business before Congress, the White House, federal agencies, federal courts, and state policy makers. Issues are identified through economic research, policy analyses, and small business outreach. The Chief Counsel's efforts are supported by offices in Washington, D.C., and by Regional Advocates located across the United States. For more information on the Office of Advocacy, visit http://www.sba.gov/advo, or call (202) 205-6533.*

Chairman Manzullo, Ranking Member Velázquez, Members of the Committee, good morning and thank you for the opportunity to appear before you today to discuss the Small Business Regulatory Enforcement Fairness Act (SBREFA).

First, let me tell you what an honor and privilege it is for me to have been appointed Chief Counsel for Advocacy by President Bush. Since my confirmation just over one month ago, I have had an incredible experience. I am grateful for the tremendous support I have had from Members of Congress; from Administrator Barreto; from the staff of the Office of Advocacy; from government leaders; and from our many small business organization and trade association friends.

Although I had worked with Advocacy on many issues while I was Regulatory Policy Counsel for the National Federation of Independent Business (NFIB), and more recently Executive Director of the NFIB Legal Foundation, as Chief Counsel I have a new appreciation for the talent and energy of Advocacy's staff. I want to give special thanks to my deputy, Susan Walthall, who is with me here today. Susan served as Acting Chief Counsel until my confirmation, and she did a great job in keeping the Office of Advocacy running smoothly during this transition period, in addition to helping me prepare for the challenges ahead.

Last October, the Office of Advocacy held a day-long symposium marking its 25th anniversary. The theme of this event was "Advocacy at 25: Looking Back, Looking Ahead" and we did just that. Although I had not yet had my confirmation vote, I attended as a "civilian" along with more than 200 other Advocacy stakeholders and small business advocates from the

government, academic and private sectors. In addition to working sessions organized around Advocacy's regulatory and economic research missions, there was an excellent presentation on an important new study released that day on the costs of regulatory compliance, and an address by Dr. John Graham, Administrator of OMB's Office of Information and Regulatory Affairs, with whom, I might add, we are working closely.

But perhaps my favorite session that day was a roundtable featuring all four of my confirmed predecessors, former Chief Counsels Milt Stewart, Frank Swain, Tom Kerester, and Jere Glover – all of whom I am proud to call my friends. As I begin my tenure as the fifth confirmed Chief Counsel for Advocacy, I must tell you that I am humbled, not only by their achievements, but also by the enormity of the challenges ahead of us.

I am committed to addressing these challenges with renewed energy. We are working now on a strategic plan for the future, and are aggressively seeking ways to fine-tune our activities and refocus our limited resources to get more bang for the buck, while at the same time maintaining the quality of Advocacy's work, continuity in our ongoing activities, and commitment to our core missions.

I commend the Committee for its review of SBREFA at this time. As we are both looking back and looking ahead, and renewing our commitment to serve America's small businesses, it is appropriate that we examine together how one of our most important legislative tools has been working after more than five years' experience, with a view towards possible fine-tuning and improvements.

**The importance of SBREFA**

SBREFA **has** made a difference – a big difference, both in opening the rulemaking process to greater scrutiny and participation by those it affects, and in achieving quantifiable reductions in the regulatory burden on small business. Perhaps even more important, SBREFA is helping change the regulatory culture in at least some government agencies, an outcome far more significant than individual rulemakings. We want regulators to think about the effects of their proposals **before** they act, and our experience has shown that SBREFA helps accomplish this goal.

SBREFA amended the 1980 Regulatory Flexibility Act (RFA) in several significant ways. **First**, it gave the courts jurisdiction to review agency compliance with the RFA, thus providing for the first time a legal mechanism to ensure agency compliance with the law. **Second**, SBREFA mandated that the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA) convene "Small Business Advocacy Review Panels" to elicit information from small entities on rules expected to have a significant impact on them, and to do so **before** the regulations are published for public comment. This formalized for those two agencies a process to involve small entities early in the agencies' deliberations on the small business impacts of regulatory proposals, and it forced agencies to consider equally effective alternatives. **Third**, SBREFA reaffirmed the authority of the Chief Counsel for Advocacy to file *amicus curiae* (friend of the court) briefs in appeals brought by small entities seeking relief from agency final actions.

Each of these three SBREFA provisions has had its effect and has made a positive contribution to our efforts to control unnecessary regulation. The judicial review provision has been particularly important. Small businesses are increasingly seeking judicial review of agency compliance with the RFA and having some success. Several court decisions have remanded rules to agencies for failure to comply with the RFA. The potential for judicial review provides a significant incentive for agencies to do more in-depth small business impact analyses and to take other steps to strengthen their in-house regulatory development processes.

Similarly, Advocacy's authority to join in litigation against agencies charged with failure to comply with the RFA has given pause to those that in the past ignored that Act's requirements. This *amicus* authority, which we use sparingly, is one more powerful incentive for agencies to consider their actions carefully. Advocacy's first brief was filed in *Northwest Mining Assoc. v. Babbitt*. The court agreed with the issues raised by Advocacy and remanded the rule to the Department of Interior. In other instances, the mere threat of using our *amicus* authority has been sufficient for an agency to reconsider its position.

One measure of the effect that the judicial review and *amicus* authority provisions of SBREFA have had may be the newfound interest of regulatory agencies in RFA and SBREFA training, a phenomenon which, not surprisingly, blossomed after the *Northwest Mining* decision in 1998. Advocacy has developed materials for this purpose and conducted training sessions and individualized counseling for hundreds of regulatory development specialists, attorneys, program managers and high-level policy officials from agencies throughout government. Many of these agencies also now participate in Advocacy's informal industry roundtables, in which those

involved in developing regulations can meet, listen to, and learn from those who will be affected by their actions. It is difficult to quantify the effect that this early exchange of information has on mitigating the cost of regulation to small business, but we are convinced that it is real.

This brings me to a theme that I believe is of paramount importance – early intervention in the rule-making process. Important as the judicial review and *amicus* provisions of SBREFA are, it would be far preferable if we never had to use them at all. If agencies consistently honored their responsibilities under the RFA and actively involved small businesses at each step of the rule development process, there would be little need to go to court.

The review panel provisions of SBREFA, which now apply only to EPA and OSHA, promote this approach and provide a model for early intervention with a proven record of success. The panel process has confirmed that: (1) credible economic and scientific data, as well as sound analytical methods, are crucial to rational decision-making in solving regulatory problems; and (2) information provided by small businesses themselves on real-world impacts is invaluable in identifying equally effective regulatory alternatives. It is important to emphasize that although the regulations that result from panel deliberations are likely to be less burdensome to small business, public policy objectives need not be compromised.

**Regulatory savings and SBREFA**

Although EPA and OSHA are the only agencies now required to use the panel process, SBREFA is affecting all regulatory agencies. Agencies logically wish to avoid judicial

challenges to their rules and are taking greater care to comply with the RFA. But beyond this pain-avoidance incentive, we are beginning to see a genuine desire on the part of some agencies to listen to small business concerns and work with Advocacy to craft better rules. Regulations have been changed to minimize their impacts on small entities, and I would like to share with you just two examples: an important IRS rule on cost versus accrual accounting methods, and a Department of Transportation (DOT) rule on providing transportation services to individuals with disabilities.

**Internal Revenue Service rule.** The Internal Revenue Service recently announced a change allowing simplified tax filing for up to 500,000 additional small businesses beginning with tax year 2001 returns. IRS Notice 2001-76 allows certain small businesses with gross receipts of $10 million or less to use the cash method of accounting for income and expenses, instead of the costly and complicated inventory and accrual method. Until now, the IRS could impose the more stringent method, accrual accounting, on businesses with more than $1 million in receipts.

Under accrual accounting, a business generally reports income when it has a right to receive payment, and deducts expenses when it has a fixed and determinable liability for them. This obviously can become very complicated, requiring specialized accounting assistance. Further, it can create cash-flow problems for small businesses.

Allowing more small businesses to use the cash accounting method was one of the recommendations of the 1995 White House Conference on Small Business. The Office of

Advocacy and White House Conference delegates have been active in urging the IRS to make this change. Advocacy also supported congressional action on this issue in testimony before the Senate Committee on Finance last year, so we are very pleased that the IRS has been so responsive in this instance. Although this change will primarily be of benefit to small service providers – businesses in manufacturing, wholesaling, retailing and mining are generally excluded – we still welcome this provision, which helps so many small businesses.

**Department of Transportation rule.** Another example of how an agency's good-faith effort to comply with the RFA as amended by SBREFA has made a difference is the Department of Transportation's revision of a proposal to implement provisions of the Americans With Disabilities Act (ADA). DOT proposed a rule requiring that over-the-road buses be accessible to passengers with disabilities, and that companies using such buses (motor carriers, tour operators, etc.) provide accessible over-the-road service. Advocacy commented that the rule as proposed would have had a serious impact on the small bus industry, and that it would have caused small operators to reduce transportation available to the public as a whole – especially in rural areas. Advocacy proposed that a service-based alternative would provide better transportation to all passengers, including those with disabilities.

Advocacy then arranged a conference for DOT officials and small business representatives to discuss the various issues involved and alternatives to the proposed rule that could accomplish DOT's objective of providing service to the disabled, while not unduly burdening small motor carriers and precipitating unintended reductions in service to the general public. DOT agreed to review the costs projected by the small businesses. After careful study,

the agency then crafted an innovative approach that achieved its regulatory objective while striking a balance among competing public policy objectives. This approach was incorporated in DOT's final rule and included both an "on-call service" feature and a phase-in period.

DOT's final rule transitions the private bus industry to full service for passengers with disabilities, while in the near term maintaining service for passengers who rely on small bus companies for essential needs. In addition, the industry has estimated that the revisions made to DOT's original proposal resulted in savings of approximately $180 million. Advocacy commends DOT for its efforts to work with small business and our office in the spirit, as well as the letter, of the RFA to reach a solution to this difficult, but solvable problem.

These are but two examples of agencies adopting a common sense approach to regulation which has and will result in substantial savings to small business, one using a "tiered" approach and the other a phase-in linked to a unique, problem-specific solution. Advocacy's annual Regulatory Flexibility Act reports detail many more such examples.

We estimate that during fiscal years 1998 through 2001, modifications to federal regulatory proposals in response to RFA/SBREFA provisions, and consultation with Advocacy, resulted in cost savings totaling more than $16.4 billion, or more than $4.1 billion per year on average. Many of these savings have been counted only once, though in fact, had the underlying proposal been finalized without small business input, the resulting costs would have been recurring from year to year.

**RFA/SBREFA compliance still needs improvement**

I noted earlier that SBREFA is helping change the regulatory culture in at least some government agencies. It is important to note, however, that this cultural change is by no means uniform within or among regulatory agencies. One of the largest hurdles to be overcome remains agency resistance to the concept that regulatory alternatives that are less burdensome on small business may in fact be equally effective in achieving public policy objectives. Other agencies simply haven't "internalized' their RFA responsibilities and don't seem to view its requirements as germane to their mission.

As we reported in our 20th anniversary RFA report for FY 2000, a number of agencies consistently ignore the requirements of the RFA. Two regular offenders are the Federal Communications Commission (FCC) and the Centers for Medicare and Medicaid Services (CMS), formerly the Health Care Financing Administration.

**FCC.** FCC regulations have not included adequate discussion of potential small business impact. Its analyses frequently are of the cut-and-paste variety, offering no specific or relevant information pertaining to the substance of the rule. Vagueness in its notices is a problem.

For example, last November the FCC proposed major changes to the current intercarrier compensation regime, in which providers of phone services compensate each other for the origination and termination of calls that begin on each others' networks. First, from the information provided, Advocacy is not convinced that a complete restructuring is necessary. Additionally, the rulemaking itself lacks specifics. Instead, it makes broad inquiries to which a

response is requested. It is impossible to ascertain what the impact on small business is because of this vagueness. Advocacy recommended that the FCC recast this rulemaking as a "Notice of Inquiry" to gather information. The Commission could then use the comments received in response to its original Notice of Proposed Rulemaking to analyze the small business impacts in a regulatory flexibility analysis.

FCC has also failed to comply with Section 212 of SBREFA, which requires that agencies publish compliance guides for small business to help those regulated better understand the rules which these agencies promulgate, a subject to which I will return shortly.

**CMS.** Turning now to CMS. An advisory committee on regulatory reform has been formed at the Department of Health and Human Services to identify overly burdensome Medicare regulations promulgated by that agency. This is a positive development, but frankly, a number of these overly burdensome regulations would not be on the books today if CMS had complied with the RFA.

For example, in the case of the Medicare reimbursement methodology for portable x-ray providers, CMS has ignored Advocacy's comments and recommendations since 1998. Advocacy commented on the proposed rule, indicating that the overall reduction in Medicare reimbursement for portable x-ray services amounted to as much as 54 percent in some cases, and that the agency had not prepared an adequate analysis of the impact on small entities. GAO also published a report in 1998 acknowledging (with some uncertainty) that portable x-ray providers may not be able to continue supplying services as a result of the reduced payments.

CMS published a final rule in this case which essentially ignored the comments of Advocacy and industry, so Advocacy submitted additional comments indicating that, under the RFA, the agency was required to address comments received in response to the initial regulatory flexibility analysis. Eventually, a transition period for implementation was allowed after a post-final rule discovery that a transition payment provision had been left out of the rule. This "fix" still did not address the overall issue of the need for an impact analysis. In December 2001, Advocacy was again forced to comment on a new payment regulation - this time a direct final rule, where the agency waived the Administrative Procedure Act requirement for a notice of proposed rulemaking. Once again, the agency failed to assess adequately the impact of the rule on small portable x-ray providers.

**SBREFA Section 212 concerns**

Before I conclude, I would like to offer a few remarks on Section 212 of SBREFA, which requires that agencies publish compliance guides to assist small entities in understanding rules for which final regulatory flexibility analyses (FRFAs) are required. This topic is timely because of a recently released GAO report entitled "Regulatory Reform: Compliance Guide Requirement Has Had Little Effect on Agency Practices." As the title suggests, GAO has found that agencies are not complying with Section 212, and I regret that this seems to be the case.

The problem is not restricted to the six agencies that were the subject of GAO's review. It is pervasive in other agencies as well. A particularly egregious example is the so-called "small entity compliance guide" published by the Federal Acquisition Regulation Council (FAR Council). In 1999, the FAR Council published in the *Federal Register* a list of all the previous

years' regulations with an asterisk beside those regulations containing a final regulatory flexibility analysis. In other words, the list itself was the compliance guide.

In yet another example, the FCC's Office of Communications Business Opportunities has created a web page to serve as a one-stop location for all of the agency's compliance guides. The agency claims that the site can be especially helpful to small businesses, and that it satisfies the requirements of Section 212 of SBREFA. Although the Small Business Compliance Guide list is of impressive length, with 285 entries, more than half do not address compliance questions at all. Of these 285 entries, 31 (or 11 percent) are consumer fact sheets aimed at consumers, 72 (or 25 percent) are news releases aimed at the media, and 43 (or 15 percent) are public notices with general information. The remaining 49 percent are links to issue pages, site maps, FAQ pages, and economic working papers. Some links are broken and lead nowhere. Few, if any, of the links on this site are devoted to small business issues. FCC's assertion that this website somehow satisfies its Section 212 obligations comports neither with the letter nor the spirit of SBREFA.

Frankly, I find it embarrassing that government agencies must be forced to publish guides to help small businesses comply with their rules. But recognizing that Section 212 is not working as intended, Advocacy wants to work with Congress and regulatory agencies to make sure that this problem is resolved. If additional legislation is needed to clarify the requirements of Section 212, then Advocacy would urge that consideration be given to the need for an oversight role. An annual report to this committee from each agency with respect to its compliance guide efforts might be productive. Also, further guidance from Congress on where and when the guides should be published and what they must include might help alleviate agency

confusion as to their responsibilities. Section 212 can hardly be called esoteric. What is really needed is a good faith effort to do the right thing.

**Conclusion**

In conclusion, I would like to refocus our discussion on why we have a SBREFA and an RFA, or why for that matter an Office of Advocacy – why do we go to all this trouble? Perhaps the best answer is the simplest – the bedrock importance of small business to our economy, both at the national and community levels.

These are the basic numbers, and though we small business advocates on both sides of the dais have heard similar statistics many times, I want to share with you the latest data we have. Small businesses:

- Represent more than 99 % of all employers;
- Employ 51% of private sector workers;
- Comprise nearly all of the self-employed, which are 7% of the workforce;
- Provide about 75% of net new jobs;
- Provide 52% of private sector output;
- Represent 96% of all exporters of goods;
- Obtain 33.3% of federal prime and subcontract dollars.

Small business is and has historically been our Nation's primary source of innovation, job creation, and productivity. It has led us out of recessions and economic downturns, offsetting job contraction by larger firms, and providing new goods and services. It has provided

tremendous economic empowerment opportunities for women and minority entrepreneurs. It plays an invaluable role in our defense industrial base. Small employers spend more than $1.5 trillion on their payroll.

All these are good reasons for us to work to ensure a healthy and competitive small business sector. Small business does not want preferential treatment – small business wants a level playing field. The cost of regulation is a good case in point. A recently released, Advocacy-sponsored study on this subject by W. Mark Crain and Thomas D. Hopkins disclosed that the cost of federal regulation to firms with fewer than 20 employees was almost $7,000 per employee, more than 50 percent higher than the per employee cost to businesses with 500 or more employees. This disproportionate burden is a huge impediment to small business realizing its full potential. Although small business has done a remarkable job in coping with this problem, it is tantalizing to think of what productive and innovative energies would be unleashed if we could reduce this burden.

That is why we are in business at Advocacy, and that is why the Congress wrote the Regulatory Flexibility Act and the Small Business Regulatory Enforcement Fairness Act – to help small businesses realize their full potential. Like the small businesses we serve, we must be flexible and innovative to respond to new challenges as they arise, but we must also keep focused on our core mission. I pledge the full cooperation and assistance of the Office of Advocacy in your deliberations on how best to accomplish this.

This concludes my prepared testimony. Thank you again for inviting me here today, and I am pleased to answer any questions you may have.

United States General Accounting Office

GAO

Testimony

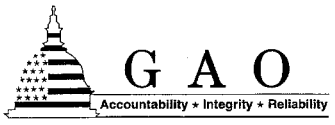
Before the Committee on Small Business, House of Representatives

For Release on Delivery
Expected at 10 a.m. EDT
Wednesday, March 6, 2002

# REGULATORY FLEXIBILITY ACT

## Clarification of Key Terms Still Needed

Statement of Victor Rezendes, Managing Director
Strategic Issues Team




GAO-02-491T

Mr. Chairman and Members of the Committee:

I am pleased to be here today to discuss the implementation of the Regulatory Flexibility Act of 1980 (RFA), as amended, and the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).[1] As you requested, I will discuss our work on the implementation of these two statutes in recent years.

The RFA requires federal agencies to examine the impact of their proposed and final rules on "small entities" (small businesses, small governmental jurisdictions, and small organizations) and to solicit the ideas and comments of such entities for this purpose. Specifically, whenever agencies are required to publish a notice of proposed rulemaking, the RFA requires agencies to prepare an initial and a final regulatory flexibility analysis. However, the act also states that those analytical requirements do not apply if the head of the agency certifies that the rule will not have a "significant economic impact on a substantial number of small entities," or what I will—for the sake of brevity—term a "significant impact." SBREFA was enacted to strengthen the RFA's protections for small entities, and some of the act's requirements are built on this "significant impact" determination. For example, one provision of SBREFA requires that before publishing a proposed rule that may have a significant impact, the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration must convene a small business advocacy review panel for the draft rule, and collect the advice and recommendations of representatives of affected small entities about the potential impact of the draft rule.[2]

[1]The RFA is codified at 5 U.S.C. §601-612 and took effect on January 1, 1981.

[2]This provision of SBREFA is codified at 5 U.S.C. §609 and took effect on June 29, 1996.

We have reviewed the implementation of the RFA and SBREFA several times during recent years, with topics ranging from specific provisions in each statute to the overall implementation of the RFA. Although both of these reform initiatives have clearly affected how federal agencies regulate, we believe that their full promise has not been realized. To achieve that promise, Congress may need to clarify what it expects the agencies to do with regard to the statutes' requirements. In particular, Congress may need to clearly delineate—or have some other organization delineate—what is meant by the terms "significant economic impact" and "substantial number of small entities." The RFA does not define what Congress meant by these terms and does not give any entity the authority or responsibility to define them governmentwide. As a result, agencies have had to construct their own definitions, and those definitions vary. Over the past decade, we have recommended several times that Congress provide greater clarity with regard to these terms, but to date Congress has not acted on our recommendations.[3]

The questions that remain unanswered are numerous and varied. For example, does Congress believe that the economic impact of a rule should be measured in terms of compliance costs as a percentage of businesses' annual revenues or the percentage of work hours available to the firms? If so, is 3 percent (or 1 percent) of revenues or work hours an appropriate definition of "significant?" Should agencies take into account the cumulative impact of their rules on small entities, even within a particular program area? Should agencies count the impact of the underlying statutes when determining whether their rules have a significant impact? What should be considered a "rule" for purposes of the requirement in the RFA that the agencies review rules with a significant impact within 10 years of their promulgation? Should agencies review rules that had a significant impact *at the time they were originally published*, or only those that *currently* have that effect? Should agencies conduct regulatory flexibility analyses for rules that have a positive economic impact on small entities, or only for rules with a negative impact?

These questions are not simply matters of administrative conjecture within the agencies. They lie at the heart of the RFA and SBREFA, and the

[3]Last year, legislation was introduced in the Senate (S. 849, the Agency Accountability Act of 2001) that would, in part, require the Chief Counsel for Advocacy of the Small Business Administration to promulgate regulations to define the terms "significant economic impact" and "substantial number of small entities."

answers to the questions can have a substantive effect on the amount of regulatory relief provided through those statutes. Because Congress did not answer these questions when the statutes were enacted, agencies have had to develop their own answers—and those answers differ. If Congress does not like the answers that the agencies have developed, it needs to either amend the underlying statutes and provide what it believes are the correct answers or give some other entity the authority to issue guidance on these issues.

## EPA's Use of RFA Discretion

The implications of the current lack of clarity with regard to the term "significant impact" and the discretion that agencies have to define it were clearly illustrated in a report that we prepared for the Senate Committee on Small Business 2 years ago.[4] One part of our report focused on a proposed rule that EPA published in August 1999 that would, upon implementation, lower certain reporting thresholds for lead and lead compounds under the Toxics Release Inventory program from as high as 25,000 pounds to 10 pounds.[5] At the time, EPA said that the total cost of the rule in the first year of implementation would be about $116 million. The agency estimated that approximately 5,600 small businesses would be affected by the rule, and that the first-year costs of the rule for each of these small businesses would be from $5,200 to $7,500. However, EPA certified that the rule would not have a significant impact, and therefore did not trigger certain analytical and procedural requirements in the RFA.

EPA' determination that the proposed lead rule would not have a significant impact on small entities was not unique. Its four major program offices certified about 78 percent of the substantive proposed rules that they published in the 2 ½ years before SBREFA took effect in 1996, but certified 96 percent of the proposed rules published in the 2 ½ years after the act's implementation. In fact, two of the program offices—the Office of Prevention, Pesticides and Toxic Substances and the Office of Solid

[4]U.S. General Accounting Office, *Regulatory Flexibility Act: Implementation in EPA Program Offices and Proposed Lead Rule*, GAO/GGD-00-193 (Washington, D.C.: Sept. 20, 2000).

[5]The proposed lead rule was published at 64 Fed. Reg. 42222 (1999). Toxics Release Inventory reporting is required by section 313 of the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA) (42 U.S.C. §11023). Reporting is also required under the Pollution Prevention Act of 1990 (42 U.S.C. §13106), which added reporting requirements to EPCRA's reporting requirements in 1991.

Waste—certified *all 47* of their proposed rules in this post-SBREFA period as not having a significant impact. The Office of Air and Radiation certified 97 percent of its proposed rules during this period, and the Office of Water certified 88 percent. EPA officials told us that the increased rate of certification after SBREFA's implementation was caused by a change in the agency's RFA guidance on what constituted a significant impact. Prior to SBREFA, EPA's policy was to prepare a regulatory flexibility analysis for any rule that the agency expected to have any impact on any small entities. The officials said that this guidance was changed because the SBREFA requirement to convene an advocacy review panel for any proposed rule that was not certified made the continuation of the agency's more inclusive RFA policy too costly and impractical. In other words, EPA indicated that SBREFA—the statute that Congress enacted to strengthen the RFA—caused the agency to use the discretion permitted in the RFA and conduct *fewer* regulatory flexibility analyses.

EPA's current guidance on how the RFA should be implemented includes numerical guidelines that establish what appears to be a high threshold for what constitutes a significant impact. Under those guidelines, an EPA rule could theoretically impose $10,000 in compliance costs on 10,000 small businesses, but the guidelines indicate that the agency can presume that the rule does not trigger the requirements of the RFA as long as those costs do not represent at least 1 percent of the affected businesses' annual revenues. The guidance does not take into account the profit margins of the businesses involved or the cumulative impact of the agency's rules on small businesses—even within a particular subject area like the Toxics Release Inventory.

## Previous Reports on the RFA and SBREFA

We have issued several other reports in recent years on the implementation of the RFA and SBREFA that, in combination, illustrate both the promise and the problems associated with the statutes. For example, in 1991, we examined the implementation of the RFA with regard to small governments and concluded that each of the four federal agencies that we reviewed had a different interpretation of key RFA provisions.[6] We said that the act allowed agencies to interpret when they believed their proposed regulations affected small government, and recommended that Congress

[6]U.S. General Accounting Office, *Regulatory Flexibility Act: Inherent Weaknesses May Limit Its Usefulness for Small Governments*, GAO/HRD-91-61 (Washington, D.C.: Jan. 11, 1991).

consider amending the RFA to require the Small Business Administration (SBA) to develop criteria regarding whether and how to conduct the required analyses.

In 1994, we examined 12 years of annual reports prepared by the SBA Chief Counsel for Advocacy and said the reports indicated variable compliance with the RFA—a conclusion that the Office of Advocacy also reached in its 20-year report on the RFA.[7] SBA repeatedly characterized some agencies as satisfying the act's requirements, but other agencies were consistently viewed as recalcitrant. Other agencies' performance reportedly varied over time or varied by subagency. We said that one reason for agencies' lack of compliance with the RFA's requirements was that the act did not expressly authorize SBA to interpret key provisions in the statute and did not require SBA to develop criteria for agencies to follow in reviewing their rules. We said that if Congress wanted to strengthen the implementation of the RFA, it should consider amending the act to (1) provide SBA with authority and responsibility to interpret the RFA's provisions and (2) require SBA, in consultation with the Office of Management and Budget (OMB), to develop criteria as to whether and how federal agencies should conduct RFA analyses.

In our 1998 report on the implementation of the small business advocacy review panel requirements in SBREFA, we said that the lack of clarity regarding whether EPA should have convened panels for two of its proposed rules was traceable to the lack of agreed-upon governmentwide criteria as to whether a rule has a significant impact.[8] Nevertheless, we said that the panels that had been convened were generally well received by both the agencies and the small business representatives. We also said that if Congress wished to clarify and strengthen the implementation of the RFA and SBREFA, it should consider (1) providing SBA or another entity with clearer authority and responsibility to interpret the RFA's provisions and (2) requiring SBA or some other entity to develop criteria defining a "significant economic impact on a substantial number of small entities."

[7]U.S. General Accounting Office, *Regulatory Flexibility Act: Status of Agencies' Compliance*, GAO/GGD-94-105 (Washington, D.C.: Apr. 27, 1994). The Office of Advocacy's report is entitled *20 Years of the Regulatory Flexibility Act: Rulemaking in a Dynamic Economy* (Washington, D.C.: 2000).

[8]U.S. General Accounting Office, *Regulatory Reform: Implementation of the Small Business Advocacy Review Panel Requirements*, GAO/GGD-98-36 (Washington, D.C.: Mar. 18, 1998).

In 1999, we noted a similar lack of clarity regarding the RFA's requirement that agencies review their existing rules that have a significant impact within 10 years of their promulgation.[9] We said that if Congress is concerned that this section of the RFA has been subject to varying interpretations, it may wish to clarify those provisions. We also recommended that OMB take certain actions to improve the administration of these review requirements, some of which have been implemented.

Last year we issued two reports on the implementation of SBREFA. One report examined section 223 of the act, which required federal agencies to establish a policy for the reduction and/or waiver of civil penalties on small entities.[10] All of the agencies' penalty relief policies that we reviewed were within the discretion that Congress provided, but the policies varied considerably. Some of the policies covered only a portion of the agencies' civil penalty enforcement actions, and some provided small entities with no greater penalty relief than large entities. The agencies also varied in how key terms such as "small entities" and "penalty reduction" were defined. We said that if Congress wanted to strengthen section 223 of SBREFA it should amend the act to require that agencies' policies cover all of the agencies civil penalty enforcement actions and provide small entities with more penalty relief than other similarly situated entities. Also, to facilitate congressional oversight, we suggested that Congress require agencies to maintain data on their civil penalty relief efforts.[11]

The other report that we issued on SBREFA last year examined the requirement in section 212 that agencies publish small entity compliance guides for any rule that requires a final regulatory flexibility analysis under the RFA.[12] We concluded that section 212 did not have much of an impact on the agencies that we examined, and its implementation also varied across and sometimes within the agencies. Some of the section's

[9]U.S. General Accounting Office, *Regulatory Flexibility Act: Agencies' Interpretations of Review Requirements Vary*, GAO/GGD-99-55 (Washington, D.C.: Apr. 2, 1999).

[10]U.S. General Accounting Office, *Regulatory Reform: Implementation of Selected Agencies' Civil Penalty Relief Policies for Small Entities*, GAO-01-280 (Washington, D.C.: Feb. 20, 2001).

[11]Last year, legislation was introduced in the Senate (S. 1271, the Small Business Paperwork Relief Act of 2001) that would, in part, require agencies to report information on civil penalty relief to certain congressional committees.

[12]*Regulatory Reform: Compliance Guide Requirement Has Had Little Effect on Agency Practices*, GAO-02-172 (Washington, D.C.: Dec. 28, 2001).

ineffectiveness and inconsistency is traceable to the definitional problems in the RFA that I discussed previously. Therefore, if an agency concluded that a rule imposing thousands of dollars of costs on thousands of small entities did not trigger the requirements of the RFA, section 212 did not require the agency to prepare a compliance guide. Other problems were traceable to the discretion provided in section 212 itself. Under the statute, agencies can designate a previously published document as its small entity compliance guide, or develop and publish a guide with no input from small entities years after the rule takes effect. We again recommended that Congress take action to clarify what constitutes a "significant economic impact" and a "substantial number of small entities," and also suggested changes to section 212 to make its implementation more consistent and effective.

Two years ago we convened a meeting at GAO on the rule review provision of the RFA, focusing on why the required reviews were not being conducted. Attending that meeting were representatives from 12 agencies that appeared to issue rules with an impact on small entities, representatives from relevant oversight organizations (e.g., OMB and SBA's Office of Advocacy), and congressional staff from the House and Senate committees on small business. The meeting revealed significant differences of opinion regarding key terms in the statute. For example, some agencies did not consider their rules to have a significant impact because they believed the underlying statutes, not the agency-developed regulations, caused the effect on small entities. There was also confusion regarding whether the agencies were supposed to review rules that *had* a significant impact on small entities at the time the rules were first published in the *Federal Register* or those that *currently have* such an impact. It was not even clear what should be considered a "rule" under the RFA's rule review requirements—the entire section of the *Code of Federal Regulations* that was affected by the rule, or just the part of the existing rule that was being amended. By the end of the meeting it was clear that, as one congressional staff member said, "determining compliance with (the RFA) is less obvious than we believed before."

Mr. Chairman, this concludes my prepared statement. I would be happy to respond to any questions.

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Jeff Nelligan, Managing Director, NelliganJ@gao.gov (202) 512-4800
U.S. General Accounting Office, 441 G. Street NW, Room 7149,
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BRAND & FRULLA
A PROFESSIONAL CORPORATION
923 FIFTEENTH STREET, N.W.
WASHINGTON, D.C. 20005

TELEPHONE: (202) 662-9700
TELECOPIER: (202) 737-7565

**Testimony of David E. Frulla Before the House Small Business Committee**

I appreciate the opportunity to testify before the House Small Business Committee regarding federal agency compliance with the Regulatory Flexibility Act ("RFA"), as amended in 1996 by the Small Business Regulatory Enforcement and Fairness Act ("SBREFA"). I share the Committee's desire to make the RFA an effective tool to ensure Federal agencies tailor their regulations to the needs and capabilities of small businesses and other small entities. Agencies' RFA compliance is not quite "the same old story" as it was before SBREFA was enacted, but challenges do very much remain. I propose discrete and constructive changes, made from the perspective of a frequent litigant on RFA/SBREFA issues, that Congress can make to the RFA to enhance Federal agency compliance with this important law.

By way of background, I am a founding partner and principal in Brand & Frulla, P.C., a ten-person law firm located in Washington, D.C.[1] I believe that my Firm has been involved in more RFA litigation since SBREFA's enactment than any other law firm in the country. Speaking personally, I have been involved in litigation regarding RFA/SBREFA compliance with four agencies: the Department of Commerce (regarding various fisheries regulations), the

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[1] Stanley Brand, the other principal in Brand & Frulla, was Counsel to the House of Representatives before entering private practice. We are also pleased that Jere Glover, Chief Counsel for Advocacy for the Small Business Administration from 1994 through 2001, joined Brand & Frulla as of counsel in January 2002, following a year as Chief Counsel to the U.S. Senate Small Business and Entrepreneurship Committee. Collectively, we have extensive experience involving business regulatory advocacy, and the RFA and SBREFA in particular.

Department of Health and Human Services (regarding the "interim payment" system for home health agency Medicare reimbursement), the Army Corps of Engineers (regarding modification of its Clean Water Act Nationwide Permit System), and the Environmental Protection Agency (regarding its Lead Rule). In this regard, we have, with some success, represented small business organizations and entities ranging from the National Federation of Independent Business to associations representing Gulf and Atlantic commercial shark fishermen.

As the Committee well knows, Congress in SBREFA added judicial review provisions to the RFA, at 5 U.S.C. § 611, to ensure that federal agencies would do more than pay "lip service" to the RFA in developing and implementing regulations with significant impacts on the crazy quilt of small businesses and other small entities nationwide. *See* 142 Cong. Rec. S3242, S3245 (*daily ed.*, Mar. 29, 1996) (SBREFA- Joint Managers' Statement of Legislative History and Congressional Intent).

The Committee asked me to address the impact of litigation on agencies' RFA compliance. In summary, an agency promulgating a rule, as that term is defined under RFA and Administrative Procedure Act ("APA") standards, must comply with the RFA, as amended by SBREFA. To date, most post-SBREFA litigation has involved whether the RFA applies to a particular agency action or whether an agency appropriately determined under 5 U.S.C. § 605(b) that a rule does not have a significant economic impact on a substantial number of small entities. (Under the RFA, an agency's appropriate certification of the lack of such an economic impact excuses the need for detailed RFA analysis and regulatory tailoring efforts.)

RFA applicability and Section 605(b) certifications are, however, only threshold issues; ultimately, to be truly effective, SBREFA and its underlying litigation must evolve to address

whether agencies are conducting adequate regulatory flexibility analyses. More specifically, to develop adequate final regulatory flexibility analyses under 5 U.S.C. § 604, an agency must first learn about, and then fully and publicly recognize, a proposed rule's economic and compliance impacts on small entities. Then, even more importantly for the long run, the agency must collect, develop, and be able to employ sufficient information about those impacts, the affected small business community's operations, and the goals of the rulemaking. Using this information, the agency's goal should be to craft creative alternatives that minimize these economic and compliance impacts, while meeting the agency's statutory goals. Also, and still at the frontier, are agencies' recognition and analyses of the impacts of their rulemaking activities on small communities and other small non-business entities.

Before turning to ways that agencies can and still try to dodge the RFA, however, I would like to tell one RFA/SBREFA success story. In November 2000. Atlantic and Gulf of Mexico commercial shark fishermen and the Department of Commerce settled a long standing court dispute regarding the scientific and economic data and analyses used by the Government to set restrictive shark fishing quotas in the Atlantic Ocean and Gulf of Mexico. As part of the settlement, the parties agreed to an independent scientific review of the scientific data and analyses used by the Government to set these quotas. Successful litigation efforts under the RFA/SBREFA, as well as the agency's organic statute, had blocked the imposition of Federal quotas that would have effectively eliminated Atlantic and Gulf commercial shark fishing. A comfortable majority of the five reviewers concluded that the "scientific conclusions and scientific management recommendations" used to set the shark quotas and related measures at issue were **not** based on "scientifically reasonable uses of appropriate fisheries stock

assessment techniques and the best available biological and fishery information relating to large coastal sharks."

Significantly, this litigation was successful because the Federal court in Tampa, Florida was able to recognize from personal, real world experience that a 50% shark fishing quota reduction would have a significant economic impact on a substantial number of small entities, the Commerce Department's rationalizations and diversions notwithstanding. The Committee should note, however, that the Court lacked the expertise (and maybe the authority) to address the flaws in relevant agency scientific analyses that were so evident to the scientific review panel. The great news is that we were able to husband a court victory regarding the agency's economic analyses under the RFA/SBREFA to obtain a thorough review of the scientific analyses underpinning the agency's regulatory actions.

We were also able to obtain reimbursement for a portion of the attorneys' fees incurred in the three-plus years of litigation leading to the court settlement. Small businesses and the associations representing them in many cases lack the capacity to maintain such a protracted battle; indeed, we ultimately funded the later stages of the litigation on what amounted to an Equal Access to Justice Act ("EAJA") contingency basis. Given EAJA's limitations, however, I cannot say that our commitment to seeing the "shark case" through to conclusion represents a sustainable way for small firms like ours to fund these important challenges, and the Committee cannot reasonably expect all law firms to extend years of credit to their small business association clients, especially in the present economic climate.

In summary, for the RFA to be optimally effective on a broader scale, agencies must embrace the RFA analysis as a useful tool.[2] Progress on this front seems, optimistically speaking, mixed. Further, changing agency culture, whether through litigation or gentler forms of persuasion, represents an uncertain process at best.

I would now like to turn to ways that agencies are still attempting to avoid or defeat RFA requirements, before offering some constructive, discrete steps that Congress can take to provide tools for those of us who sometimes need to secure agency RFA compliance through litigation. Agencies continue to employ the following strategies to avoid full-scale (or any) RFA compliance:

- Agencies still attempt to claim that binding, widely-applicable actions do not represent "rules" subject to the RFA, not to mention the Administrative Procedure Act ("APA"), notwithstanding, among other cases, the Court of Appeals for the District of Columbia Circuit's recent confirmation of the scope of APA rulemaking requirements in *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2002);

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[2] The "Discussion of the Issues" inserted into the Congressional Record during the House's floor debate leading to the RFA's passage, emphasized that:

> [The RFA] is quite explicit about the direct involvement of affected smaller entities in rulemaking. The participation of affected small entities in an agency's deliberations regarding flexible alternatives is an absolutely essential responsibility of an agency under this legislation. **Such public participation will doubtlessly produce numbers of significant contributions to an agency's search for the least burdensome regulatory strategy consistent with its mandate.**

126 Cong. Rec. H24589-90 (Sep. 8, 1980) (emphasis added). Especially with administrative regimes now so pervasive, "Public rulemaking procedures increase the likelihood of administrative responsiveness to the needs and concerns of those affected. And the procedure for public participation tends to promote acquiescence in the result even when objections remain as to substance." *Guardian Federal Savings and Loan Ass'n v. Federal Savings and Loan Insurance Corp.*, 589 F.2d 658, 662 (D.C. Cir. 1987).

- Agencies are still not yet fully cured of their reluctance to recognize the true economic and compliance impacts of their proposed rules on small entities, and many are still too quick to try to certify under 5 U.S.C. § 605(b) that their proposed action will not have a significant economic impact on a substantial number of small entities[3];

- Agencies often claim (sometimes, we believe, inappropriately) that their general statutory grants of authority do not accord them any flexibility regarding small entities as to the voluminous details of the regulations they implement; [4]

- Agencies often claim that their regulations do not directly impact small entities, [5] or else they design their regulatory schemes to impact indirectly small entities, perhaps in part to avoid or limit RFA requirements;

- Agencies sometimes fill the decision-making record with impenetrable layers of economic information, but do not take the important, subsequent step of distilling and analyzing this information, so as to assist the decision-makers and the public to develop flexible regulatory alternatives;[6]

- Or, by contrast, agencies attempt to justify or excuse shoddy RFA compliance by claiming that they do not have sufficient information or resources to do careful impact statements, and, more importantly, alternative analyses.

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[3] *See, e.g., Southern Offshore Fishing Ass'n v. Daley*, 995 F. Supp. 1411 (M.D. Fla. 1998); *Northwest Mining Ass'n v. Babbitt*, 5 F. Supp.2d 9 (D.D.C. 1998). Both cases involve flawed agency Section 605(b) no significant impact certifications.

[4] For instance, in *National Association for Home Care v. Shalala*, 135 F. Supp.2d 161 (D.D.C. 2001), the Health Care Financing Administration claimed that **one** page of statutory language in the Balanced Budget Act of 1997 accorded it essentially no flexibility in how it developed and implemented **forty-seven** Federal Register pages of regulatory analyses and requirements imposed on small home health care providers. *See also Greater Dallas Home Care Alliance v. United States*, 36 F. Supp.2d 765 (N.D. Tex. 1999).

[5] *See Motor Equipment Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 466 (D.C. Cir. 1998) (RFA applies only when an agency directly regulates small entities).

[6] Agencies recognize that courts are generally loath to tackle reams of data, and courts may, unfortunately, conclude under the APA's "arbitrary and capricious" standard of judicial review that the collection of economic data equates to its synthesis, analysis, and constructive use.

We recommend the following, practical, and achievable steps to enhance RFA compliance:

(1) Extend the successful SBREFA panel process to other agencies. The SBREFA panel process represents an important innovation. We have seen small entities present information in the panel process that changes and improves the regulatory dynamic. Among agencies that ought to be considered as candidates for the panel process, the Department of Commerce's National Marine Fisheries Service issues more regulations than almost any other federal agency; these regulations almost exclusively directly impact small entities; and that agency has a checkered record of RFA compliance. *See Southern Offshore Fishing Ass'n v. Daley,* 995 F. Supp 1411, 1434 (M.D. Fla. 1998) (the "shark case"); *Southern Offshore Fishing Ass'n, Inc. v. Daley*, 55 F. Supp.2d 1336, 1344 (M.D. Fla. 1999), *vacated on settlement,* 2000 WL 33171005 (M.D. Fla., Dec. 7, 2000); *North Carolina Fisheries Ass'n v. Daley,* 16 F. Supp.2d 647, 651 (E.D. Va. 1997); and *North Carolina Fisheries Ass'n v. Daley,* 27 F. Supp.2d 650, 659 (E.D. Va. 1999). In fairness to NMFS, it has prevailed in some recent RFA cases. *See, e.g., Ace Lobster Co., Inc. v. Evans*, 165 F. Supp.2d 148 (D.R.I. 2001). That agency's professed increased attention to RFA compliance should ensure that the panel processes can be implemented in a manner that ensures that NMFS's economic and social regulatory planning process is undertaken in conjunction with its fisheries conservation and management planning process.[7]

(2) Clarify applicable standards of review for SBREFA litigation. SBREFA states generally that courts should review agency RFA compliance under Administrative Procedure Act standards. *See* 5 U.S.C. § 611(a)(1). But the APA and the caselaw implementing it sets forth a series of standards of review. The RFA should be amended to clarify that agency decisions regarding whether the RFA applies and whether a particular agency's organic statute permits any regulatory flexibility represent questions of law that a reviewing court should consider *de novo*. Subsequent agency analyses contained in regulatory flexibility analyses should be subject to the "arbitrary and capricious" level of review under the APA. Agencies should not be permitted an RFA/SBREFA "pass" in any circumstance by being able to claim their RFA analyses are subject to the hollow "without observance of procedure required by law" standard.

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[7] At a minimum the panel process should apply to major fisheries management plans and plan amendments, as these terms are used in the Magnuson-Stevens Fishery Conservation Management Act. *See* 16 U.S.C. § 1853.

(3) The RFA should be clarified, either through an amendment or direct committee language, to impose an affirmative obligation on an agency to base its RFA analyses on reasonably adequate economic and social information and regulatory plans. Just as an agency cannot seek to excuse a flawed National Environmental Policy Act ("NEPA") analysis on the basis it did not collect and analyze the needed information to conduct a reasonably informed analysis, an agency should not be able to make such an excuse to defeat or impair its RFA obligations. [8]

(4) The RFA should specifically state that courts should defer to any review and determination by SBA's Chief Counsel for Advocacy that a particular agency action is subject to the RFA. The RFA establishes the Chief Counsel as the RFA "watch dog,"[9] and he and his experienced staff have a detailed familiarity with when the RFA should apply, as well as the benefit of an overall perspective on the many and varied ways that agencies attempt to avoid or defeat their RFA compliance obligations.[10]

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[8] "In general, NEPA imposes a duty on federal agencies to gather information and do independent research when missing information is 'important,' 'significant,' or 'essential' to a reasoned choice among alternatives." *Oregon Environmental Council v. Kunzman*, 817 F.2d 484, 495 (9th Cir. 1987) (citations omitted). *See also Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1026 (9th Cir. 1980) ("An impact statement must be particularly thorough when the environmental consequences of federal action are great."). Certain courts have already found that NEPA's substantive requirements are analogous to duties imposed on resource agencies under the RFA. *See Associated Fisheries of Maine, Inc. v. Daley*, 127 F.3d 104, 114 (1st Cir. 1997). In fact, the RFA should impose an even stronger substantive obligation on a Federal agency than NEPA. While NEPA does not require an agency to implement the most environmentally beneficent alternative (provided it adequately considers a reasonable range of alternatives), the House of Representatives' Discussion of RFA Issues inserted into the Congressional Record attendant to that law's passage stated, "It would not be reasonable for an agency to publish a finding that a rule is unnecessarily burdensome and that it could and should be made flexible, and for the agency to then fail to promulgate such a flexible rule:" 126 Cong. Rec. H24590 (Sep. 8, 1980).

[9] *See Southern Offshore Fishing Ass'n*, 995 F. Supp. at 1434; *Greater Dallas Home Care Alliance*, 36 F. Supp.2d at 767 & n.8.

[10] *Compare Southern Offshore Fishing Ass'n, supra,* n.9, with *American Trucking Ass'ns v. EPA,* 175 F.3d 1027, 1044 (D.C. Cir. 1999) (no deference owed to either EPA's or SBA's RFA interpretations), *modified on other grounds*, 195 F.3d 4 (D.C. Cir. 1999), *aff'd in part and rev'd in part on other grounds, sub nom., Whitman v. American Trucking Ass'ns*, 531 U.S. 457 (2001). Congress should resolve this potential conflict between the cases in favor of deference to the SBA Chief Counsel for Advocacy on issues within his ken.

(5) SBREFA should be amended to provide for attorneys' fees under the EAJA whenever a small entity prevails on an RFA/SBREFA claim. Small entities and associations representing them often lack the funds to sustain RFA litigation, particularly once it reaches the often-protracted remedy phase. RFA litigation and compliance efforts should not become a war of attrition for these often economically marginal entities and associations representing them. These litigants should be assured that they will receive an EAJA award if they secure a judicial finding that an agency has not complied with the RFA/SBREFA. These small entities should not be required to make the additional showing that agency action was "not substantially justified" under the EAJA, 28 U.S.C. § 2412(d)(1)(A). Agencies should know that, by law, they take creative and aggressive RFA positions at their own financial risk and peril, rather than at the financial risk and peril of the small entities they regulate.[11] Finally, Congress should confirm that an EAJA award should be available to RFA/SBREFA litigants even if an agency settles an RFA/SBREFA claim. Both an agency and the regulated community should have the incentive to put aside RFA/SBREFA litigation in favor of active and constructive compliance with the RFA as soon as possible, and such litigation should not need to be extended solely to ensure an EAJA award.[12]

(6) Congress should remain cognizant that the SBA's efforts to police and foster agency compliance with the RFA, as well as agencies' efforts to use the RFA as a constructive and proactive tool, require adequate resources. Such a public investment in RFA compliance pays dividends in terms of "more just application of the laws and more equitable distribution of economic costs, which will ultimately serve both the society's and the government's best interests." *See* 126 Cong. Rec. H24589 (Sep. 8, 1980).

I appreciate the opportunity to testify before the House Small Business Committee, and hope the Committees and Congress will act promptly and decisively to make the SBREFA-improved RFA even stronger and better.

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[11] Congress should also re-consider the EAJA's $125 per hour cap on attorneys' fees. In my experience, that cap level simply does not reflect the prevailing hourly rate for litigation attorneys in cities or small towns.

[12] Such an approach also fosters judicial economy. RFA litigation is generally based on an administrative record, which can be voluminous. Resolution of a case thus can require a substantial amount of the court's own resources to review the record and briefs and write an opinion.

National Association of
Portable X-Ray Providers
1333 Village Drive
St. Joseph, Missouri 64506

# Testimony
# of
# Norman Goldhecht

*Regulatory Chairman*
National Association of
Portable X-Ray Providers

"SBREFA Compliance: Is It The Same Old Story"

House Committee on Small Business
Full Committee Hearing
March 6, 2002

Testimony
Norman Goldhecht
*Regulatory Chairman*, NAPXP

National Association of
Portable X-Ray Providers
1333 Village Drive
St. Joseph, Missouri 64506

Thank you, Chairman Manzullo, Congresswoman Valazquez, and distinguished Committee members for the opportunity to testify before you again today. My name is Norman Goldhecht and I appear before you today as the Regulatory Chairman of the National Association of Portable X-Ray Providers (NAPXP). I am also a former owner of a portable x-ray provider company in New Jersey who recently sold his company after 16 years largely because I felt that federal rulemaking was dooming our industry and that I could no longer afford to remain in business. Selling my family owned business was particularly difficult for me and my partner, who is my brother in-law, because we had both hoped to pass our company along to our children. Sadly, we realized that, if we remained in this business we would not pass along the legacy of a proud company but the burden of an impossible situation in which quality patient care and service were not feasible under increasingly onerous federal rulemaking.

The Portable X-Ray industry is dominated by small and micro-businesses. Our companies provide services to our nation's elderly in a particularly safe, convenient fashion, as we, literally, provide care at the patients' bedside. Because the vast majority of our patients rely on Medicare, our industry is highly dependant upon CMS and its regulatory processes and pricing mechanisms.

I have been asked to provide the perspective of our small business dominated industry regarding CMS compliance with the Regulatory Flexibility Act (RFA). My answer, on behalf of the small businesses that provide critical care to nursing home or home bound elderly Medicare patients is simple. We agree with the SBA Office of Advocacy in finding that CMS has failed to comply for over three years relative to the rulemaking process for our industry. When asked by the press to comment on the most recent plea by Advocacy to obey this law, CMS graciously offered to consider complying next year.

As I sit here, our industry is dying. This is the third time I have come before you asking your assistance. Again, I appreciate you giving me the opportunity. In the face of record hikes in gasoline prices last year in addition to significant increases in labor costs due to technical staff shortages, we have been given an approximate 8% cut across the board in reimbursements under the Physician Fee Schedule. This cuts a rate that was already driving many small businesses to halt services to rural areas and/or leave the industry. These cuts are literally arbitrary as there is no legal mechanism for establishing industry costs. Clearly, if any shred of the RFA were being enforced this situation could not continue.

The question before us is; does the RFA work? This is the power of the RFA as we are experiencing it. One federal agency, the SBA, informs another, CMS that they are in violation of federal statute. This is not a situation where our industry or our attorneys offer this analysis; this

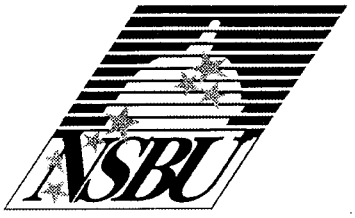
is the SBA Office of Advocacy. CMS refuses to even respond to the SBA. When we ask this Committee or the SBA what we can do to force CMS to obey the law, we are told we can sue. Sue the federal government, because as small businesses we are being driven into extinction through illegal rulemaking and are unable to survive financially. Sue the federal government because they refuse to respond to a federal agency of jurisdiction. If we sue under RFA we cannot receive any punitive damages if we win. All we can do is force CMS to obey the law. We might consider this because we are small businesses who are facing bankruptcy over illegal rulemaking. Rather than pay our employees our creditors or our selves, we might pay lawyers to sue the federal government to force them to obey the law. We are informed that we might, if we are lucky, receive funds to reimburse our legal costs up to $125 per hour. So let me see if I have this straight; one federal agency (the SBA) has confirmed that another federal agency (CMS) is breaking the law. The offending agency (CMS) refuses to comply with the law in spite of clear counsel from the agency charged with oversight's (SBA's) opinion that the offending agency is in violation. SBA can't bring suit, it is the job of small businesses, who are, because of the lawbreaking, going bankrupt, to bring this to court in the hope that they can compel the offending agency to obey the law at their own expense minus what one pays a plumber to come fix a leak on Saturday and no compensation for the harm done to the small businesses. And the question before us is "Does the RFA Work?" Mr. Chairman, I don't mean to be disrespectful, but my industry has cried foul for years and received steadily worse treatment for our trouble. We now have what, to a normal citizen, a taxpayer, a Medicare patient or a constituent would appear to be an "open and shut" case. The SBA says we're right and CMS is wrong. That and a few hundred thousand dollars over a few years to sue the government might force CMS to agree and do what they should have done in the first place, no more. The reality is, we won't be around to see the case through, **because the rulemaking in question is bankrupting us.**

Mr. Chairman, fifteen days ago you wrote a courageous letter to CMS Administrator Tom Scully regarding this ongoing policy failure. You requested a substantive response by today in keeping with Mr. Scully's boast of a fifteen-day turnaround to Congressional inquiries when he testified before this Committee on July 25, 2001. Have you received that response? If you have, was it substantive or simply more or the same "we'll get back to you" that we have seen in the past? This committee is well aware of our plight. Mr Chairman, you and your predecessor, Chairman Jim Talent have sponsored legislation to address some of our concerns. The subject of this hearing is neither that worthy legislation nor CMS' questionable opposition to it. The issue before us today is Agency compliance with the RFA. I believe that our experience provides a textbook example of why this admirable law deserves the teeth required to allow it to achieve the intent of this Committee and the Congress. If our situation does not frustrate and anger this Committee as it frustrates and angers us than your work on this matter is done. If this Committee feels that justice is being done in this case, than your work is done. If this Committee feels that small businesses are served by a law that, at best, allows them to take a federal agency to court to force compliance with no hope of compensation for damages let alone the true costs of acting as a government watchdog, then your work is done. However, if this Committee is outraged by the callus refusal of CMS to obey the law and respond appropriately to the Congress, the Executive Branch and the public in this instance, than I am afraid that your work is not complete. If this Committee does not believe that small businesses should have to sue to force agency compliance, particularly when the Congress and the SBA are in accord regarding

the lack of agency compliance, then we are here to work with you to strengthen the law and protect American small business from federal agency abuse.

Our case against CMS does provide an illustration as to how the current RFA might be strengthened to the point where it could truly protect small business from federal rulemaking abuse. We would begin with the premise that, by definition, small businesses are those least able to pursue legal remedies against federal agencies in the courts. This is all the more true when the law does not allow for any damages, which might offer incentive for private small businesses to hold agencies accountable through suit. Additionally, by utilizing the equal access to justice act, the ability to possibly recoup $125 per hour for legal fees if the small business is vindicated clearly does not suffice to compensate for legal expenses. As we are discussing a suit that is aimed solely at compelling the agency to comply with the law, the time and money spent pursuing such a suit should not be a further deterrent against wronged parties seeking justice. In the case of our industry and this violation, even if we were to prevail, we would lose, as the effect of the improper rulemaking would doom our industry to the extent that few of our companies would survive to witness agency compliance. In order to avoid this sort of "lose/lose" scenario, a mechanism that forced compliance without small businesses resorting to suing the government needs to be put in place. At the most obvious level, if the SBA Office of Advocacy finds a violation, there should be some level of compliance required or penalty assessed short of legal action in a court of law. We note that the Office of Inspector General for each agency serves as an internal and external watchdog for that agency. Could the I.G. be employed to force compliance from an agency? At the very least, we must find a way to enforce the existing law if not improve upon it by expanding the Office of Advocacy's jurisdiction or otherwise placing agencies on notice that non-compliance will not be tolerated.

In summation, Mr. Chairman, Congresswoman Valazquez and distinguished Committee members, I must stress that you represent our last, best hope for fairness. Without your assistance, our services will continue to vanish and elderly nursing home patients will be denied our care. The most damaging effect, however may not be to our small businesses and patients alone, but to all of our nations' small businesses that count on regulatory fairness and believe that laws like the RFA protect them. The NAPXP stands ready to assist this Committee in any way in devising a workable solution to this serious problem. Thank you for this opportunity to offer our views. Mr. Chairman, I'll be happy to answer any questions you or the other Committee Members might have for me.




**TESTIMONY OF DAMON DOZIER**
**DIRECTOR OF GOVERNMENT AND PUBLIC AFFAIRS**

**NATIONAL SMALL BUSINESS UNITED**

*SBREFA Compliance: Is it the Same Old Story?*

**Before the House of Representatives Committee on Small Business**

**March 6, 2002**

Chairman Manzullo, Ranking Member Velazquez and other Members of the Committee:

My name is Damon Dozier and I serve as the Director of Government and Public Affairs of National Small Business United, the nation's oldest bipartisan advocate for small business. NSBU represents over 65,000 small businesses in all fifty states. Our association works with elected and administrative officials in Washington to improve the economic climate for small business growth and expansion. In addition to individual small business owners, the membership of our association includes local, state and regional small business associations across the country. The goal of our organization is to protect and promote our members and all of our nation's small businesses before Congress and the Administration. We at NSBU work toward this goal by working with Congress, the media, our direct members, affiliates and a national audience as a small business advocacy organization.

I am pleased to appear before the Committee today to share my views concerning the Regulatory Flexibility Act of 1980, as amended by the Small Business Regulatory Enforcement Fairness Act, also known as the "Red Tape Reduction Act," or SBREFA. I would like to add that the views expressed today are based on my direct experience in working with the RFA as a former Assistant Advocate for Environmental Policy in the Office of Advocacy in the Small Business Administration, and as staff with regulatory affairs responsibilities for the Senate Committee on Small Business and Entrepreneurship.

The bulk of my experience with the RFA has centered on monitoring Environmental Protection Agency compliance with the law, which, during my tenure at the Office of Advocacy, included

ensuring that proposed rules were properly certified as not having a "significant economical impact on a substantial number of small entities." My duties also included, among other things, reviewing Federal agency initial and final regulatory flexibility act analyses, filing comment letters on proposed and final rules, and, of course, providing assistance to the Chief Counsel in his role as one of the three members of the SBREFA Panel.

It has been my experience that, comparatively speaking, the EPA has been particularly active in its small entity outreach efforts, and has made tremendous steps over the past five years in ensuring that the small entity representatives participating in the Panel process have enough quality data and information to make educated comments regarding rules in development. However, NSBU has disagreed with some interpretations the EPA has made under the RFA, most notably, the rulemakings for the National Ambient Air Quality Standards for Ozone and Particulate Matter, and the revised reporting standards for lead under the Toxics Release Inventory. Both of these rules should definitely have been subject to appropriate "RegFlex" analysis and the SBREFA Panel processes.

However, according to the EPA, as of March 20, 2002, the agency will have completed 25 SBREFA Panels. While completion of SBREFA Panels is not, and should not, be the only standard by which RFA compliance should be measured, the record bears mentioning nonetheless.

For most rules that affect small business, the agency has done a tremendous amount of outreach. Through the exceptional efforts of the Small Business Ombudsman Karen Brown and the Small Business Advocacy Chair Thomas Kelly, the agency has put in place the right mechanisms to

hear from small business, a level of involvement which is desperately needed at other Federal agencies.

Moreover, there have been a number of SBREFA successes in scaling back potentially onerous EPA regulations. In one particular rule, the Office of Advocacy found faulty pollutant loading data, and the agency revised its rule accordingly.[1] In another case, a proposed regulation was withdrawn entirely, saving small businesses on the order of $103 million dollars annually.[2]

The Occupational Safety and Health Administration has a bit of a spottier record, having convened only three panels. In one of the panels, the ergonomics program standard, the agency seemed to discount Advocacy data, which showed the true cost of the rule on small firms. While this rule was overturned under the Congressional Review Act and small businesses ultimately won the fight against a costly and unnecessary rulemaking, OSHA would be well served to follow EPA's better example of outreach.

When I started at Advocacy in 1996, the SBREFA law was very new and it seemed that no Federal agency was exactly sure how to comply, and were not, quite frankly, very motivated to learn. Six years later, this still seems to be the case. In my opinion, the RFA, and later SBREFA were desperately needed because Federal agencies were refusing to do adequate outreach (in most cases, any outreach at all) to small firms.

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[1] Effluent Limitations and Guidelines for the Transportation Equipment Cleaning Industry, Notice of Proposed Rulemaking issued June 25, 1998

[2] Effluent Limitations and Guidelines for Industrial Laundries, Notice of Proposed Rulemaking issued December 12, 1997.

Six years after the enactment of SBREFA, I think it would be fair to say that the law has had some real successes, but could yet be improved through a few technical amendments. In the last Congress, the Senate Committee on Small Business and Entrepreneurship approved a bill (S. 1156) that would have streamlined the SBREFA Panel process and made the Internal Revenue Service subject to the law. NSBU strongly supported this effort, and we are willing to work with this Committee to ensure if a similar bill is introduced this session, that it ultimately becomes law.

While one of the issues to be addressed at this hearing includes perhaps adding additional agencies to the SBREFA Panel process (an option that I enthusiastically support), the problem of the lack of outreach will still remain no matter how many are added, unless agencies are forced to change the belief that they can get away with refusing to comply with the law.

Just a few short months ago, the General Accounting Office, in a report entitled *Regulatory Reform: Compliance Guide Requirement Has Had Little Effect on Agency Practices*, found that six federal agencies including the Commerce Department, the Environmental Protection Agency, the Federal Communications Commission and the Securities and Exchange Commission failed to produce small business guidance documents as required by the Small Business Regulatory Enforcement Fairness Act of 1996.

This particular report focused on Section 212 of the Small Business Regulatory Enforcement Fairness Act, which requires agencies to publish compliance guides for each rule or

group of related rules for which the agency is required to prepare a final regulatory flexibility analysis. GAO found that Section 212 has had little impact, and its implementation has varied across and sometimes within the agencies. Most alarmingly, not only did the six agencies fail to provide compliance guides, some of the documents provided by the agencies "appeared to have been identified as small entity compliance guides only in response to our inquiry," the GAO said.

The findings of the GAO seem to be a microcosm for a larger problem: most Federal agencies simply are not committed to agency outreach, and thus, fail to comply with most of the RFA's provisions. If the agencies cited in the GAO report had been committed to doing outreach to small firms and small business associations, even if the agency found that a particular rule or set of rules failed the "significant and substantial test," the small business community could have provided pressure on these agencies to comply with section 212, or at least made them aware that the provision existed.

One suggestion that I believe would help solve this problem would be to change certain language located in §609(a) of the law. Currently, the law states:

(a) When any rule is promulgated which will have a significant economic impact on a substantial number of small entities, the head of the agency promulgating the rule or the official of the agency with statutory responsibility for the promulgation of the rule shall assure that small entities have been given an opportunity to participate in the rulemaking for the rule through the reasonable use of techniques such as--
(1) the inclusion in an advanced notice of proposed rulemaking, if issued, of a statement that the proposed rule may have a significant economic effect on a substantial number of small entities;
(2) the publication of general notice of proposed rulemaking in publications likely to be obtained by small entities;
(3) the direct notification of interested small entities;
(4) the conduct of open conferences or public hearings concerning the rule for small entities including soliciting and receiving comments over computer networks; and
(5) the adoption or modification of agency procedural rules to reduce the cost or complexity of

participation in the rulemaking by small entities.

By changing §609(a) to read "When any rule is promulgated which will have *any* impact on *any* number of small entities...," Federal agencies would be required to do what simply makes sense: reach out to the regulatory community before they propose to regulate said community. Realizing that there may be some "procedural" rulemakings that probably should not be subject to these provisions, agencies should be able to petition the Office of Advocacy to exempt *certain* categories of rulemakings, as long as these agencies can make a convincing case. Of course, any change along these lines should be judicially reviewable, or agencies will ignore them altogether.

There has been some discussion in recent years about giving the Office of Advocacy the authority to define the term "significant economic impact on a substantial number of small entities" for purposes of RFA compliance, but it is not clear to me how such a rule would be implemented or enforced.

Currently, Advocacy publishes an RFA guide, and agencies have their own internal policies that determine which rules could potentially be subject to SBREFA Panels. While the current arrangement leads to debate between Advocacy and the EPA (as well as OSHA and a number of other Federal agencies), I am unsure that Advocacy has the resources and staff to add clarity to the "significant impact and substantial number" question.

Additionally, we at NSBU feel that there should be a remedy for small businesses adversely affected by erroneous RFA certifications before rules are finalized (and thus, subject to judicial review).

However, without staff and resources, Advocacy will not be able to participate in these matters.

First of all, in order for any office to define these terms, there has to be an expert understanding of the regulated community. While SBA generally has the responsibility for setting up size standards for all businesses using the North American Industrial Classification Code System, SBA size standards are constantly being revised and updated. Thus, the definition of a small business is a task that always represents a moving target, and SBA already has an Office of Size standards that has a huge task, with sometimes mixed results.

Secondly, to accurately determine an economic impact on an industry, Advocacy would need significant amounts of data on every industry regulated and classified by the Federal government, another tremendous task. This data usually takes years to compile and analyze. I do not believe Advocacy has the staff or the resources to complete these tasks.

For example, one of the SBREFA Panels I worked on during my tenure at Advocacy was Effluent Limitations and Guidelines for the Centralized Waste Treatment Industry. During the course of that Panel, EPA provided specific economic data based on years of information collection requests and on-site visits.

It is a far simpler task to have small entity representatives to provide comment on regulations (and provide critical analysis of agency data based either on the experiences of their own firms or through data provided by associations or other groups) than for Advocacy to create

"hard and fast" rules on what is significant and substantial. That Panel proved to be very successful, as the final rule reflected EPA's decision based on the recommendations made by small entity representatives to go with less expensive regulatory options than those originally proposed.

This has become an all too familiar refrain over the past five or six years, but it is indeed remarkable how Advocacy has been able to incorporate the additional functions given to it by the SBREFA without an effect in the quality or quantity of the work it has historically performed, despite annual fights to maintain funding and being handicapped by personnel freezes stemming from problems in the rest of the agency. Adding new responsibilities without additional funding and staff would prove to be, I believe, a crushing blow for the Chief Counsel's office.

I appreciate this opportunity to testify before the Committee this morning, and I would be happy to answer any questions that you may have.

**Testimony of Jeff Gibson**
**Director of Support Operations for the Halotron Division**
**American Pacific Corporation**
**Before the**
**House Small Business Committee**
**March 6, 2002**
**on**
**SABREFA Compliance**

Mr. Chairman and Members of the Committee, my name is Jeff Gibson. I am the Director of Support Operations for the Halotron Division of American Pacific Corporation. I am here today representing the National Association of Manufacturers and its 10,000 small and medium-sized companies. I welcome the opportunity to testify before you today on the necessity for SBREFA compliance by federal agencies. As a small business, we are reminded daily of the onerous and unintended effects regulations can have on our and other small businesses. While my testimony will focus on one particular regulation that has a direct impact on our company, I am submitting for the record a list of regulations both proposed and final that affect small manufacturers.

American Pacific Corporation employs 220 people in Utah and Nevada. We manufacture specialty chemicals and our sole manufacturing facility is located in Cedar City, Utah. Since 1958, we have manufactured chemicals that are used in

the space shuttle and DOD solid rocket motor programs in the past decade, we have diversified into the air bag and fire protection chemical market.

During the past three years, we have spent an inordinate amount of time and an extraordinary amount of money to oppose a proposed rule to establish an allocation system for controlling hydrochlorofluorocarbons (HCFC) production, import and export in the United States. This proposed EPA rule would negatively impact our company and many other NAM small businesses. This rule proposes an allocation system for a key ingredient in our fire protection chemical, which is also used in a wide variety of other products, from foam insulation to commercial chillers. We believe that the EPA has not done due diligence in weighing the negative impact to small businesses against the potential minimal environmental gain.

In 1992, realizing a need for alternatives to ozone depleting fire suppression chemicals, we entered the fire extinguisher business. Our company developed Halotron I™, an EPA-approved replacement for halon 1211. Halon 1211 is a potent ozone depleter that is no longer produced in the United States. Alternatives to this substance are in great demand. Our product is the most widely tested, approved, and used halocarbon-based clean agent for portable fire extinguishers in

the U.S. and the rest of the world. However, our survivability is in jeopardy. The promulgation of this rule would benefit the 27 producers and importers of HCFCs by establishing an EPA-created commodity market and would hurt many small businesses through increased costs due to contrived shortages. These small businesses should not be punished for following EPA rules and bringing these innovative and more environmentally friendly products to market.

It took millions of dollars to research, develop and test this product and many years to meet all of the criteria mandated by government agencies. We were finally able to bring this product to market in 1996. We are starting to see some return on our initial investment from a decade ago.

At the time the EPA prepared to initiate this rule four years ago, the U.S. consumption of all HCFCs was nearing 92 percent of the Montreal Protocol mandated cap. The EPA was concerned that the U.S. would exceed its agreed upon allowance level. Subsequently, the EPA conducted stakeholder meetings on this potential new rule that would allocate production rights of HCFCs. Initially, it was represented by the EPA to be a "placeholder" that would not go into effect unless the U.S. consumption did indeed near the cap. Should that happen, a trigger

mechanism would be invoked and the rule would go into effect. If the threshold were not reached, there would be no rule.

In April 1999, the EPA released an Advance Notice of Proposed Rulemaking to establish an allocation system for controlling the production, import and export of HCFCs in the United States This rule was reproposed and released for public comment on July 20, 2001. As this rule has evolved over the years, the HCFC consumption trend has gone down instead of up as the EPA had anticipated. The threat of exceeding the cap is gone. Nonetheless, the trigger mechanism has been removed and the EPA continues to push for this rule to be enacted immediately. HCFC consumption is down to 83.75 percent, and will decrease further once HCFC 141b is no longer produced or imported in 2003, as mandated by the Montreal Protocol. While we support compliance with the Montreal Protocol, this rule, as written, is patently anti-competitive, ill conceived, unnecessary and disastrous to our and many other small businesses.

This regulation, which will have no environmental gain, will raise the price of HCFCs, will create a new bureaucracy of the EPA reporting requirements and will establish a new commodity market, limited to the 27 companies that are slated to receive the allocations. Small businesses are bound to suffer price increases due

to contrived shortages and lack of competition at the hands of a government-created oligopoly.

In the preamble to this rule, the EPA stated that there are no economic effects to a significant number of small businesses, yet they do not know that there are any effects because they have not conducted a Regulatory Flexibility Analysis to determine if small businesses are affected. Nor did they contact small businesses in a variety of sectors to determine the effects of this rule. The EPA should comply with the Small Business Regulatory Enforcement Flexibility Act and perform a Regulatory Flexibility Analysis on the impact to small businesses that use HCFCs -- not just the 27 producers and importers of HCFCs that are slated to receive allocations. That analysis would confirm that the unintended effects on small businesses are significant, unfair and needless.

We have requested that the EPA comply with SBREFA and investigate this issue. That has not come to pass. The evidence suggests that thousands of small businesses that use HCFC 123, 124, 22 and the other EPA-approved HCFCs will suffer because due diligence has not been done by the EPA on the impacts to these use sectors. Indeed, it is likely that many of the companies that will be affected by this proposed rule do not even know of its existence.

Many small businesses cannot afford to have staff designated to monitor the EPA Web site or *The Federal Register*, much less join trade associations to keep abreast of the ever-changing obscure regulations that often have unintended or intended detrimental effects on their companies. Companies are effectively being regulated out of business without ever having the opportunity to work with the EPA staff or other agencies to fashion rules that would give them the opportunity to make a difference BEFORE the rule is finalized or even proposed. There are a number of mechanisms that the EPA could have used to alert and solicit comments from small businesses. For example, the EPA has listed the 27 producers of HCFCs in *The Federal Register* notice for this rule. By requesting a list of companies that buy HCFCs from these producers and importers, the EPA could contact those companies to alert them to the rule and ascertain the impact such a rule may have. This could be done confidentially, and would assure that small businesses could have input into the drafting of the rule and alert the agency if any unintended effects that had not been considered would occur.

While the EPA did hold a public hearing on this proposed rule, at the request of some of the companies being affected, they did not publish that hearing date in *The Federal Register*, nor contact small businesses in advance to solicit input. As

a result, the hearing was poorly attended and small businesses were grossly underrepresented. This is another example of the EPA complying with the letter of the law, but not the spirit in which it was intended.

We concur with Senator Bond's floor comments on the 5th anniversary of SBREFA when he said, "My views are simple. I want an agency that intends to regulate how a business must conduct its affairs to do so carefully and only after it has taken every step to ensure that it will impose on small business the least amount of burden to achieve its stated objective." The sole purpose for this rule is to assure that the United States stay below the mandated U.S. consumption cap of HCFCs. There is no threat to exceeding the cap now, nor in the future; therefore, this rule is harmful and unnecessary.

The Small Business Administration has worked with us on this issue for several months. They have acted as a liaison between us and the EPA to find an equitable solution. They have done an admirable job of stating our and other small business's concerns. Unfortunately, the EPA persists in its quest to see the rule come to fruition – no matter what the cost, no matter what the ancillary effects, no matter that the rule is no longer necessary.

Small businesses are important to this country's economy, job creation and innovation. These regulations have a disproportionate impact on small businesses. The intent of SBREFA was to mandate that federal agencies thoroughly analyze the affect on companies like ours. By following the legislative intent of SBREFA and not seeking to find loopholes in the law, federal agencies could be seen as good stewards of the taxpayer's money, rather than spoilers of the entrepreneurial spirit.

We applaud you for holding this hearing to focus on the need for the EPA to use sound science and cost-benefit analyses to define the health and environmental problems and design the most cost-effective remedies, rather than to corrupt these analyses in order to defend policy decisions already made. We also appreciate the opportunity to highlight the need for the EPA to honor the spirit of SBREFA in its rulemakings.

Thank you for the opportunity to present our views today. We look forward to working with the committee members and staff on this important issue.

ATTACHMENT

Recently, we've seen the EPA ignoring sound science in issuing its toxic release inventory (TRI) "lead-reporting" rule in the final days of the Clinton Administration. This rule significantly lowers the reporting threshold for lead and lead compounds, creating considerable additional reporting requirements on small businesses. In our view, there are a number of serious scientific concerns with respect to this rule, including the EPA's questionable scientific approach to applying persistent, bioaccumulative, toxic (PBT) criteria to metals; whether the EPA's determination of lead as a PBT under that approach is appropriate; and whether the EPA's lowering of the lead-reporting threshold to 100 pounds is warranted under that determination. The final rule potentially subjects thousands of new facilities to the burdens of determining whether they manufacture, process or use 100 pounds of lead and, if so, of preparing and filing annual TRI reports.

The costs associated with these new requirements will be very substantial, especially for small businesses. The EPA's own estimates indicate increases in overall TRI reporting costs at $116 million in the first year and $60 million in years two and beyond. In its rush to the *Federal Register*, the lead TRI rule ignored both overall cost implications and the effects on small businesses. The EPA engaged in virtually no consultation with small businesses before publishing the proposed rule. In addition, the EPA's evaluation of overall costs and benefits of the rule was, by its own admission, weak. For example, the EPA identified a variety of industries that may be affected by the rule, but for which existing data are inadequate to make a quantitative estimate of additional reporting, so they were not included in the cost equation.

On April 26, 2001, in a letter to Administrator Whitman, the NAM urged the EPA to charge the Science Advisory Board (SAB) with the task of thoroughly reviewing these issues, specifically the PBT issue, in time for the EPA to reconsider the rule prior to the July 1, 2002, deadline for small businesses to start filing these onerous reports. A broad SAB review would alleviate some of the concerns that would have been expressed by small businesses had they had full opportunity to participate in the rule's formation. On February 21, the NAM joined with 33 other industry trade associations that represent small businesses to urge the EPA to defer the implementation of the new rule's reporting requirements from July 1, 2002 to July 1, 2003. The EPA has failed to address the problems faced by small businesses trying to comply with this rule. For example, many small businesses, including first time filers, are being forced to reconstruct data without the benefit of needed assistance from the EPA. Second, the Agency's guidance document was not available in final form until 13 months after the date on which facilities were required to begin recording data. Third, the guidance document that was finally released is long, confusing and leaves many important questions unanswered. Also, compliance workshops were poorly publicized and provided little help. As a result, more time is needed for the EPA to undertake needed outreach and develop and implement effective compliance assistance to address the small business concerns the Agency has ignored.

The NAM is very concerned that the EPA has a pattern of ignoring the Small Business Regulatory Enforcement Flexibility Act (SBREFA). During the appeal of the 1997 PM 2.5 and ozone rules, the EPA argued successfully that it was only setting standards and it was the states that had to implement them; therefore, the EPA could not

be required to obey SBREFA's requirements to attempt to work with small businesses to mitigate their costs of achieving the rules' goals. We at the NAM disagree with the decision of the U.S. Circuit Court and believe that the EPA should honor the spirit, if not the technical wording of SBREFA. Unfortunately, the tendency of the EPA to ignore SBREFA requirements also appears to transcend Administrations. For example, the EPA recently released a proposed electronic reporting and recordkeeping rule [Cross-Media Electronic Reporting and Recordkeeping Rule (CROMERRR)] that appears to take the position that future use of computers to store data for EPA recordkeeping requirements would be permissible only if very expensive retrofits for existing or new computer systems are made. The CROMERRR provisions would seem to impose very high costs on facilities □ potentially in the billions of dollars □ and well in excess of the $40,000 per facility estimated in the rule's preamble. EPA's own analysis concludes that the costs of implementing CROMERRR exceed the benefits unless a company already has the requisite systems. SBREFA mandates an appropriate analysis whenever a rule is determined to have a significant impact on a substantial number of entities. CROMERRR clearly would have that effect, yet the EPA did not comply because it claimed CROMERRR is voluntary. However, although presented as voluntary, CROMERRR's recordkeeping requirements would apparently apply to all EPA-mandated records kept on a computer. Most regulated entities would seem to have no choice but to collect and store data on a computer and would then have to adapt their computer systems to meet CROMERRR requirements.

Another current example of ignoring small business impacts is the recent EPA proposed rule for controlling the production, import and export of

hydrochloroflourocarbons (HCFC) in the United States. While we support eventual phase out of environmentally damaging chemicals as recommended by the *Montreal Protocol on Substances that Deplete the Ozone Layer*, this rule, as written, is patently anti-competitive, ill-conceived, unnecessary and disastrous to many small businesses. Additionally, the EPA did not comply with SBREFA and conduct an analysis of the impact to small businesses that use HCFCs. Instead, the EPA conducted an analysis on the 27 producers and importers of HCFCs that are slated to receive allocations. A small business analysis would confirm that the unintended burdens on small businesses are significant, unfair and unnecessary.

SMALL BUSINESS
LEGISLATIVE
COUNCIL

**THE SMALL BUSINESS LEGISLATIVE COUNCIL'S**
**WRITTEN STATEMENT FOR THE RECORD**
**ON THE SMALL BUSINESS REGULATORY**
**ENFORCEMENT FAIRNESS ACT**
**FOR THE HOUSE SMALL BUSINESS COMMITTEE**
**MARCH 6, 2002**

The SBLC is a permanent, independent coalition of nearly 80 trade and professional associations that share a common commitment to the future of small business. Our members represent the interests of small businesses in such diverse economic sectors as manufacturing, retailing, distribution, professional and technical services, construction, transportation, tourism and agriculture. Our policies are developed through a consensus among our membership. Individual associations may express their own views.

The Regulatory Flexibility Act (RFA) of 1980 requires federal agencies to examine the impact of their proposed and final rules on small entities and to solicit the ideas and comments of such entities. In 1996, Congress amended the RFA with the Small Business Regulatory Enforcement Fairness Act (SBREFA). SBREFA was enacted to enhance small businesses' influence in the regulatory process. For instance, one of the key provisions in SBREFA requires the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA) to convene small business advocacy review panels with representatives of small businesses for a proposed rule that may have a significant impact on a substantial amount of small entities.

SBREFA was also intended to make the regulatory process more user-friendly by developing more accessible sources of information on regulatory and reporting requirements for small business. As an illustration, Section 212 of SBREFA requires agencies to publish compliance guides for each rule that the agency is required to prepare for a final regulatory flexibility analysis under the RFA.

Although SBREFA has provided an opportunity for small businesses to become more involved in the regulatory process, there are still areas of the law that can be strengthened. SBLC believes that through legislation, Congress can improve SBREFA and make it work for small businesses the way it was originally intended.

According to a recent Government Accounting Office (GAO) report entitled "Compliance Guide Requirement Has Had Little Effect on Agency Practices," agencies are failing to comply with Section 212 of SBREFA. One reason for this is the vagueness of the threshold in SBREFA, which triggers

1010 Massachusetts Avenue, N.W. - 4th Floor Washington, DC 20001 (202) 639-8500 / FAX (202) 296-5333

this requirement. The GAO indicated in this report, and in previous ones as well, that the terms "significant economic impact" and "substantial number of small entities" needs further clarification. SBLC strongly suggests that Congress consider legislation that would direct the Chief Counsel for Advocacy within the Small Business Administration (SBA) to conduct a rulemaking to further clarify these terms. Currently, the agencies themselves are given the authority to define what is an "economic impact" and "substantial number of small entities." Agencies have been avoiding SBREFA's requirements by creating their own definitions. SBLC feels that in order to best serve the interest of small businesses, that responsibility should be given to the Chief Counsel.

Congress can create more transparency in the regulatory process through SBREFA by requiring agencies to publish their decision certifying a regulation as not having a "significant economic impact on a substantial number of small entities" separately in the Federal Register. In so doing, the small business community will know when that decision was made instead of having to wait for the proposed rule as the current law states. Furthermore, agencies should be required to publish a summary of their economic analysis supporting the certification decision, and to make the full analysis available to the interested public so that they will be able to evaluate whether the agency has met their burden to conduct adequate outreach and analysis in determining the impact of the regulation.

One of the main objectives of SBREFA should be to get small business' input into the rulemaking process at a time it can have the most impact. A way to achieve this goal would be to require agencies to conduct a cost benefit analysis during both the initial regulatory flexibility analysis, and the final regulatory flexibility analysis. In particular, during the final regulatory flexibility analysis agencies should be required to describe the comments received on the initial regulatory flexibility analysis and a statement of any change made as a result of those comments.

Another way Congress can improve SBREFA is to expand the list of agencies that are required to conduct small business advocacy review panels. There is nothing more annoying to the small business community than when the IRS issues a proposed rule and the authors have no understanding of the practices of the small businesses to be covered by the rule. OSHA and the EPA have also been identified in the past as agencies guilty of acting without a solid understanding of an industry. That is why the 104th Congress required that the EPA and OSHA conduct these review panels under SBREFA.

The EPA and OSHA must collect information on small business before they finish development of a proposed rule. SBREFA requires OSHA and the EPA to increase small business participation in agency rulemaking activities by convening a Small Business advocacy review panel for a proposed rule with a significant economic impact on small entities. The review panel must be convened to review the proposed rule and to collect comments from small businesses. For such rules, the agencies must notify SBA's Chief Counsel of Advocacy that the rule is under development and provide sufficient information so that the Chief Counsel can identify affected small entities and gather advice and comments on the effects of the proposed rule. Within 60 days, the panel must issue a report of the

comments received from small entities and the panel's findings, which become part of the public record.

For a variety of reasons, the panel requirement was not imposed on the IRS. SBLC believes that this omission should be corrected. If there is one agency with ongoing rulemaking responsibilities that have the most profound impact on small business, it is the IRS. Some provisions of SBREFA apply only to the IRS when the interpretative rule of the IRS will "impose on small entities a collection of information requirement." The IRS has embraced an extraordinarily narrow interpretation of that phrase. As a result, the IRS has evaded compliance and continues to be a costly burden to small business. Some sort of mechanism needs to be created that will make the IRS more accountable to small businesses.

In conclusion, the principals argued in this statement for improving SBREFA are based on S. 849, the "Agency Accountability Act of 2001." SBLC strongly endorses S. 849. SBLC recommends that the House of Representatives pursue similar legislation. Since small businesses account for 75 percent of net new jobs, thus leading the country in new job creation, it is imperative that agencies get their input at the time it can have the most impact. Small businesses deserve more influence in the regulatory process; Congress can provide that opportunity.

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