SMALL BUSINESS ADVOCACY REVIEW PANELS

HEARING

BEFORE THE

SUBCOMMITTEE ON REGULATORY REFORM AND PAPERWORK REDUCTION

AND

SUBCOMMITTEE ON GOVERNMENT PROGRAMS AND OVERSIGHT

OF THE

COMMITTEE ON SMALL BUSINESS
HOUSE OF REPRESENTATIVES

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SMALL BUSINESS ADVOCACY REVIEW PANELS

THURSDAY, MARCH 11, 1999

HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON REGULATORY REFORM AND PAPERWORK REDUCTION, JOINT WITH THE SUBCOMMITTEE ON GOVERNMENT PROGRAMS AND OVERSIGHT, COMMITTEE ON SMALL BUSINESS,

Washington, DC.

The Subcommittee met, pursuant to call, at 10:00 a.m., in room 311, Cannon House Office Building, Sue Kelly [chairwoman of the Subcommittee on Regulatory Reform and Paperwork Reduction] presiding.

Chairwoman KELLY. Good morning ladies and gentlemen.

I would like to welcome everybody to today's Joint Regulatory Reform on Paperwork Reduction Subcommittee and Government Programs and Oversight Subcommittee Hearing on Improving the Small Business Advocacy Review Panel Process.

I would like to thank my good friend, Chairman Roscoe Bartlett, for agreeing to hold the hearing with me. As many of you know, this is an issue that Chairman Bartlett and I have been involved with for some time.

We held two hearings in the last Congress on the Issue. I am grateful that he has continued providing oversight over the Advocacy Review Panel Process with me. Small Business Advocacy Review Panels are a good model for what we should be doing in Government.

Originally created by the Small Business Regulatory Enforcement Fairness Act, the panel process has been successful because it allows the small business community the opportunity to have a real impact on agency rulemakings.

The key to the success is getting small businesses involved in agency rulemaking early in the process. By doing so, agencies will have a much better understanding of the unique needs of small businesses before the parameters of a potential regulation get too firmly defined.

The Advocacy Review Panels are viewed as a positive process by those who actually participate in them as well. From most accounts, small businesses indicate that they appreciate having the opportunity to provide their thoughts to agencies in this type of forum.

Likewise, the agencies have indicated that they feel they benefit from this early input, which in turn can be used to produce better regulations. The goal of this hearing today is to revisit how the panel process is working generally, as well as consider ways in which the process can be strengthened and improved.

The most notable change that we are considering is adding the Internal Revenue Service as one of the agencies that is covered by the panel process. Small businesses have repeatedly described how the IRS simply does not understand the impact that many of their rules have on the operation of small business.

By requiring the IRS to convene Advocacy Review Panels, we may be able to begin to change this problem. We have an excellent panel of witnesses this morning who will be testifying.

All of them have significant experience with the Regulatory Flexibility Act and the panel process. I appreciate the time that each of them has sacrificed out of their very busy schedules for being with us here today.

In conclusion, the Subcommittee is a very strong supporter of the Advocacy Review Panel Process. We are committed to taking whatever steps necessary to see that it remains a strong part of the regulatory process.

Now, I would like to turn to my friend, Chairman Bartlett, to ask him if he would like to make a statement.

[Mrs. Kelly's statement may be found in the appendix.]

Mr. BARTLETT. Thank you. Good morning.

It is a pleasure to welcome you to this joint hearing held by the Subcommittee on Government Programs and Oversight, and the Subcommittee on Regulatory Reform and Paperwork Reduction, Chaired by my colleague, Congresswoman Sue Kelly.

This hearing is, in many respects, a continuation of joint hearings that our two Subcommittees held in April of 1997 and March of 1998, in which we addressed the need for common sense in rulemaking and the unfair financial burden born by small businesses all over this Nation, as a result of unscientific, impractical, and unnecessary regulations.

These same hearings also examined the implementation and performance by the Environmental Protection Agency, the EPA, and the Occupational Safety and Health Administration, OSHA, of the panel process added by the Small Business Regulatory Enforcement Fairness Act of 1996, better known as SBREFA.

The panel process requires these two agencies, EPA and OSHA, to consider and to respond fairly to the advice and recommendations of small businesses concerning the impact upon small businesses of proposed regulations.

We believe, as we have stated at the previous hearings, that the panel process is important. In a study done for Committees of both the House and the Senate, the General Accounting Office concluded that:

"Agency Officials and Small Entity Representatives generally agree that the panel process is worthwhile, providing valuable insight and opportunities for participation in a rulemaking process."

For some reason, when the panel process was initiated, only two agencies were included; EPA and OSHA. The legislation which we will be discussing today adds a third agency, the IRS.

This addition is long overdue. The difficulty and cost of complying with mind-numbing IRS regulations are a major concern for small businesses in my District, Western Maryland. I am sure they are for all small businesses throughout this Nation.

Small businesses need the common sense relief that advance consultation will provide. There is an old farmer's test for measuring costs and benefits. Those of you familiar with me will recall, you do not do something if the juice ain't worth the squeezing.

The IRS should be required to make sure the juice is worth the squeezing when they design new regulations. Again, thank you for coming to this important hearing. We look forward to a lively and productive discussion.

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

Chairwoman KELLY. Thank you Mr. Bartlett.

I want to explain that one of the reasons why we have gone ahead and begun this hearing is that I know that our witnesses have busy schedules, as do I am sure everyone else in this room.

The Ranking Members have phoned me and told me that they have been held up, but they will be here. They are on their way and they will be here as soon as they possibly can. So, they are comfortable with our going ahead with this.

I now would like to introduce our witnesses. We have Mr. Keith Cole. Mr. Cole is a Partner at the Law Firm of Swidler, Berlin, Shereff, and Friedman in Washington, D.C.

He is a former Senate Small Business Committee Staffer, one that we relied on extensively. He has extensive knowledge of the Regulatory Flexibility Act and the Advocacy Review Panel Process.

Our next witness is Katherine Gekker. Ms. Gekker is the owner of the Huffman Press located in Alexandria, Virginia. She was also a small entity representative on the Safety and Health Program Advocacy Review Panel that OSHA convened.

Jack Waggener is our next witness. He is a registered professional engineer employed by the environmental consulting firm of Resource Consultants/Dames and Moore located in Brentwood, Tennessee. He has participated on a number of advocacy review panels that the EPA has convened.

The final witness is Jim Morrison. Mr. Morrison is the Senior Policy Advisor for the National Association For the Self-Employed located here in Washington, D.C.

He also has an extensive knowledge of the Regulatory Flexibility Act. We welcome all of you here today and look forward to your testimony.

With that, Mr. Cole, would you be willing to begin?

Mr. COLE. Certainly.

Chairwoman KELLY. Thank you.

STATEMENT OF KEITH COLE, PARTNER, LAW FIRM OF SWIDLER BERLIN SHEREFF FRIEDMAN, WASHINGTON, DC

Mr. COLE. Madam Chairwoman and Mr. Chairman, members of the Subcommittee, my name is Keith Cole. As you mentioned, I am a Partner at Swidler Berlin Shereff Friedman here in Washington.

I very much appreciate the opportunity to testify, once again, before the Subcommittee. First, I would like to state for the record that I am not testifying today on behalf of my firm or any particular client, but solely on my own behalf, based on my experiences as Regulatory Affairs Counsel to the Senate Small Business Committee when SBREFA was drafted, and my experience in dealing with rulemakings where SBREFA panels have been convened.

I believe the SBREFA Panel Process is off to a good start. The Office of Advocacy, OMB, and EPA appear be cooperating to make the panel process a productive one. I am less sure of the experience at OSHA and I will defer to other witnesses on that.

Overall, we do not need a wholesale revision of SBREFA. However, there are a number of ways that Congress could improve the panel process, both through oversight, such as today's hearing, and through targeted legislative change such as contained in the discussion draft. In my view, the key to a successful panel is giving the right information, at the right time, to the right people. While that is relatively easy to say, it is difficult to implement in practice and very difficult to legislate.

I urge the Subcommittee to tread lightly here because too much specificity may be counter-productive to the interest of small business. As Congress recognized when it passed SBREFA, there is a tension between conducting the panel early in the rulemaking process, when the data may not be available, and conducting the panel when all of the data is available, when decisions may have become set in stone.

In my view, there is some minimum amount of information that Small Entity Representatives, or SERs as they have come to be called, must have to provide meaningful comments to the panel.

I believe the panel should take place as soon as these basic informational needs are met. However, the Subcommittee must be careful to ensure that any statutory language on minimum informational requirements does not have the unintended affect of delaying the panel until just before publication of the proposed rule when it becomes only a pro-forma review of the agency's decision; a post-hoc review.

If agencies should convene a panel as soon as the necessary information is available, the next question is what is the right information?

The type of data that really empowers the Small Entity Representatives, and by extension the panels, is a discussion of the pros and cons of the regulatory alternatives that the agency is considering. This should include some basic comparison data estimating the benefits and costs of the regulatory alternatives. This will allow Small Entity Representatives and the panel to put the alternatives into perspective. The original act does not require this type of information, but it may be one of the most productive changes this panel could make. However, this does not mean that Small Entity Representatives need to see the full economic analysis for the proposed rule or even the draft regulatory text. The key is looking at information on proposed regulatory alternatives and the cost and benefits of moving from one alternative to another.

The next issue is how do we get the right group of people to serve as Small Entity Representatives? In my view, we need a mix of people who know the SBREFA Panel Process and people who know the industry.

I do not know if the Office of Advocacy should choose Small Entity Representatives on its own, but certainly Small Entity Representatives should not be chosen over the objection of the Office of Advocacy.

A related issue is whether agencies should be able to pick a particular person to serve as a Small Entity Representative, or simply pick the organization. In my opinion, the organization should be free to select whomever it chooses to speak to the panel on its behalf.

There is also the question of standing. I believe the test should be whether the small business will bear the impacts that give rise to the benefits of the rule. This extends beyond entities who are subject to the rule. This is a critical issue we will need to discuss further regarding the scope of Reg Flex. I want to come back to that at the end of my statement.

The next issue I would like to address is when should panel reports be released? This has been a contentious issue. My experience is that EPA and OSHA have developed different practices on this. Frankly, I cannot say which approach is better. Early release can provide assurances to small businesses about the panel process. On the other hand, I am concerned that early disclosure of the panel report can open up the agency to additional pressure from outside groups, other than small business, to unwind the process made by the panel. Perhaps more experience is needed on this issue, but I am sure others will have perhaps stronger opinions on this.

Next I want to turn to the content of the initial Reg Flex Analysis. It may seem obvious that the comments of the Small Entity Representatives about the impacts of the rules should be incorporated into the initial Regulatory Flexibility Analysis. My experience with the Industrial Laundries Rule convinces me otherwise. Any legislative revision to the panel process should clarify that agencies must modify their initial Reg Flex analysis to incorporate relevant facts brought to their attention during the panel process.

On the issue of compliance by the IRS, all I can say is one word, yes.

Finally, let me return to one of the biggest problems presented by EPA's early implementations of SBREFA. The issue is the type of impacts that are to be considered by agencies in deciding whether Reg Flex applies and whether to convene panels.

The EPA has taken the position that it only look at impacts on entities that are subject to the rule. When EPA issues a new rule that directs States to take an action under one of the many delegated programs, the EPA has taken the position that it can ignore the impacts of that rule, on the theory that the small entities are not directly subject to the rule.

This issue is currently the subject of litigation in the D.C. Court of Appeals in a pair of cases entitled *The American Trucking Association* v. *U.S. EPA*. Oral arguments on this were heard December 17th of last year. A decision is expected later this spring.

I urge the Subcommittee to keep a close eye on the decision of the Court. Reg Flex and SBREFA Panels should look at the impacts on all entities that give rise to the benefits of the rule, not just those that are subject to the rule.

If the Court defers to the EPA on this issue and upholds the agency's interpretation, legislation would be urgently needed to reaffirm the intent of Congress and prevent the Reg Flex from effectively being gutted by one of the primary agencies SBREFA was designed to address.

Thank you very much.

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

Chairwoman KELLY. Thank you very much, Mr. Cole.

We have been joined by Mr. Pascrell. Mr. Pascrell, if you have an opening statement, would you be willing to give it now?

Mr. PASCRELL. Thank you.

First, I would like to give my remarks by thanking Chairwoman Kelly and Chairman Bartlett for bringing this important issue to the attention of both Subcommittees.

Small businesses are the engines of growth for our Nation's economy and are indeed the backbone of our economic system. By examining ways to make the regulatory process more efficient, we will ensure that this important sector remains vibrant and robust. I am committed to that goal.

As the new Ranking Member of the Regulatory Reform and Paperwork Reduction Subcommittee, I believe today's hearing which will examine the Small Business Advocacy Review Panel Process is of critical importance.

It is critically important because the relationship between our regulatory agencies and our Nation's small businesses must be one of mutual understanding, as opposed to mutual disdain.

Regulations that are promulgated by OSHA and EPA are very important with regard to establishing and ensuring a safe work place and a clean environment. At the same time, those who formulate regulations must be aware of the actual implications of those regulations. Very frequently they are not. When we are dealing with small businesses, we must keep in mind the fact that the cost of regulatory burdens are disproportionate on small businesses because of their very size.

This fact has been confirmed by 27 studies and recognized by both the Regulatory Flexibility Act and the Small Business Advocacy Review Panel Process. Today, we are going to hear testimony.

We have already started to hear testimony on the effectiveness of the process. We have a vote. A process which is designed to provide the small businesses community with an opportunity to participate in the rulemaking.

I think that is a tremendous breakthrough, by the way. I congratulate the Chairwoman. It is very important that we are at the same table, rather than imposing regulations and not knowing what those consequences would be because we are not familiar with the acumen of the particular business.

It is my hope that today's hearing will contribute greatly to our understanding. I might add, Madam Chairwoman, that I totally support your efforts in bringing some other agencies under the scrutiny of this process.

I do not know if you have spoken about that yet. I totally support, not only putting IRS into the mix, but I have spoken with the Chairwoman and she agrees with me also on INS, which I think is the most convoluted agency in the Federal Government. I think they need to go under the microscope.

These are folks that are talking out of both sides of their mouths, in terms of regulation, and are affecting people at the work place and businesses, and small businesses indeed.

So, thank you, Madam Chairwoman. You have my total support.

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

Chairwoman KELLY. We do have a vote. We have just had the first call. Ms. Gekker, if you are willing to hold within the 5 minute rule, we might be able to fit you in.

STATEMENT OF KATHERINE GEKKER, HUFFMAN PRESS, ALEXANDRIA, VA

Ms. GEKKER. I think I can keep it to 5 minutes.

Good morning, I want to thank the Subcommittee for giving me the opportunity to speak to you about my participation on the Small Business Advocacy Review Panel convened for OSHA's Draft Proposed Rule on Safety and Health Programs.

I was glad to hear some of you stumble over this too. I also appreciate the opportunity to comment on the proposed bill to amend the Small Business Regulatory Enforcement Fairness Act.

My name is Katherine Gekker. I am the owner of the Huffman Press in Alexandria, Virginia. I am also representing the Printing Industries of America. I would like to ask that PIA's written testimony be included in the record.

I have been in business since 1974. The Huffman Press specializes in high quality printing for graphic artists and corporations. Currently, we have nine full-time employees, including myself; and one to two part-time employees, depending on the work load.

Our gross sales should be roughly $1 million to $1.1 million this year. I found my experience on the Safety and Health Program Standard Panel both rewarding and confusing.

The process forced me to reconsider what my company was doing in our own work place and my own need for continued vigilance regarding safety and health, and training and education of our workers and myself.

I also found the panel process a remarkable accomplishment. Small businesses are important to this Country, both for the economic activity they generate in their communities and for the income they provide to employees and owners.

The fact that for the first time small businesses has a voice in expressing concerns or commendations about regulations they may face is an achievement for which Congress and these Subcommittees should be proud.

My greatest difficulty with the process was the lack of any documentation as to why the proposed rule on Safety and Health Programs is needed, and why OSHA believes it will improve safety and health.

I believe that the following questions should have been answered before any proposed rule was developed, and certainly before the panel was convened.

Is a specific industry's injury and illness experience rating low or high?

Is it increasing or decreasing?

If rates are getting lower, should safer industries be exempted?

Does the size of the company affect the rates of accidents and illnesses?

Is there actual data to support issuing a new rule?

Why do we need this rule?

Will the rule truly improve safety and health?

Has it been tested at individual states?

What have been the long-term results?

How current is any statistical data provided?

If such statistics do exist, they should have been included in the documentation which those of us on the panel received. They should have been addressed to the specific industries the panelists represented.

The economic analysis section also seemed incomplete to me:

When were the numbers developed?

Based on what?

What relevance do they have to my industry?

I found OSHA's lack of a specific outline or format for participants' submitted comments confusing. How was the panel to compare and assess our responses, if we were not all answering the same questions?

I wish that OSHA would have shared the comments of others with us afterwards. A final report was never sent to us. I found the tele-conference helpful, although the format made participation somewhat difficult; perhaps too many people; perhaps tele-conferencing itself is difficult. I was particularly shocked to learn that work on the proposed rule began many years ago.

I was also alarmed to realize how many people and how many hours had already gone into the review process. I looked back in my records and learned that I spent 22 hours participating in the review process.

I do not begrudge those hours at all, but I am a bit chagrined to note that I could perhaps have implemented the proposed rule in that amount of time.

It made me wonder if a cooperative consultation program, one that would actually improve safety in the work place, could not have been implemented and carried out by OSHA during the time involved in developing this rule.

My reaction to Representative Kelly's proposed bill is generally favorable. The suggested time limits in getting information to the small businesses advocate and to panel participants seem reasonable to me.

While I found the schedule for the review panel adequate, in my case, it was not generous. Perhaps a bit more time for me would have improved the SBREFA Process.

I am not sure that oral presentations are necessary, unless it would give regulators an opportunity to ask questions to clarify comments provided by panel members. Section 6, I believe is particularly important.

Since it is impossible for most small businesses to come to Washington, D.C. to inspect an agency's rulemaking record, I think it is important that those companies have access and the right to know what is happening and what other business owners think about a regulation.

If you require that the comments be printed in a public forum, like the Federal Register, it gives any company with Internet access the ability to read the comments.

For purposes of openness in Government and the responsibility of regulators to inform the public, I believe this is an important step. Yes, I believe IRS should be included.

Thank you for the opportunity to participate today. I will be happy to answer any questions.

[Ms. Gekker's statement may be found in the appendix.]

Chairwoman KELLY. Thank you very much, Ms. Gekker.

In light of the fact that we have a vote, I am going to adjourn for 15 minutes.

I assume we will be back at the end of 15 minutes, barring the fact that we may have another vote on the floor. Nobody seems to be quite sure about that. Otherwise, we are adjourned for 15 minutes.

Thank you.

[Recess]

Chairwoman KELLY. Thank you very much for waiting for us. It turned out that we had quite a few votes. That is why this was longer than a 15-minute break.

I appreciate having heard the prior testimony. Now we would like to hear from Jack Waggener.

STATEMENT OF JACK WAGGENER, RESOURCE CONSULTANTS/ DAMES AND MOORE, BRENTWOOD, TN

Mr. WAGGENER. Thank you. I would like to thank the Subcommittee for having me here. It is my pleasure to be here.

Over the last 25 years, I have been involved in EPA rulemakings. I have witnessed SBREFA having a very significant and positive impact on the process. I would like to thank the Congress really for bringing a breath of fresh air to the process, which had gotten pretty stale over the last 20 years.

My background, again, as indicated earlier, I am a Registered Professional Engineer in some 14 States. I work with Resource Consultants/Dames and Moore out of the Nashville, Tennessee area, where I have resided for some 54 years.

My company has been involved for many years as an environmental engineering consulting firm working for industries in helping solve environmental problems. In 1998, we had been a small business for all of that time for some 30 years.

So, I do understand the problems of small businesses, in addition to actually providing services to small businesses. In my duties, I have designed many EPA type facilities, waste water treatment systems, storm water systems, negotiated permits, work with industry to assure compliance, and worked on many EPA industrial affluent limitation guidelines.

Through that grass rooted experience, about 20 years ago I started working for many of the Trade Association here in Washington, D.C. and scattered around the Country to assist them with our technical knowledge of analyzing regulatory regulations coming out of the agency; EPA in particular.

In doing that, I have personally worked on some 20 effluent limitation guidelines that have come out of the agency in the last 20 years. So, I understand the process very well.

In 1997 and 1998, I was fortunate enough to be involved in several SBREFA Processes as a SER where I represented and worked on the Transportation Equipment Cleaning Effluent Guidelines, the Centralized Waste Treatment Effluent Guidelines, and Storm Water Regulations directly.

Indirectly, I have provided services on the Industrial Laundry Effluent Guidelines and was involved in some of that. As a result of the panel process, I have certainly observed that the rules that were eventually proposed with regard to this process that I have been involved in has resulted in very positive things.

It has given many more regulatory alternatives that would never have appeared in the Federal Register if it had not been for SBREFA.

It has been much better economic analysis and much better environmental assessments; not perfect, but much better than what it was before. I really believe, and I want to make sure that I make this point.

I think the teamwork between the EPA, the Small Business Administration, OMB, and the SERs is really what has taken place and has made this very successful.

There has certainly been plenty of disagreements along the way, but those disagreements have been worked out in this process and has resulted in good things happening from the processes that I have personally been involved in.

So, I do applaud these staffs for their work. I sincerely do. Over the last 25 years in working with the regulatory process, I have noted it has improved considerably; particularly in the last 3 years.

That, by and large in my opinion, has been due to SBREFA and what that has resulted in causing. In my early days in the 1970s and 1980s representing industry and dealing with the EPA, the EPA dealt in a very closed door atmosphere.

They did everything pretty much in a secretive fashion. As a result of that, the industry mistrusted what the EPA was doing and the EPA had a definite attitude of not trusting what industry did.

What I have seen happen in the SBREFA Process is that has not entirely disappeared, but the negative attitudes, a lot of the negative attitudes between the EPA and the regulated community have dissipated. Again, not entirely gone away, but there has been significant improvement there and much more cooperative effort.

Each SBREFA Process of the four that I have had involvement in, what I have witnessed is that each one improves as it goes along. The agency understands more of what the SERs need, what the SBA needs, and what OMB needs.

So, there has been a continual improvement. The learning effect is what one would hope and expect would happen. Again, SBREFA has been working very effectively with small businesses.

What I would like to see, again, making my comments with regard to the bill, there are some modifications being considered. I think they should be carefully measured. Sometimes even minor changes that seem to be minor could have negative impacts on the process which, in general, seems to be working very well.

So, we do not want to impede that process because we have made large steps here. The problems that I have personally seen and have encountered in dealing with the process is not timely receiving all of the critical information.

Also, it is tied to that, by not timely receiving it, also not having enough time to adequately review all of the information and come up with alternatives that could be put on the table during a discussion. As I said earlier, in the very beginning of the SBREFA Proc-

ess, as I think I was involved in maybe the first or second one, the agency did not really know what we wanted and visa-versa.

So, it was a learning process. So, what has happened is I have seen that they are much better at doing this. Sometimes that is still not the case. So, there really needs to be some definition.

I do not want to over-define it to impede the process as to what information is required and make sure we get it to everybody on time.

One thing that I would like to see in the bill, and I think would be helpful to us that have served as SERs, is at least 45 days receiving the critical information, at least 45 days prior to the SBREFA Panel convening.

That would allow enough time. Obviously, we always want more time. It would allow, in my opinion, adequate time to really review the information and to formulate some ideas before convening the panel.

I would like to see that occur. It also would allow time, if you did not receive all of the information you thought was necessary, you could identify it and move forward to get that. Typically, the information that we have eventually gotten from the agency, and I believe what is important is initial information that identifies the regulatory alternatives that are being considered, the initial economic impact data.

I am saying data, not some formal report, but the data which we can look at. It has enough formality to really look at it and analyze it. Information on the cost effectiveness and the benefits, information as to what toxics are going to be removed by this regulation.

In other words, what is the benefit of the regulation? That must be supplied with adequate detail for us to do our jobs as SERs. On the other hand, if we put too much specifics in this bill, I believe it could impede the process.

If we ask for things in a very formal form, that is going to take the agency more time to put together, which moves the process further along towards the end of the regulatory process. It would impede the process.

One thing in particular I noticed in the bill where it says "Drafted Proposed Rules." Well, my experience is that rarely would anyone ever see a drafted proposed rule or one would be prepared by the time the SBREFA Process needed to take place.

Certainly, the elements of that proposed rule are needed to be looked at. But to say in any way or imply in any way that it should be a proposed rule, even drafted, I think may be going too far. It has been my experience in the other SBREFA Processes that we have had at least two meetings in the 60-day span; one of an introductory kind of meeting and then one following giving ideas.

I believe that is a very good idea. I think perhaps maybe even in the bill that there should be an indication that at least two meetings should occur. Even though it has occurred, the individuals at the EPA have been very congenial and made those things happen.

People like Tom Kelly, who has been really at the heart of this at EPA. He has done a great job of doing that. I would like to see something in the bill that says that there must be at least a couple of meetings to get our points across.

Another thing in the bill that I am a little concerned about is it indicates that the Chief Counsel will select the SERs. I think really the process, in my opinion, should say that both SBA and EPA should have somewhat of an equal say so in selecting the SERs. There should be some agreement there.

That generally is what has been occurring. In my opinion, it has worked fairly well. Again, not perfect, but it has worked fairly well. I do not think it is broken, so why fix it, as the old saying goes.

I believe that in terms of the panel members, it is important to say that—obviously all of the panel members represent small businesses and their interests. I think it is important to have small business owners on the panel and their representatives or other representatives which are very knowledgeable of the process of small businesses.

Most small business operators and owners know very little about how regulations are developed, the basis of them, and frankly how to critique those in this process. They certainly know how things impact their business.

What I have found, again, as a consultant and being on these panels, since I have worked for some 25 years in the regulatory community, I understand how the regs are put together.

I understand the technical aspects of it. I think the combination of that experience has been invaluable in coming to a successful SBREFA conclusion.

So, again, the people who are on these panels, there needs to be really a diverse group as to what is there where they can really get to the meat of the issue and come up with real, workable, regulatory alternatives that really help small businesses.

The ones I have been involved with, I believe actually have. So, I am very pleased about that. In conclusion, again, I think SBREFA, honestly, has been a success story for this Congress, for EPA, for OMB, and all of the parties involved, at least in the three or four that I have been involved in. So, again, this makes a minor adjustment to tweak the process, but let us do not do anything that may impede it.

Thank you very much.

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

Chairwoman KELLY. Thank you very much, Mr. Waggener.

Mr. Morrison, our last, but not our least witness.

STATEMENT OF JAMES MORRISON, SENIOR POLICY ADVISOR, NATIONAL ASSOCIATION FOR THE SELF-EMPLOYED, WASHINGTON, DC

Mr. MORRISON. Representatives Bartlett and Kelly, good morning. I am James Morrison the Senior Policy Advisor to the National Association for the Self-Employed.

On behalf of the NASE's 330,000 members, we thank you for taking up this important subject. NASE strongly supports the Review Panel Process. We believe it is one of the most successful innovations in SBREFA.

It has helped to build a more fair and rational regulatory process. Certainly, there is work to be done at both EPA and OSHA. Other witnesses this morning have discussed that.

I would like to focus, if I may, on another aspect of the draft legislation that the Subcommittees are considering: adding the Internal Revenue Service to the Review Panel process.

The NASE strongly favors this. But adding IRS could be even more effective with further changes in the Regulatory Flexibility Act.

IRS' regulations reflect its daunting task: to deal with a big, complex country that has a very big and complex tax code, and bring in the money necessary to keep the Government running.

Many of us believed that explicitly putting most IRS rules under the Reg Flex Act, which SBREFA did in 1996, was the kind of change that might eventually be welcomed by the IRS. That has not happened.

Few IRS rules formally opt out of the Act.

Fewer still contain Reg Flex Analyses. Even those that do are extremely limited in scope. Why is this happening? Well, when the original Reg Flex Act was passed in 1980, quite a few agencies asked Congress to let them out from under it. IRS was one of those.

No such exemptions were ever contemplated, let alone enacted. Still, when the law was passed, several agencies, including the IRS, looked for legal technicalities they could use to avoid it.

When Congress took up SBREFA in 1996, a top priority was bringing all rules significantly affecting small entities under the Act, including all IRS rules. IRS also opposed this.

One of the main points that IRS made then was that the diversity of its rulemaking, which includes revenue procedures, private letter rulings, and so on, would prevent the agency's rules from being brought under the Act.

So, SBREFA set-up a trigger for IRS compliance, which is whenever an IRS rule requires a "collection of information." That occurs when IRS requires 10 or more people to gather information, including any records they must keep.

Unfortunately, three major problems have emerged with this trigger. To make any IRS Review Panels work better, I believe they should be addressed.

First, IRS frequently overlooks the record keeping part of the trigger.

The Service seems to assume that if it is not requiring taxpayers to fill out some new form, then it is not collecting any information. For example, when IRS proposed to change the tax treatment of limited partnerships, it set the tax base at 500 hours of annual participation in the partnership. Of course, calculating that would require record keeping. Yet, the Service insisted it was not collecting any information. So, it refused to do a Reg Flex Analysis, despite the major small business impact. In that case, unfortunately, Congress had to step in.

Second, IRS interprets the trigger to mean that very little analysis is required. Here we have a dispute over words. I believe that Section 603(a) of the Reg Flex Act says, in effect: "IRS, if your rule requires any record keeping or reporting, do a Reg Flex Analysis."

That is not how the IRS sees it. They seem to believe that the same section says: "if there is a paperwork requirement, analyze

only that paperwork impact." If one takes the IRS' view, then the RFA becomes, in effect, a second Paperwork Reduction Act.

This raises questions: Why would Congress impose two Paperwork Reduction Acts on the IRS? Why just the IRS and not any other agency? For that matter, why would Congress ask every other agency to analyze the economic impact of their actions, but not ask the IRS to do so?

A few weeks ago, IRS published proposed and final rules on COBRA continuation health insurance coverage. The IRS said there was no major small entity impact because the cost of filling out the forms would only be $5 or $6 per employer annually.

But surely, this is not the only economic impact of changing COBRA rules. What about implementation costs for employers? What about impacts on small insurance companies, small hospitals, small non-profits, small governments? IRS' narrow focus on paperwork costs inevitably leads to such absurd outcomes.

All this means is there will not be as many Advocacy Review Panels at IRS as necessary, unless the analysis requirements are made clearer.

Third, even if the analysis requirements are fixed, the trigger still needs to cover more rules. Sometimes rules have a major impact on small entities, but have no collection of information requirement.

One recent IRS rule, for example, dealt with the auditing guidelines for partnerships that have been modified. Some other recent rules dealt with the hearings that IRS convenes before imposing liens and levies. A lot of small entities have potentially big stakes in these rules.

Since there is no collection of information requirement in any of these rules, there is no Reg Flex Analysis for any of them. In these cases, too, having Advocacy Review Panels would be hampered by the language of the existing law.

Finally, there are also rules with indirect, but significant small business impact. Consider IRS' proposed rule on deductions for interest paid on education loans. True enough, this deductibility directly affects only student borrowers, who would not fall under the RFA.

But what about indirect affects on the lending institutions that make the loans? On the small colleges that use them to attract students?

I would make two suggestions to the Subcommittees.

First, make a technical correction in the Regulatory Flexibility Act. Make it clear that while information collection triggers the analysis, paperwork costs are not the sole point of the analysis. In my written testimony, I offer some possible wording for doing this.

Then, add IRS to the covered agencies for the review panels.

If the technical fix still ends up omitting too many rules, Congress may need to change the trigger altogether, making it: "any regulatory action by IRS that significantly impacts small entities."

Secondly, give both the SBA Office For Advocacy and the IRS the resources they need to make the resulting analysis and panels work. Advocacy has been stretched very thin, even as it has been assigned ever greater responsibilities. This has to end and now is the time to end it.

The IRS also needs adequate resources to comply. No doubt, resource concerns have been a factor in the Service's past reluctance to deal fully with the RFA. I hope the IRS will eventually come to see this change as an enhancement to their commendable new customer service orientation, as a way to better involve small entity customers in IRS rulemaking.

Such involvement would lead to better IRS rules which are easier to implement and enforce, and which draw a far more positive reaction from small entities and from Congress.

That concludes my testimony. I would be happy to take any questions at this time.

Thank you for asking me to appear here.

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

Chairwoman KELLY. Thank you very much, Mr. Morrison.

I have just a few questions. With Congressman Bartlett's indulgence, I am in a mark-up in two other committees. So, I am going to ask my questions first and let him take over and finish up here.

I would like to start with you, Mr. Cole. In my opinion, Section 609 is currently unclear as to which agency is responsible for identifying Small Entity Representatives.

Our draft bill clarifies that it is the SBA's responsibility to name them, although it would not preclude SBA from getting input from the covered agency. What are your thoughts about this change?

Mr. COLE. The Act, as originally drafted, is a bit unclear on this. The best way that I can describe how I think the Act currently works is something like this: Chief Counsel For Advocacy kind of nominates individuals to serve on the panels, then the agency selects and notifies those individuals. I see value in placing responsibility in one agency. It will assist your oversight function in the future if you do not have divided responsibility and the agencies pointing fingers at one another.

I think it is an important issue. The question is how much of a fight is this going to provoke down at the agencies? There is a lot of good in this bill, but I fear this is going to trigger a bit of a turf fight between EPA and SBA, between OSHA and SBA. I would hate to see that stand in way of the rest of the bill. So, in my mind, it is not the most important change to put this in SBA. I think there are some alternatives in the middle such as EPA has to select the Small Entity Representatives with the concurrence of Advocacy. That way, EPA could not select Small Entity Representatives over the objections of Advocacy.

In the end, this is something that is going to be up to the Subcommittee. I would not want to see this stand in the way of the rest of this bill passing.

Chairwoman KELLY. All right. Let me just go to another question. Your broader comments about Reg Flex were very helpful. Do you think the agency should use the panel process to help them determine whether rules should be certified as not having a significant effect on small businesses?

Mr. COLE. Certainly, that is one function of the panels. If during the panel process you can identify regulatory alternatives which really resolve the problems for small businesses, then the outcome could be that by the time the proposed rule comes out, there is no

need to have a Reg Flex Analysis because you have taken care of the problem prior to the proposed rule.

That is a factual determination. In that scenario, it is a question of analyzing how do the regulatory alternatives affect small entities, and the SBREFA Panel Process can be very helpful.

The problem that we have at EPA is the disagreement over whether entities that are not subject to the rule still suffer the impacts of the rule. That issue is not really addressed by the panel process. In other words, we have to resolve the threshold jurisdictional issue before we can decide whether a panel is necessary. Actually, this is the basis of a lot of the arguments between SBA and EPA over what types of small entity representatives should be invited.

EPA is taking this very restrictive view that only the small entities that are directly subject to the rule should be invited to be members of the panel. The Office of Advocacy recognizes what I think was Congress' original intent in this. In the Reg Flex Analysis, you are to look at those entities which are reasonably impacted by the rule; whether they are subject to the rule or the impacts flow through, for instance a state is often the mediating entity. SBA wants to include this larger group of small businesses as Small Entity Representatives. If we resolve this threshold issue, there are going to be less arguments over which entities should be invited and less arguments over who should be on the panel between EPA and SBA.

Chairwoman KELLY. Has EPA ever conducted a panel only to certify the rule under Reg Flex upon its completion, that you know of?

Mr. COLE. I do not believe so. EPA and OSHA have conducted 15 panels to date; 13 at EPA. Seven of those have had proposed rules. Of those 7, each had an initial Regulatory Flexibility Analysis prepared. So, I do not believe that they have certified after having done a panel.

Chairwoman KELLY. Thank you very much.

Ms. Gekker, you posed a number of questions in your testimony relating to your concerns about OSHA's Safety and Health Program rule. Did you ever get a response that was adequate?

Ms. GEKKER. No. In fact, when I asked the question during the tele-conference, I had the feeling that there were no answers from the responses I got.

Chairwoman KELLY. Were any of your questions addressed in the panel's final report?

Ms. GEKKER. I believe not. It has been awhile. We did not get the final report for quite awhile. It was only because I was appearing here that I did get it. So, I do not believe so.

Chairwoman KELLY. That is interesting.

Do you feel that you got it as a consequence of your willingness to appear here?

Ms. GEKKER. It was the only time I received it.

Chairwoman KELLY. Okay. Thank you very much.

I think that is a shame.

Ms. GEKKER. I did too.

Chairwoman KELLY. That was not the intent of this law. Was a copy of the panel's final report provided to you? It obviously was

not from what I understand, and I just want to clarify this. You feel that it was not timely when it was provided to you.

Ms. GEKKER. No. I should clarify. It was provided to me by the Printing Industries of America who asked me to appear before you.

Chairwoman KELLY. Do you think it should have been made public in a more timely manner?

Ms. GEKKER. I would have liked to have seen it within 4 or 5 weeks while it was still fresh in my mind.

Chairwoman KELLY. I appreciate that. I think that is something we will have to take a look at because there is no point in having this if we cannot have some kind of a timely response from the agencies.

I want to go to Mr. Waggener next. Mr. Waggener, you indicate that the current process for Small Entity Representatives works fairly well for the EPA, and I agree.

However, I also think that there is significant ambiguity in the statute over whose responsibility it ultimately is, EPA or SBA. Let us assume that other agencies are added to the process.

Let us assume that there is not as good a working relationship between this new agency and the SBA. In this case, who do you think should have the ultimate responsibility of naming the Small Entity Representatives, the new agency or the SBA?

Mr. WAGGENER. I can only speak from my experiences. What I have seen happen, EPA, first of all, has been dealing with the industries that are impacted by the regulation, more so than SBA, during the regulatory process.

So, the initial names that they bring to the table is normally from their experience of dealing with those individual entities. Then SBA adds names to the list that they believe should be on there.

There is usually a debate about who that should be. Then they come to a conclusion. As I have stated here, I do believe that before the process goes on, there should be an agreement between both SBA and EPA or the other agency, whoever that may be. My experience is with EPA.

That these are the Small Entity Representatives that we are going to use. They do represent small businesses. So, there should be some agreement as to that is what I want the result to be because I think that works.

Chairwoman KELLY. What if there is not an agreement? What if these agencies do not get along; the agency and the SBA? Then what? Who do you think should have that ultimate responsibility?

Mr. WAGGENER. I think that SBA should have the final word on it.

Chairwoman KELLY. Do you have any thoughts on when the EPA should make a panel report available to the public? What are your thoughts on what timeliness is, in terms of making it available?

Mr. WAGGENER. My experience has been, first of all, the panel report was always published right at about the time of the proposed rule. It came out within a month or so earlier than the proposed rule.

It may not have shown up until the proposed rule. It is always discussed in the preamble. What has occurred is that it has not been made available until then. However, the results have been

discussed with the Small Entity Representatives by EPA and the SBREFA individuals, such as Tom Kelly.

So, we have been made aware of what was in the document as it was going forward to be completed. That has seemed to work fairly well. I do not really see a strong need, actually, if that takes place and the process takes place; making it available to the public in a reasonable amount of time, which may be, I do not know 4 months, 5 months or something down the line, or when the rule is proposed, I think is adequate.

Chairwoman KELLY. Well, obviously, we have just heard from Ms. Gekker that it did not work that way with the OSHA. So, there may be some area there for concern.

Mr. WAGGENER. I think I did hear that it was perhaps provided to the people that served as the Small Entity Representatives. Is that incorrect?

Ms. GEKKER. No. I was a Small Entity Representative. It was not provided to me, except in this round about way.

Mr. WAGGENER. That is bad. That needs to be corrected.

Chairwoman KELLY. One would think that if you take your time—all of you are busy. If you take your time to serve as Small Entity Representatives, you ought to be entitled to have a timely response with that report.

It seems to me that Ms. Gekker did not get that from OSHA. Well, you did because you were a part of the working process on the final report from the EPA. So, it is obvious that the interaction between the SBA and the agencies is different with each agency. We may need to have a look at that.

I thank you very much. I just want to ask Mr. Morrison a couple of questions. Mr. Morrison, it seems as if you feel that without the underlying changes to make the IRS better comply with the Reg Flex Act, adding them to the panel process will not make any difference.

However, you also indicate that this is a problem that has never been able to be fixed. If we have the opportunity to add the IRS to this panel process, should we not take it and continue to work on the underlying problems that you have outlined?

Mr. MORRISON. Yes. Let me clarify what I am saying on that. I am glad you asked. First of all, I think it is useful to add IRS to the review process, per se.

It is useful for two reasons. Number one, it will spotlight some of the problems that I have been talking about here. It will make those problems much more visible.

Number two, in those instances in which the IRS does concede that its rules fall within the Reg Flex Act, having the panel process in place will get them used to convening panels.

I think doing so will eventually reduce their opposition to having more of the panels and probably, in time, reduce their opposition to broadening the scope of the Act to more activities they undertake.

So, yes, I think putting IRS under the panel process now makes sense. I guess what I was trying to say with the testimony: is if you want to capture more of their rules, and therefore have more review panels, there probably needs to be some additional technical changes in the Act.

Chairwoman KELLY. Good. Maybe we can work with you on thinking that through. I think having the IRS at least attempt to convene Advocacy Review Panels will help with the whole culture of the agency.

I think it has worked, definitely with the EPA. I think it is beginning to work with OSHA. It seems to me, as you have said, it might work with that culture. I hate to see us impose mandates in ways on agencies because I think they need to do their job.

On the other side of the coin, we have a problem here with the IRS that you have pointed out with the culture of the agency. What do you think about at least our trying to convene them?

Mr. MORRISON. I think it is useful to do. I suspect that if you sat down and talked to Mr. Rossotti about it, the IRS Commissioner, he might even agree with you. He represents the effort by a lot of people in Congress and the Administration to change that culture.

I think he is very sincere about trying to do it. And I think culture change certainly was the thrust of the IRS Restructuring Act Congress passed last year. So I think there is a lot of movement in that direction.

Maybe in the case of agency's General Counsels and a few people a little farther down the ladder, it may not have sunk in. But I think that we are at a point right now where there is much more receptivity to these kinds of changes at IRS.

Chairwoman KELLY. I thank you very much.

Now, I am going to have to turn the panel over. I have a vote in another committee. I apologize. I really do thank the four of you for coming in today. Your testimony has been very, very helpful on this.

Chairman BARTLETT [presiding]. Thank you. Least I forget at the end, let me state now that we will hold the record open for a number of days so that those members whose duties prevented them from being here can ask questions for the record.

So you may expect some questions from some of the other members who were not here. Mr. Cole, you spoke about the timing of the draft proposed rule and the problems that, that might impose.

If they already had drafted a rule that they would then have a mind set that the hearings would not matter much because they have already kind of committed themselves.

Yet, it is not being productive to have hearings when you do not know what you are talking about. Is there not some middle ground here where they could simply indicate the nature of the proposed rule or the problem they are trying to solve?

I understand your concern about actually drafting a rule. They now have pretty much committed themselves. It is going to be a tough call to get them to change it.

Mr. COLE. I think there is a middle ground. The key to finding that middle ground is having the panel occur at the point at which regulatory alternatives have been identified, and where there is at least some data about the benefits and costs, and the pros and cons of those regulatory alternatives.

You do not need the lawyerly text about what is going to be in the Federal Register. That can occur later on in the process. The panel should occur before we get down to the lawyers drafting the fine points of the rule.

The most productive discussions that I have seen in the panels occur at the phase where you have economic data. You may not have the economic analysis— that is a term of art for the document that is required by Executive Orders to be in the Federal Register Notice.

You may not have the draft proposed rule. I think Jack said it very well. He talked about initial economic data, cost effectiveness data, and data on the benefits; in EPA's case, toxics removed, or in OSHA's case, worker injuries avoided. That, to me, is the key informational requirement. Jack, you have had more experience with this.

Mr. WAGGENER. I would agree with that. Again, that is it. It is a middle ground. That is a middle ground what has been being provided. It is this initial, what are the regulatory alternatives, 1, 2, 3, 4, and 5, which typically is laid out in the SBREFA Process.

This is what the economics would be. Then here is another batch of data that says what the toxics are being removed. It is a piecemeal thing to get all of the data that you need. It is not a formal written document. I think that is what you were saying there.

We just need to know what the intent of the rule would be so that you can make a fair assessment of the impact on small business.

Mr. COLE. Writing this into the statute would be an advance. When SBREFA was originally drafted, it references answering the specific questions in the initial Reg Flex Analysis. That direction kind of misses the point because SBREFA does not mention regulatory alternatives in the data to be provided. So, writing this in would be a big advance.

I just want to mention one additional point. EPA has published interim guidance on implementing SBREFA in 1997. In that interim guidance, it directs the agency to give the panel members, not the Small Entity Representatives, not the small business folks, but the members of the panel, the EPA, Advocacy, and OMB an outline describing the important components of the rule and any significant regulatory alternatives.

The guidance goes on to talk about what is going to be provided to the Small Entity Representatives. They only get enough information about the rule for them to be able to judge the likely impacts of the rulemaking.

I think in this guidance we have the kernel of what is really important here. It is what the EPA's guidance was originally going to provide only to the panel members and what they are now providing to the Small Entity Representatives as well. That is an outline describing the important components of the rule, any significant regulatory alternatives, and data on the pros and cons, data on the costs and benefits of those different alternatives so that you can compare them. The best thing that happens is a panel where you can lay out a couple of regulatory alternatives and people can see that getting the extra molecule increases the cost dramatically to small businesses.

What are you getting for that marginal increase in cost? When you have data that can answer that question, you will have a successful panel.

Chairman BARTLETT. Why should not the Small Entity Representatives get as much information as the panel members?

Mr. COLE. I believe they should. I have just quoted you the language from EPA's interim guidance in 1997. My understanding in talking to the folks at EPA is that they now provide the same information to both the Governmental Officials on the panel and the Small Entity Representatives.

I believe that we have to have everyone having the same information so we can have a cooperative conversation about the impacts of the rule.

Chairman BARTLETT. There has been some discussion of the selection of the panelists and whether the affected industries have an adequate voice there. Do you think that we need some legislative language?

Apparently, with EPA it has been working okay, but that is just because there has been a good cooperative relationship that would not necessarily obtain with all agencies.

Do you think that we need some definitive legislation that would indicate a meaningful role for the affected entities in choosing the panelists? Let the record show that their heads are nodding.

Mr. COLE. On the issue of selecting representatives, there is this threshold jurisdictional issue as to what the word "impacts" means in the context of the whole Reg Flex Act. Does it just mean impacts on entities that are subject to the rule, or does it mean something more?

I used the example of there are some Clean Water Act rules and some Clean Air Act rules where the person who actually has to comply with the rule is the state. EPA tells the state write these numbers into your permits or EPA tells the state you have to achieve this quality air. Then it is up to you to go after the small businesses to get it. EPA hides behind that structure to avoid bringing in the small entities that are going to bear the brunt of that regulation, and whose actions are going to lead to the benefits EPA claims will be achieved by that regulation.

As I mentioned in my testimony, this issue is under litigation right now. The ruling of the Court could come down any time this spring. I think the Subcommittee should look very closely at this. If the Court comes down the wrong way, by deferring to EPA's interpretation, legislation is urgently needed to ensure that all small entities who are going to be affected by the rule, that have some reasonable nexus between the rulemaking and the impact on the small entity, should have the opportunity to participate as small entity representatives.

Chairman BARTLETT. Does this not remind you a little of the defense of the Mafia Don who says it was really the hit man who committed the crime?

Mr. COLE. That is exactly the defense that EPA has raised here.

Chairman BARTLETT. I agree. We probably need to address this in specific legislation. Ms. Gekker, you mentioned that OSHA appeared to be about making rules for problems that, as far as you were concerned, were essentially non-existent.

That reminded me of the testimony of my dentist who said that OSHA came into his office, required procedures that increased his cost of doing business 21 percent, which he then, of course, duti-

fully passed onto me, because that is what happens with all of these regulations.

They get passed onto the ultimate consumer. His testimony was that there had never been in his office, nor in any dental office he knew, a single instance that would justify any of these onerous regulations that were piled onto them.

There is an old saying, if it ain't broke, don't fix it. When an agency comes in imposing regulations to fix problems that are not there—do you think that what OSHA is really trying to do is justify its existence?

Ms. GEKKER. I feel very hesitant to answer that. I have no idea. Perhaps the comments by somebody else who was on the Small Entity Representatives tele-conference with me will suffice.

He would be covered by this rule; his office would. He is a head hunter firm, I believe he was. He said, the only dangers in his company are if one of them happens to climb on a ladder to change a light bulb. So, he would be required to come up with pages and pages of documentation of all of the hazards that exist in his office.

The only one that he could think of was if one person pulled that ladder out of the closet to change the light bulb that is on the ceiling. I work in a dangerous industry. So, there are some needs for safety concerns and for some regulations.

I try to abide by everything I am aware of. I do not want anyone to be hurt when they are on my premises. These are people I care about. We work side-by-side. If one of them is out, it means that I have to work longer, as does everybody else there.

We cannot replace them quickly. We care about them. We know their families. So, there is no benefit in my ignoring the need for their safety and their health, none at all, to my business or to me.

Chairman BARTLETT. I appreciate those comments. I, in another life, was a small business person. I ran a land development, home construction company.

When one of my employees, most of whom were my friends, by the way, when one of my employees got hurt and could not be on the job, that left a big hole in our team. I could not fill that hole by just going down and hiring a temporary.

It really impacted the productivity of our company. So, I, more than any person in OSHA, was concerned about the safety of my employees. Now, I would have welcomed a Government agency coming in and reviewing with me my safety procedures, because there might have been things that I could be doing that I was not aware of.

But to come in to me in an adversarial kind of a position; you know, I have talked with a lot of our contracting people across our District. They are more terrorized by a visit from OSHA than they are an audit by the IRS.

Now, when you are more terrorized by some Government agency than you are an audit from the IRS, clearly I think we need to take a look at what is happening there.

Mr. Waggener, you were talking about this SBREFA influence on openness and we are observing this, because of this legislation, there is now more openness. Has the adversarial relationship diminished?

I know when these regulations first started that all of them were implemented because of agreement with one or both of two assumptions. The one assumption is that every manufacturer, every employer is inherently evil, and greedy, and are going to hurt the public, or hurt their employees.

Therefore, you have to make sure they do not do that. The other assumption is that every consumer and every employee is incredibly stupid and they are going to hurt themselves unless Big Brother protects them. I fundamentally reject both of these hypothesis, which means I see very little need for most of our regulations.

But because this was the mind set of, I believe, the Congress and certainly the early agencies here, there was clearly an adversarial relationship between the agencies and those that they were regulating. Has that diminished?

Mr. WAGGENER. Yes, it has. It is still there. Again, in the 1970s when I started this in the 1970s and 1980s, it was a very adversarial process. I mean, it was like go away. Leave me alone. I am doing my job. I am here to protect you and everybody else.

I have really witnessed, truly and sincerely witnessed, that particularly in some parts of the agency that I deal mostly in, that there is still certainly a realm of that type of thing occurring.

There are still some old timers around that still possess that. As things go along, we have got a younger group of people. They certainly possess some of that. But they are much more cooperative.

In dealing with people like myself and the other industries, we have many more meetings, sit down meetings, talking about where the regs are going. They come and give presentations to groups to talk about where the regs are going and what they are doing. That was totally unheard of back in the 1970s and 1980s. I particularly, as I have said earlier, I have seen this really occur.

I have said this to a number of people before this in the last 2 or 3 years. I think the fact that SBREFA has now forced the industry, EPA, OMB, SBA, to come together and sit down at a table, and that is also another point.

I said I wanted at least two meetings because that is a minimum that allows you to have that eye contact; talk about your problems. I think that has gone a long way to reduce that adversarial situation. It is still there, but just not as much as it used to be.

Chairman BARTLETT. I know from the perspective of the head of these agencies that they recognize that they need to change. I think the problem is filtering down change from Washington to the field where there are some people there who have been there for a long time who still have the older mind set. I am glad that it is changing.

Mr. Morrison, do you think that there is any legislation that we can write that can require a non-cooperating IRS to comply?

Mr. MORRISON. Well, you could actually. Certainly, there are ways to compel agencies to do things they do not want to do.

Chairman BARTLETT. Are they now using rather obtuse reasoning to justify their non-compliance with regulations that they ought to be complying with, relative to this small business world?

Mr. MORRISON. I think a lot of people would say that. It is possible that we have an honest disagreement about the meaning of some terms in the Regulatory Flexibility Act. But they have a long

history of not wanting to comply. So, you have to take it in that context.

Chairman BARTLETT. Mr. Archer, the Chairman of Ways and Means, has a solution to that problem that I concur with. He would like to have a flat tax on consumption. He says that the IRS is an evil weed that you need to pull out by its roots.

So, he would like to repeal the 16th Amendment. One of you in your testimony talked about the enormous complexity of the IRS code. It is so complex that even IRS, itself, does not know what that code is.

I understand now if you get the name of the person who gives you advice that IRS will at least absolve you from penalty, if you comply with that advice and it turns out to not be the right advice.

Let me just ask all of you one final question. I notice that the present legislation uses the terminology "has a significant economic impact on a substantial number of small entities."

What does that mean? The IRS could rationalize that if only 50 percent of the small businesses went belly-up, or OSHA, or EPA, could rationalize that if only 50 percent of small businesses went belly-up because of this regulation that, that was not a significant economic impact on a substantial number of small entities.

Do you not think that we need some terminology that is a little more restricting? This could be interpreted any way one wished, and apparently is, by some of the agencies.

Mr. COLE. One of the issues at the IRS is a threshold issue of what regulations fall under Reg Flex. Jim Morrison mentioned this. IRS has regulations, interpretive regulations, revenue rulings; a whole series of ways in which it imposes requirements on the small business community. Only some of those are captured under the Act. SBREFA tried to expand that to include interpretive rules. The IRS is still finding ways to circumvent that.

I think another area where additional Congressional action to clarify the Act would be appropriate is to say that rules that pose significant economic impacts on small entities should be covered, regardless of whether that impact is positive or negative. If you go back to the 1980 debates, there is legislative history to the point that agencies should look at both regulatory and deregulatory actions that have a significant impact on small entities. Unfortunately, agencies have largely taken the position that it is only regulatory actions that should go through Reg Flex. So, if there is a rule that they claim is deregulatory, they say Reg Flex does not apply at all. If you are doing a deregulatory action, the opportunity for additional regulatory relief is still present in that rulemaking. That rulemaking should go through Reg Flex analysis.

I cannot define what "significant impact" means; substantial number of entities. I think there is guidance at EPA. They have a methodology on how to do this. My belief is that we should direct the agencies to work together to come up with guidance. Perhaps we should direct OMB to come up with some agency-wide guidance on what constitutes "significant impact" and what constitutes a "substantial number of small entities."

It is very, very difficult. That is a different question in the EPA world than it is in HICFA. It is very different there than it is in the telecommunications world. That is why SBA has pages and

pages of regulations defining what small business means. It is very difficult to have one across the board set of numbers, for example, to apply to all agencies. The closest I can think of is a suggestion to direct OMB to come up with some guidance. Then from that guidance, agencies to come up with specific tests that they would apply.

Ms. GEKKER. I work in a industry that is an increasingly mature industry; the printing industry. We have collected figures on profit in our industry for many years. The average printing company in America earns 3.6 percent profit on its sales.

That means a company my size, a million on average, and thank Heavens we are not average, on average earns $36,000 in a year of profit. I like to think of profit as the ability to continue. It is the thing that buys you the ability to continue the next year, and the next year, and the next year.

If a rule requires $10,000, even only a one-time expense, that is a major amount. That is 30 percent of that profit that that printing company has earned. I have a dentist like yours. He is able to pass along cost increases to me.

I have not had a price increase in my business since 1989. I cannot pass along the cost of raises. I cannot pass along the cost of increased material costs. I cannot do it. The marketplace is mature. They are not willing to pay more at this point.

Chairman BARTLETT. Because of competition?

Ms. GEKKER. Partly, yes; I guess for the most part.

Mr. COLE. If I could just amend my comments. You brought up a very important point and that is that there is a problem with some of the tests that EPA has used where it looks at impacts on revenue, as opposed to the impacts on net profitability. In some of the discussions in rulemakings about what are the impacts, the EPA seems to discount impacts on industries that work on a very narrow profit margin. Congress could clarify that you are to analyze impacts on the profitability of small businesses, not just the impact on net revenues.

Chairman BARTLETT. Thank you for your comments.

It just appeared to me that the wording "significant economic impact on a substantial number of small entities" could be interpreted a great many different ways. That there might be a lot of inconsistency within one agency from time-to-time and certainly between agencies.

I do not know whether this can be tied down with legislative language or if we would require the agencies to submit their definitions of this terminology to the Congress for approval before implementation.

It just seems to me that this is open to very divergent interpretation. Rules like this or legislation like this, which is so non-specific just creates opportunities for mischief that we do not need to create.

We need to tighten it up, I think.

Mr. MORRISON. Mr. Bartlett, I think you have raised some important points there. But I would note with respect to one piece of that problem, which is the definition of "small entities," there is some additional language in the Reg Flex Act which helps narrow the definition down.

The Act also says that the agencies have to take SBA's definition of what a small business is, unless they define it themselves through a regular notice and comment rulemaking process. So, I think with respect to that particular term, "small business," the Act still has a bit more precision. I take your point about the imprecision of other parts of the Act.

Chairman BARTLETT. But the "significant" and the "substantial" are very qualitative adjectives that could be defined in very different ways.

Mr. WAGGENER. If I may, I would like to comment to what Keith Cole said. A lot in the passing on of the impact of the regulations, a lot of the regulations that I have talked about this morning that I was involved in, the agency has taken the philosophy that you can pass all of those costs on to the people you are working for.

These are service industries. They are also extremely competitive; commodity type service industries, where the fact is they cannot pass on all of those costs. I do not know how you legislate this. There are truly flaws in the economic analysis that are still there that we are having to deal with on a day-to-day basis, where those types of assumptions are made.

Chairman BARTLETT. Unless we are regulating the factory in Sri Lanka, you cannot be assured that all of those costs are going to be passed on. Well, thank you all very much for your testimony. It has been very useful.

The Subcommittee now stands adjourned.

[Whereupon, at 12:45 p.m., the committee was adjourned.]

APPENDIX

PREPARED STATEMENT OF REPRESENTATIVE SUE W. KELLY

Good morning, ladies and gentlemen. I would like to welcome everyone to today's joint Regulatory Reform and Paperwork Reduction Subcommittee and Government Programs and Oversight Subcommittee hearing on improving the small business advocacy review panel process.

I would like to thank my good friend, Chairman Roscoe Bartlett, for agreeing to hold this hearing with me. Many of you know that this is an issue that Chairman Bartlett and I have been involved with for some time. We held two hearings in the last Congress on this issue, and I am grateful that he has continued providing oversight over the advocacy review panel process with me.

The Small Business Advocacy Review Panels are a good model for what we should be doing in government. Originally created by the Small Business Regulatory Enforcement Fairness Act, the panel process has been successful because it allows small business community the opportunity to have a real impact on agency rulemakings. The key to this success is getting small businesses involved in agency rulemakings early in the process. By doing so, agencies will have a much better understanding of the unique needs of small businesses before the parameters of a potential regulation get too firmly defined.

The advocacy review panels are viewed as a positive process by those who actually participate in them, as well. From most accounts, small businesses indicate that they appreciate having the opportunity to provide their thoughts to the agencies in this type of forum. Likewise, the agencies have indicated that they benefit from this early input, which in turn can be used to produce better regulations.

The goal of this hearing today is to revisit how the panel process is working generally, as well as consider ways in which the process can be strengthened and improved. The most notable change that we are considering is adding the Internal Revenue Service as one of the agencies that is covered by the panel process. Small businesses have repeatedly described how the IRS simply does not understand the impact that many of their rules have on the operation of small businesses. By requiring IRS to convene advocacy review panels, we may be able to begin to change this problem.

We have an excellent panel of witnesses that will be testifying. All of hem have significant experience with the Regulatory Flexibility Act and the panel process. I appreciate the time that each of them has sacrificed out of their schedules by being here today.

In conclusion, this Committee is a very strong supporter of the advocacy review panel process. We are committed to taking whatever steps necessary to see that it remains a strong part of the regulatory process.

PREPARED STATEMENT OF REPRESENTATIVE ROSCOE G. BARTLETT

Good morning. It is a pleasure to welcome you to this joint hearing held by the Subcommittee on Government Programs and Oversight and the Subcommittee on Regulatory Reform and Paperwork Reduction, chaired by my colleague Congresswoman Sue Kelly.

This hearing in many respects is a continuation of joint hearings the two subcommittees held in April 1997 and March 1998 in which we addressed the need for common sense in rulemaking and the unfair financial burdens borne by small businesses all over this Nation as a result of unscientific, impractical and unnecessary regulations.

These same hearings also examined the implementation and performance by the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA) of the panel process added by the Small Business Regulatory Enforcement Fairness Act of 1996—better known as SBREFA. The panel process requires these to agencies—EPA and OSHA—to consider and to respond fairly to the advice and recommendations of small businesses concerning the impact upon small businesses of proposed regulations.

We believe—as we stated at the previous hearings—that the panel process is important. In a study done for Committees of both the House and the Senate, the General Accounting Office concluded that: "Agency officials and small entity representatives generally agreed that the panel process is worthwhile, providing valuable insight and opportunities for participation in the rulemaking process."

For some reason when the panel process was initiated only two agencies were includes—EPA and OSHA. The legislation which we will be discussing today adds a third agency—the IRS. This addition is long over due.

The difficulty and cost of complying with mind-numbing IRS regulations are a major concern for small businesses in my district—Western Maryland—as I am sure they are for all small businesses through out this nation. Small businesses need the common sense relief that advance consultation will provide.

There's an old farmer's test for measuring costs and benefits. Those of you familiar with me will recall—you don't do something if the juice ain't worth the squeezing. The IRS should be required to make sure the juice is worth the squeezing when they design regulations.

Again thank you for coming to this important hearing. We look forward to a lively and productive discussion.

PREPARED STATEMENT OF REPRESENTATIVE DANNY K. DAVIS

Thank you Chairwoman Kelly, Chairman Bartlett, Ranking member Pascrell.

For years small businesses have complained about unfair regulations and burdens imposed by Government agencies. As a result, the 104th Congress passed legislation named the Small Business Regulatory Enforcement Fairness Act to make federal government regulators more accountable to small businesses. The Small Business Regulatory Enforcement Act expanded the jurisdiction of the courts by including in the review process the regulatory appeals brought by small entities and requiring OSHA and EPA to consult with small businesses before publishing the proposed rules.

Later, the Office of Advocacy testified before our committee on the accomplishments of SBRFA and found that because of the early involvement of small entities in the development of rules there was better data collection and efficient, fair regulatory provisions. Many agree that progress has been made but significant work remains to be done.

As a result today we have called a form to discuss a bill to improve the conditions of small businesses. I believe what you do, poorly or well, can never be erased. Therefore I want to do the best job here on this committee for our nation and or nation's small businesses.

I am delighted to see our witnesses and welcome their testimonies.

PREPARED STATEMENT OF REPRESENTATIVE BILL PASCRELL, JR.

Good morning. I would like to begin my remarks today by thanking Chairwoman Kelly and Chairman Bartlett for bringing this important issue to the attention of both subcommittees. Small businesses are the engines of growth for our nation's economy and are indeed the backbone of our economic system. By examining ways to make the regulatory process more efficient, we will ensure that this important sector remains vibrant and robust. I am committed to that goal.

As the new ranking Member of the Regulatory Reform and Paperwork Reduction subcommittee, I believe today's hearing, which will examine the Small Business Advocacy Review Panel Process, is of critical importance. It is critically important because the relationship between our regulatory agencies and our nation's small businesses must be one of mutual understanding as opposed to mutual disdain.

Regulations that are promulgated by OSHA and EPA are very important in regard to establishing and ensuring a safe workplace and a clean environment. But at the same time, those who formulate regulations must be aware of the actual implications of regulations. And when we are dealing with small businesses we must keep in mind the fact that the costs of regulatory burdens are disproportionate on small businesses because of their very size. This fact has been confirmed by 27 studies and was recognized by both the Regulatory Flexibility Act and SBREFA, which created the panel process.

Today we are going to hear testimony on the current effectiveness of the Review Panel Process—a process which was designed to provide the small business community with an opportunity to participate in the rulemaking process, which allows small businesses to express their opinions on the effectiveness and practicality of proposed regulations before they are finalized.

It is my hope that today's hearing will contribute greatly to our understanding of the Review Panel Process—and how to improve it. We need to reduce unnecessary regulations, improve those elements that work, and use common sense as our guide.

Thank you.

TESTIMONY OF KEITH N. COLE

Mr. Chairman, Members of the Committee: My name is Keith Cole, and I am a Partner at the law firm of Swidler Berlin Shereff Friedman LLP. I appreciate the opportunity to testify at today's hearing on the Small Business Advocacy Review Panels (Panels) established under the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

I would like to state for the record that I am not testifying today on behalf of my law firm, or any particular client, but solely on my own behalf. My testimony is based on my expertise as former Regulatory Affairs Counsel to the Senate Committee on Small Business, and my experience in the private sector since leaving Capitol Hill. While in the private sector, I have followed closely the implementation of the SBREFA Panel process out of both personal and professional interest. In 1998, I prepared written comments on the Panel process in the EPA's Proposed Industrial Laundries rule on behalf of the Textile Rental Service Association.

At earlier hearings before this Committee, I have testified about the need for SBREFA; some of the expectations Congress had for the Act; and the early implementation of the Act. Today, I want to testify as to my experience with rulemakings where SBREFA panels were used, and my assessment of how the Panel process has worked in other rulemakings based on discussions with numerous participants. I also want to provide the Committee with comments on the discussion draft and the proposed changes to the Panel process.

BACKGROUND ON SBREFA PANELS

Small business advocacy review panels

SBREFA amended the existing requirements of section 609 of the Regulatory Flexibility Act (5 USC § 601 et seq) (Reg Flex) for small business participation in the rulemaking process at the Environmental Protection Agency and the Occupational Safety and Health Administration. For proposed rules with a significant impact on a substantial number of small entities, EPA and OSHA must now collect advice and recommendations from small business to better inform the agencies' initial Reg Flex analyses. The findings of the Panel and the comments of small business representatives are, at a minimum, made public as part of the rulemaking record when the proposed rule is published.

SBREFA established Small Business Advocacy Panels to provide small businesses with an early opportunity to better inform EPA and OSHA about the impacts of soon-to-be proposed rules in an arena especially dedicated to address small business impacts. As federal agencies themselves recognize, small businesses have an inadequate voice in the development of regulations, particularly at the early stages of regulatory development. By the time regulations are published in the Federal Register, the ability of small businesses to have their concerns meaningfully addressed appears to be compromised in some way. The goal of this process is not special access, but to provide a remedy for the disproportionate regulatory burdens born by small businesses.

Just as the Members of the Committee are taking testimony from today's witnesses, the federal employees on the Panels are expected to receive testimony and comments from small business representatives. While SBREFA does not mandate that this process occur with the formality of a congressional hearing, the legislative history of SBREFA suggests that the usual procedure would involve at least the opportunity for a face-to-face meeting of the Panel and small businesses. The remedial and right-to-know purposes of the Reg Flex Act and SBREFA require, in my opinion, that the usual procedure for the Panels at EPA and OSHA should be to meet with small business representatives before issuing their reports.

The Committee should note, however that the requirement to convene a Panel is not absolute. SBREFA provides a mechanism to waive the Panel requirement where convening a Panel "would not advance the effective participation of small entities in the rulemaking process." While the elements of this test are not spelled out in the statute, one scenario that the Committee might wish to consider as suitable for a waiver is when EPA or OSHA have successfully completed a regulatory negotiation prior to proposing a regulation. I recommend that the Committee work with SBA, EPA, and OSHA to develop suitable guidelines for when the Panel requirement should be waived.

IMPLEMENTATION OF SBREFA PANELS

EPA and OSHA have completed a total of 15 SBREFA Panels; 13 at EPA and 2 at OSHA. These totals continue to grow. EPA has seven Panels scheduled in the next six months including the Panel for the Arsenic in Drinking Water rule which is just about to start. OSHA began the SBREFA Panel on the Ergonomics rule just last week, and has scheduled an additional Panel on Permissible Exposure Limits for later this year.

Based upon my review of the Panels completed to date, the verdict on SBREFA Panels is that the law appears to be working to allow greater participation by small businesses in the rulemaking process. It also appears that the Panel process can succeed in reducing the regulatory burden on small businesses, although the verdict is less clear on this.

My first observation is that the Small Business Office of Advocacy, OMB and EPA appear to be cooperating to make the Panel process a productive one. And for this, each of these agencies deserve credit for making an honest effort to make the Panels work. They are reaching out to the small business community and identifying companies who can act as small entity representatives or SERs. They are providing information to the SERs, and while it is clear that there has been a learning curve for all of the agencies concerned, that information has helped the SERs to provide meaningful input to the agencies at a critical juncture in the rulemaking process. From the Panel reports completed to date, it also appears that the agencies have been listening. Each of the reports contains meaningful suggestions on how the proposed rules might be changed to minimize the burdens on small businesses. I am less sure of the experience at OSHA and will defer to other speakers on that issue.

At this point, we have less data on whether EPA and OSHA will actually put all the good work of the Panels to use by changing their proposed rules. Only seven of the EPA rules that have gone through the SBREFA Panel process have been published as proposed rules. At OSHA, only one rule has been published in proposed form, although the Safety and Health Programs rule is scheduled to go shortly to OMB in draft form. While some of the EPA rules clearly have benefitted from the Panel process, my personal experience with the Industrial Laundries rule, suggests to me that more could be done to incorporate the comments of the SERs and the recommendations of the Panel into the proposed rule and the Initial Regulatory Flexibility Analysis.

Overall, I believe SBREFA is off to a good start. We don't need wholesale revision of the Act. However, there are a number of ways that Congress could improve the SBREFA Panel process both through oversight, and through targeted legislative change. I am very encouraged that the Committee is continuing to take seriously its oversight responsibilities by holding today's hearing, and that the Committee is beginning to address the need for legislative change through the discussion draft now being circulated. I believe the draft contains positive proposals, but there are a number of specific issues that the Committee should consider as it moves towards introducing legislation to revise the Panel process.

SBREFA PANELS: LEGISLATIVE ISSUES

In a nutshell, the record to date demonstrates that the key to a successful SBREFA Panel is giving the right information at the right time to the right people. The data must be available, it must be provided early and it must be meaningful. The people who advise the Panel must be knowledgeable enough about the specific industry affected by the rule to be able to identify opportunities to meet regulatory goals more efficiently, and knowledgeable about how the Panel process can be most efficiently used to change agency decision making. While that is relatively simple to say, it is difficult to implement in practice, and difficult to legislate. I urge the Committee to tread lightly here, because too much specificity may be counterproductive to the interests of small businesses.

Getting information at the right time

As Congress recognized when it passed SBREFA, there is a tension between conducting the Panel early in the rulemaking process, when key decision have yet to be made, and conducting the Panel when all of the data is available, when decisions may be set in stone. Congress chose not to set any firm deadlines for when a Panel should occur, leaving that decision to be worked out between the various agencies. In earlier testimony to this Committee, I said that we simply did not know enough to fix a time for the panels. I also said that the Committee should monitor the situation as it develops in upcoming rulemakings. Now that we have more experience with SBREFA Panels, I think we can take the next step and reach some conclusions about the best timing of panels.

In my view, it is becoming clear that there is some minimum amount of information on the proposed regulatory alternatives that is necessary before the SERs can provide meaningful comments to the Panels. I believe the record shows that the right time for the Panel to occur is best described as being as soon as this minimum amount of information is available. This means that the Panel should take place whenever the informational needs are met in the process of rule development. If the SERs have the data to make a strong case for changes in the rule, the Panel can effect changes in the rule, even if it is relatively later in the process. However, the Committee needs to ensure that any statutory language on minimum information requirements does not have the unintended effect of delaying the Panel until just before publication of the proposed rule.

Getting the right information

If the answer to the timing issue is "whenever the necessary information is available," the next question is, what is the right data? EPA's Interim Guidance for implementing SBREFA distinguishes between the information provide to the Panel members and the information provided to the SERs. It directs the agency to give the Panel members an "outline describing the important components of the rule and any significant regulatory alternatives." However, the SERs are only to get "enough information about the rule for them to be able to judge the likely impacts of the rulemaking." It is my view that the SERs should be informed about regulatory alternatives under consideration by the agency so they can put the anticipated impacts into context and gauge their reasonableness.

The type of data that really empowers the SERs, and by extension the SBREFA Panels, is a discussion on the pros and cons of regulatory alternatives the agency is considering, and how the alternatives stack up against one another. This should include some basic comparison data estimating the benefits and costs of the regulatory alternatives that will allow SERs and the Panel to look at what additional benefits will be provided by more costly regulatory alternatives. This does not mean that the SERs need to see the final economic analysis for the proposed rule, or even a completed draft, but it means that there is some initial estimates of the tradeoffs being considered by the agency. If the SERs have this basic information, I do not believe the SERs needs actual draft regulatory language, or the final economic analysis of the proposed rule. However, the members of the Panel should have access to what ever draft economic analyses and draft regulatory language are available at the time the Panel convenes.

The data provided to the SERs should be developed by the agency proposing the rulemaking in consultation with OMB and the Office of Advocacy. Discussions between the agencies on the adequacy of data should be completed with adequate time for the SERs to have digested the data when the Panel convenes. This suggests that there should be some informal scoping communications between the agencies involved in Panel. However, I do not believe that this informal process to create the informational packet should be written into statute. Rather, the agency proposing the rule should start the process by determining that the necessary data is available after consultation with OMB and the Office of Advocacy.

SERs should be provided the data with some minimum time for review, but it is not necessary to create a statutory window of 15 to 45 days. A 30 day minimum period should suffice, unless court ordered deadlines require a shorter period.

Getting the right people

The first issue is getting the right group of people to serve as SERs is to get a good mix of people who know what to expect from the SBREFA process and people who know the industry. Thus, SERs could be owners of small businesses, employees whose job it is to make sure the business complies with agency regulations, employees of industry trade organizations who might provide compliance assistance to small businesses throughout the country, or even technical experts familiar with the affected small businesses. Ideally, the Panel would hear from different SERs with each of these backgrounds.

The second issue in choosing SERs is who gets to decide. I think for the Panel to have legitimacy, the SERs must be seen by the affected elements of the small business community as truly representing their interests, and the Office of Advocacy's approval of the SERs is very helpful to obtaining that legitimacy. I do not know if the Office of Advocacy should choose SERs on its own, but SERs should not be chosen over the objection of the Chief Counsel for Advocacy. Thus, SERs could be chosen by the agency proposing the rule, as provided under current law, but with the concurrence of the Office of Advocacy.

A third issue in choosing SERs is whether the government entity, be it the agency or the Office of Advocacy should be allowed to pick a particular person in a given

company or organization. I think the better approach is for small businesses, or their trade organizations, or companies with expertise in a particular industry to be selected as SERs. The selected business or organization should then be free to select whomever it chooses to speak to the Panel.

A final issue in choosing SERs is which businesses or organizations have standing to before the Panel. The best answer is that Panels should hear from small businesses and organizations with a direct nexus to the rule. I believe the test should be whether the small business will bear the impacts of the rule. This extends beyond the entities who will be "subject to" the rule and includes those entities who will bear the burdens giving rise to the benefits of the rule. Other types of small businesses and other types of small entities should not be allowed to use the Panels simply to file objections to the rule. Trade associations may have members whose size exceeds the limits of a "small business concern," but this fact alone should not prohibit the organization from commenting, provided that they focus their comments on the impacts of the rule on small business.

Timing of public release of panel reports

As with many issues today, there are conflicting tension surrounding the timing of public release of Panel reports. This is not an issue of whether the report will be made public. The report will always be included in the public rulemaking record when the rule is proposed. However, the questions arises when many months pass between the completion of a SBREFA Panel and the publication of the proposed rule.

My experience is that EPA and OSHA have developed different practices on this, with OSHA releasing its reports at the completion of the Panel and EPA releasing its reports only when the rule is published. Based on the data to date, I cannot say which approach is better. Early release can assure small businesses that their concerns have been heard by the Panel and included in the Panel recommendations. On the other hand, early disclosure of the Panel report can open the agency up to additional pressures form outside groups to unwind the progress made by the Panel. On this issue, I believe more data is needed.

Incorporating SER comments into the IRFA

It may seem obvious that the comments of the SERs about the impacts of the rule should be incorporated into the Initial Regulatory Flexibility Analysis description of impacts, but my experience with the Industrial Laundries rule convinces me otherwise. In that rulemaking, the Initial Reg Flex Analysis omitted key information about the nature and extend of the small business impacts of the rule, even though the EPA had ready access to that information in the Panel Report. It was as if the Reg Flex analysis was written before the Panel ever met, and never looked at again.

When Congress passed SBREFA, one of its original goals was to improve the quality of Reg Flex analyses. Part of the solution was to make Reg Flex subject to judicial review. Another part of the solution was to provide the agency personnel direct access to the people who could best understand the impacts of a proposed regulatory alternative on small businesses, and communicate those impacts to the agency personnel responsible for preparing the Reg Flex analysis. Section 609(b)(6) directs the agency to modify the Initial Reg Flex Analyses where appropriate, but it doesn't state the obvious that the Reg Felx analysis should always incorporate relevant facts brought to the agencies attention during the Panel process by the SERs.

IRS compliance with SBREFA panels

Yes.

OTHER KEY ISSUES

While the focus of today's hearing is on the SBREFA Panel process, there are some important related issues that apply more broadly to the Reg Flex Act. The key issue here is what rules are subject to the Reg Flex Act and hence subject to the SBREFA Panel requirement. If federal agencies interpret the statute in a way that exempts from Reg Flex whole classes of important regulatory actions, we will never have a chance to see the benefits of the Panel process, or any other benefits of Reg Flex.

What types of impacts are covered by the Reg Flex Act?

The biggest problem presented by EPA's early implementation of SBREFA goes to the threshold issue of determining when a Reg Flex analysis is required. At issue is the type of impacts that must be considered by agencies in deciding whether Reg Flex applies and conducting a Reg Flex analysis. For example, when EPA is issuing

a new rule that directs states to take action under its many delegated programs, it takes the position that it can ignore the impacts of that rule on small businesses.

EPA's approach to revising the National Ambient Air Quality Standards (NAAQS) for ozone and particulate matter (PM) illustrates the problem. EPA has taken the position that these proposed rulemakings do not require either a Reg Flex analysis or a Small Business Advocacy Review Panel. Instead of conducting a Reg Flex analysis and convening a Review Panel, EPA has chosen to make a certification under section 605 of the Reg Flex Act. The 605 certification states that these rules "will not have a significant economic impact on a substantial number of small entities."

SBA's Chief Counsel for Advocacy, Mr. Jere Glover, wrote to EPA on November 18, 1996, stating that, "considering the large economic impacts [of the ozone rule] suggested by EPA's own analysis that will unquestionably fall on tens of thousands, if not hundreds of thousands of small businesses, this would be a startling proposition to the small business community." In fact, EPA's own regulatory impact analysis (RIA) indicates that "at least one or more small establishments in up to 30 or 40 percent of affected industries . . . may experience potentially significant impacts" from the PM rule. For the ozone rule, the RIA indicates that "small establishments in up to 18 percent of affected industries . . . may experience potentially significant impacts."

How does EPA reach the conclusion that these rules "will not have a significant economic impact on a substantial number of small entities," in spite of the findings of its own RIA? In the rulemakings to revise the ozone and PM NAAQS, EPA has taken the position that the scope of a Reg Flex analysis is limited only to an assessment of the impacts on small entities that are "subject to" the rulemaking, and that other impacts are to be ignored, even if those impacts would not exist, but for the rule. In the case of the Clean Air Act, the ambient levels of the NAAQS are designed to be achieved through State Implementation Plans (SIPs). Small entities are subject to legal requirements in the SIPs which will be modified as a direct result of the ozone and PM rules, but no one will ever be "subject to" the NAAQS. In other words, the impacts of the rule flow directly from EPA through the states to small businesses whose actions give rise in part to the benefits of the rule.

According to EPA's reading of the statute, States are the only ones subject to the NAAQS, and no small entity will feel any impact of the ozone and PM rules, much less the "significant impact on a substantial number of small entities" required by the Reg Flex Act. Since SBREFA requires that EPA convene a Small Business Advocacy Review Panel only when an initial Reg Flex analysis is required, EPA's narrow reading of the application of Reg Flex has the effect of (1) denying small businesses the special opportunity for input that the Panels were designed to create, (2) denying small businesses the special opportunity for input that the Panels were designed to create, (2) denying small businesses their right to know about how they are likely to be impacted by the new regulations, and (3) hiding those impacts from the sunshine of full public disclosure.

EPA's argument is that it need only concern itself with the impacts on small entities that are "subject to" a proposed regulation has no support in the statute. Nowhere in Reg Flex is the key phrase, "a significant impact on a substantial number of small entities," limited by a requirement that the entities be "subject to" the rule. Clearly, Congress could have written such a limitation into the Reg Flex Act, but it did not.

Of course, any change in regulations could have potentially infinite impacts throughout the economy and the analysis must be cut off at some point. In deciding whether to certify out of the Reg Flex Act and in conducting a Reg Flex Analysis, the agency must apply a rule of reason to distinguish between the foreseeable impacts that are directly attributable to the rulemaking and those highly speculative impacts that are only indirectly attributable to the rulemaking. However, nothing in the Reg Flex Act or SBREFA suggests that Congress intended to limit the analysis so narrowly as to cover only the impacts on small entities that are subject to the rule. While lawyers can always disagree with one another over how exactly to interpret a statutory requirement, EPA's interpretation appears at odds both with the plain language of the statute and the underlying purposes of both the Reg Flex Act and SBREFA.

This issue is currently the subject of litigation in the DC Court of Appeals in the cases entitled *American Trucking Association* v. *US EPA*. Oral arguments were heard on December 17, 1998, and a decision is expected later this Spring. I urge the Committee to keep a close eye on the decision of the court. If the court affirms the original intent of Congress and overturns EPA's interpretation, no further action on your part will be necessary. However, if the court gives EPA deference and upholds the agency's interpretation, legislation would be urgently needed to reaffirm

the intent of Congress and prevent the Reg Flex from effectively being gutted by one of the primary agencies SBREFA was designed to address.

When does an IRS rulemaking involve a collection of information requirement?

The committee should carefully assess how the Internal Revenue Service is implementing the new provisions of SBREFA clarifying that Reg Flex applies to IRS interpretative rulemakings to the extent they involve a collection of information requirement. I believe that the clear intent of Congress was to bring most IRS interpretative rulemakings within the ambit of Reg Flex. However, in recognizing that some IRS interpretative rulemakings may have no relationship to the forms that must be filed with the IRS or the paperwork that small businesses must maintain to document their compliance with IRS rules, Congress included a limited exemption to the general proposition that Reg Flex applies.

The Committee should carefully examine the IRS's interpretation of when a rule "involves a collection of information requirement." The Committee should ensure that the IRS does not limit the application of Reg Flex simply to the text of its forms. The term "collection of information requirement" is defined in SBREFA, as in the Paperwork Reduction Act, to include "recordkeeping requirements." Thus, Reg Flex applies to all IRS interpretative rulemakings that in any way involve or relate to any change in the records or other paperwork that a small business must prepare or maintain to demonstrate compliance with the tax laws. Any interpretation by the IRS that seeks to narrow this definition would, in my view, violate the text and intent of SBREFA.

Are agencies complying with the regulatory review plans they adopted under section 610?

Section 610 of the Reg Flex Act requires that federal agencies adopt a plan to review all of their regulations within 10 years of adoption and to publish an annual list of the regulations the agency intends to review during the following year. However, this section has not received much attention in well over a decade. Shortly after the Act was enacted, over 15 years ago, nearly all federal agencies adopted plans for the periodic review of existing regulations and for a few years, some agencies complied with their plans and annually reviewed and modified existing regulations. But for over a decade, most federal agencies have ignored their own plans and forgotten their obligation under section 610 to review existing regulations. SBREFA sought to change this by allowing for the judicial review of agency compliance with section 610.

Several recent GAO reports indicate that there is still significant non-compliance with section 610. The current Unified Agenda identifies only a relative handful of periodic reviews under section 610, and many of these reviews have been ongoing for over a year. The Committee should look into agency compliance with the requirement to have a plan, to comply with that plan, and to annually notify small entities about the rules to be reviewed in the coming year. If the Committee reports legislation to revise the Panel process, it should consider including amendments to close the loopholes allowing agency to continue to ignore the requirements of section 610.

Testimony by

Katherine Gekker

The Huffman Press, Alexandria, VA

Joint Subcommittee Hearing on Improving the

Small business Advocacy Review Panel Process

House Committee on Small Business

March 11, 1999

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Testimony by

Katherine Gekker, The Huffman Press

March 11, 1999

Good morning. I want to thank the Committee for giving me the opportunity to speak to you about my participation on the Small Business Advocacy Review Panel convened for OSHA's draft proposed rule on safety and health programs, as well to comment on the proposed bill to amend the Small Business Regulatory Enforcement Fairness Act.

My name is Katherine Gekker, and I am the owner of The Huffman Press, located in Alexandria, Virginia. I am also representing the Printing Industries of America. I would like to ask that PIA's written testimony be included in the record.

I have been in business since 1974. We specialize in high quality printing for graphic artists and corporations. Currently, we have nine full-time employees, including myself, and one to two part-time employees, depending on the work load. Our gross sales should be roughly $1 million to $1.1 million this year, down from $1.2 million two years ago.

Safety and Health Program Panel Process

I found my experience on the safety and health program standard panel both rewarding and confusing. The personal and business rewards included learning what some other companies were doing about safety and health in their workplaces. I learned of programs that exist about which I was unaware (SHARP, for example). The process

also forced me to reconsider what The Huffman Press is doing in our own workplace, and my need for continued vigilance regarding safety and health, and training and education of our workers (and myself).

Further, the panel process itself is a remarkable accomplishment. Small businesses are important to this country, both for the economic activity they generate in their communities and for the income they provide to employees and owners. The fact that for the first time, small businesses have a voice in expressing concerns or commendation about regulations they may face is an achievement for which Congress and this Committee should be proud.

Specific Concerns with the Panel Process

On the other hand, my greatest difficulty with the process was the lack of any documentation as to why the proposed rule on safety and health programs is needed and why OSHA believes it will improve safety and health.

I believe that the following questions should have been answered before any proposed rule was developed, and certainly before the panel was convened: Is a specific industry's injury and illness experience rating low or high? Is it increasing or decreasing? If rates are getting lower, should safer industries be exempted? Does the size of the company affect the rates of accidents and illnesses? Is there actual data to support issuing a new rule? Why do we need this rule? Will the rule truly improve safety and health? Has this been tested in individual states? What have been the long-term results? How current is any statistical data provided?

When I asked these types of questions during the teleconference, we were not given answers that were as complete as the questions required. It made me suspect that the answers to my questions might not exist.

If they do exist, those reasons should have been included in the documentation which those of us on the panel received, and it should have been addressed to the specific industries the panelists represented.

In my experience, small printing companies don't have many accidents. Our industry increasingly works on computers. Even our heavy press equipment is increasingly safe. More moving elements are enclosed, controlled by digital rather than mechanical means. This means that our workers come into contact with fewer and fewer moving parts (the cause of three of our four serious accidents at my company). I wanted to hear that my experience is different in order to justify the time, money and effort required to implement such a rule and to be able to assess whether the rule would have made a difference in safety.

The economic analysis section also seemed incomplete to me: When were the numbers developed? Based on what? What relevance do they have to my industry?

I also found OSHA's lack of a specific outline or format for submitted comments by participants confusing. How was the panel to compare and assess our responses if we weren't all answering the same questions? I wish that OSHA would have shared the comments of other participants with us after our participation – a final report was never sent to us.

A "layman's" fact sheet would have been helpful for those of us, like myself, who were not familiar with the rule. For instance, while I knew I had to make my workplace

as safe as possible, I did not know what the General Duty Clause was until I called Printing Industries of America.

Teleconference

I found the teleconference helpful, although the format made participation somewhat difficult. Perhaps too many people were included; perhaps the format itself presents difficulties. In any case, I felt it was difficult to hear and understand well.

Justification for the Proposed Rule

I was shocked to learn that work on the proposed rule began many years ago. I was also alarmed to realize how many people and how many hours had already gone into the review process. In fact, I looked back into my records and learned that I spent 22 hours participating in the review process. While I do not begrudge those hours at all, I am a bit chagrined to note that I perhaps could have implemented the proposed rule in that amount of time! It made me wonder if a cooperative consultation program could not have been implemented and carried out by OSHA for tens of thousands of businesses in the time involved in developing this rule.

I work in small industry, so when we want to fix or change something, we just do it. Any studies we do must take a very short time. Our marketplace cannot tolerate years of us studying whether to introduce a new technology that our customers might find valuable, for instance. We would be out of business if we did not quickly adapt to what both our customers and our employees need. While I understand the need for a large organization to move more slowly, I was appalled to realize just how slowly this

particular process is going. This is particularly so, given the fact that the resulting proposal does such a poor job of reflecting what will actually improve safety in the work place and only highlights OSHA's lack of understanding of just what this proposed rule will do to small businesses. With all of the time and money spent, one wonders why this very burdensome standard was the result.

Comments on Proposed Legislation

My reaction to Representative Kelly's proposed bill is generally favorable.

The suggested time limits in getting information to the Small Business Advocate and to panel participants seem reasonable to me. While I found the schedule for the review panel adequate in my case, it was not generous. As a small business owner, I always find it difficult to fit in tasks other than my daily ones. Without a deadline, however, I must admit I would probably continue to procrastinate! The one thing the panel organizers asked for which I did not have time to do was to talk to other small printing company owners to get their impressions of the proposed rule. Perhaps a bit more time for me to do that would have improved the SBREFA process.

I'm not sure that oral presentations are necessary, unless it would give regulators an opportunity to ask questions to clarify comments provided by panel members.

I believe that Section 6 of Representative Kelly's bill is particularly important. It would be impossible for most small businesses to come to Washington, DC, to inspect the agency's rule-making record. Given the impact this rule is likely to have, regulated companies have the right to know what is happening and what other business owners think about the regulation. Requiring that comments be printed in a public forum like the

Federal Register gives any company with internet access the ability to read the comments. For purposes of openness in government and the responsibility of regulators to inform the public, this is an important step.

Thank you for the opportunity to participate today. I would be happy to answer any questions you might have.

TESTIMONY OF

JACK E. WAGGENER, P.E.
RESOURCE CONSULTANTS/DAMES & MOORE

My name is Jack Waggener and I would like to thank the committee for inviting me to participate in this hearing about the SBREFA process. Based on my experience with numerous EPA rulemakings (over 25 years), I believe that SBREFA has significantly improved the regulatory process. I thank the Congress for passing SBREFA as it has brought a breath of fresh air into the regulatory process.

First, I will tell you about my background. I am a registered professional engineer in 14 states and employed by the environmental consulting firm of Resource Consultants/Dames & Moore (RCI/D&M) in Brentwood, Tennessee. Brentwood is a suburb of Nashville, Tennessee where I have resided for most of my 54 years. In 1967, I helped to form RCI as a small business which provides environmental engineering consulting services to all types of industries through out the USA. Until October 1998, when RCI merged with Dames & Moore, we operated as a small business with less then 100 employees. I understand the day to day problems encountered by a small business.

I have designed numerous wastewater and stormwater treatment plants, negotiated discharge permits, trained operators, and helped industry to assure compliance with all of the EPA Industrial Effluent Limitation Guidelines (ELGs). As a result of this "grass roots" experience, in the late 1970's I began to assist industry and industrial trade associations to critique and comment on developing ELGs. I have been directly involved in doing this for more than 20 ELGs.

In 1997 and 1998, I directly participated in the SBREFA process for three EPA rulemakings on behalf of small businesses. These included the Transportation Equipment Cleaning ELG, the Centralized Wastewater Treatment ELG, and Stormwater Regulations. I was indirectly involved in the SBREFA process for the Industrial Laundry ELG.

As a result of the SBREFA Panel Process, all of these resulted in much improved proposed rules which presented many more regulatory alternatives, better economic analysis, and better environmental assessments. These have not been finalized as yet. The success of the SBREFA processes in which I have been involved has occurred because of all of the diligent teamwork of the staffs of EPA (Tom Kelly and many others), SBA, OMB, and many of the SERS. It has not always been an easy process, but the end result has typically been good. I sincerely applaud the work of the staffs of all of these organizations, I have worked very closely with all of them.

I have witnessed the regulatory process improve to become more open and effective over the past 25 years. A significant part of this process took place during the last 3 years, in large part this is due to SBREFA. In the 1970s and 1980s the regulatory process was essentially closed to the regulated community. EPA worked behind "closed doors" and revealed very little about their thoughts or the supporting and background information they used in developing regulations. This somewhat secretive process resulted in regulations that were likely more restrictive and economically impactive than necessary. At that time, there seemed to be an apparent anti-industry attitude throughout most of the EPA. It resulted in a distrust of EPA by the regulated industries. The SBREFA process has greatly reduced these negative attitudes.

I have observed that each subsequent SBREFA process improves over the last. Typically, EPA, SBA, OMB, and the SERs have learned from the previous experience and acted to improve the process. It has not been a perfect process, but it is generally getting the desired results.

Because the SBREFA system is generally working effectively to help small businesses, any modifications being considered to improve it must be carefully measured as to the total impact. This includes obtaining constructive input and critique from all parties (EPA, SBA, OMB, and SERs). I highly recommend that this committee do this. Sometimes, the most seemingly minor changes to make improvement to the IAW and regulations can have unforeseen negative results.

The significant problems I have encountered as a SER in the SBREFA process are:

1. not timely receiving all of the critical information on which the regulation will be based and

2. not having enough time to adequately review the data and to develop alternatives to help small businesses.

However, I have noted that EPA has improved with each SBREFA process to reduce these problems. There have been many debates between all of the participants as to what needs to be provided. Further definition of what and when data packages are to be provided should be considered as part of this Bill. However, too much definition could impede the process if the Bill does not allow some discretion to deal with specific situations.

I do believe that adequate data packages should be provided to the SERs at least 45 days prior to conveying a review panel. This will allow an appropriate amount of time for the SERs to evaluate the information and to formulate their ideas and suggestions. It will also allow the SERs to identify whether any further information is needed to accomplish their task.

Typically, the needed information for the SERs identifies the regulatory alternatives under consideration, initial economic impact data and assumptions, initial information on the cost effectiveness and benefits, draft analysis of toxics expected to be removed by the regulatory alternatives with adequate details on what these are based, and general background information. My experience is that EPA, through the help of SBA, OMB, and the SERs has made significant improvements in doing this. The better and more complete this information is, the better the input from all the parties.

If too much detail is required in the formal documents prepared by EPA, it could have a negative effect by delaying the SBREFA panel process until late in the regulatory process. The implication in the Discussion-Draft of this Bill says that such things as "drafted proposed rules" shall be provided. These are not normally available at the time of the SBREFA process. To ask for this type of formal document could possibly delay conveying input from the SBREFA process to EPA until late in the rulemaking thus not allowing adequate time for EPA to adequately respond to the panels conclusions. I am concerned about this, as time is of the essence when developing regulations.

For adequate discussion and exchange of ideas, I believe that at least two meetings with the SERs during the 60 day process is needed and should be required. At least two meetings have been held for the SBREFA processes in which I have been involved.

As I understand the proposed language of this Bill, the Chief Counsel will select the SERs. Based on my experience, I believe that both SBA and EPA should have equal authority to work together to select the SERs. To the best of my knowledge, this has been the process used to date and it seems to work fairly well. It is not a perfect solution, but what is? Obviously, it is very important that the SERs represent small businesses. They can be the actual small business owners, their representatives, and other representatives knowledgeable of the interests of small businesses. Most small business owners and employees have little idea how the regulations are developed and their basis. As a consultant to the effected industries who has worked in the EPA regulatory area for 25 years and who has run a small business, I have been successful in making a significant impact on the work of the SBREFA Panels. A carefully selected blend of small business owners/representatives and knowledgeable people like myself is imperative to making these panels successful. EPA and SBA have worked successfully to do this, let them keep doing it.

In conclusion, I would like to again thank this committee for allowing me to participate in this hearing. SBREFA has clearly been a success story for the Congress, EPA, SBA, OMB, and most importantly, small businesses. I am proud to be a part of it. The system needs only very minor adjustments to improve it and this must be done very carefully so as to keep the process a success.

TESTIMONY OF

James W. Morrison

Senior Policy Advisor

National Association for the Self-Employed

before the

Subcommittee on Regulatory Reform and Paperwork Reduction and the

Subcommittee on Government Programs and Oversight

Committee on Small Business

U.S. House of Representatives

11 March 1999

Regarding Advocacy Review Panels Under the Regulatory Flexibility Act

Representatives Bartlett and Kelly, members of the Subcommittees, good morning. I am James Morrison, the Senior Policy Advisor to the National Association for the Self-Employed. The NASE is grateful for the opportunity to appear here this morning. Our organization represents over 330,000 self-employed Americans, who live in every state and Congressional District in the United States. On behalf of them, we commend the Subcommittees for their continuing oversight of federal regulatory activities. These activities continue to be a top concern for the nation's small businesses.

Today's hearing focuses on the Small Business Advocacy Review Panels, a major -- and successful -- innovation created by the Small Business Regulatory Enforcement Fairness Act (SBREFA).

For the record, the NASE strongly supports the Review Panel process. We believe it is one of the most significant innovations in SBREFA, and that the experience with the panels since 1996 in general has been very positive. What the panels are helping accomplish is exactly "broad brush" goal of the Regulatory Flexibility Act and SBREFA -- to build a fairer and more rational regulatory process. A process in which accurate information about small businesses and other small entities surfaces early in an agency's decision making. A process that explicitly acknowledges the very limited resources of those small entities. A process that broadens their input so as to broaden consensus. And therefore a process better enabling us to achieve our national goals.

Both EPA and OSHA have issued revised and improved rules as a result of the Review Panels. Certainly there is work to be done in strengthening both the panel process and those agencies' compliance with it. Other witnesses this morning will be discussing that in more detail. But I believe it is fair to say that the basic concept has been shown to work.

For the balance of my testimony, then, I would like to focus on another aspect of the draft legislation that the Subcommittees are considering -- adding the Internal Revenue Service to the Review Panel process. The NASE favors this initiative.

There is only one agency of the federal government which affects every small business in America, and that is the IRS. The IRS applies the internal revenue laws of the nation through a variety of means. These range from legislative and interpretative rules,

through revenue procedures, to guidance documents and private letter rulings. The unique diversity of the IRS' regulatory process reflects its exceptionally broad reach: the U.S. is a very big country with a very big, complex tax code. Yet the IRS must cope with that, while shouldering the crucial responsibility of raising enormous money every year to keep the entire federal government functioning.

It is not hard to understand how a large organization faced with these kinds of challenges would develop certain habits -- or a certain culture -- which seem, from within the organization, to "get the job done quickly".

Congressional hearings over the past several years, legislation like the IRS Restructuring and Reform Act, and the remarkable leadership of IRS Commissioner Charles Rossotti all have pointed to one thing: that IRS culture needs to change.

It needs to change because, however good it may be at managing the tax code and raising the dollars, it's in danger of losing the support of the American people. And in our democracy, no tax collection system can endure long without that support.

Happily, important and positive changes have occurred on this front during the last three years. But there has also been a disappointment. Many of us believed that explicitly putting most IRS rules under the Regulatory Flexibility Act -- which SBREFA did in 1996 -- was the kind of change that eventually would be welcomed by the IRS.

That has not happened. Very few IRS rules explicitly "opt out" of the Act, using the legal procedure for doing so that Congress provided within the RFA.[1] Even fewer IRS rules are built on an analysis of small entity impact, as provided for in the heart of the RFA.[2] That is because the IRS interprets the RFA in a way that completely exempts most of its rules. On those rare occasions when the IRS concedes that a rule falls under the RFA, it further interprets the law so as to greatly limit the scope of analysis.

In a moment, I will explain how this problem has arisen. But first, I want to emphasize that <u>at this point, since the IRS rarely acknowledges that a rule falls under the RFA, adding IRS to the Review Panel process will not result in very many panels being convened.</u>

Now, how did we get into this difficulty?

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[1] 5 USC 605(b)

[2] 5 USC 603-4

LEGISLATIVE HISTORY

Congress' original intent in passing the Regulatory Flexibility Act in 1980 was to include every agency -- and every agency's rules -- under it. Neither the statute nor any document in its legislative history contemplates exempting any agency from the Act. Certainly Congress heard from agencies imploring exemptions from the Act -- ranging from the Battlefield Monuments Commission to USAID, and from the Federal Reserve Board to the CIA. And including the IRS.

But no such exemptions were ever considered or enacted.

Yet when the law was passed, several agencies looked for legal technicalities they could use to avoid it.[3] Among these was the IRS, which said that most of its rules were "interpretative", not "legislative". Translated, the IRS was arguing that most of its rules merely explain what Congress means, but add nothing to that.[4] And since the agency was simply doing what Congress asked whenever it put out these "interpretative" rules, the RFA would not apply. Only those rare rules that Congress told IRS to "legislate", as determined by the IRS itself, would fall under the RFA.

Whatever the merits of this "interpretative / legislative" distinction, and I think they are dubious, having the IRS itself make such subjective decisions, regarding its own rules, was bound to lead to abuse.

During the 1980's and early 1990's, numerous annual reports of the SBA Chief Counsel for Advocacy complained vehemently about IRS non-compliance with the RFA.

When Congress took up SBREFA in 1996, inclusion of these so-called IRS "interpretative" rules within the RFA was a top priority. This was opposed by the IRS.

One of the points that the IRS made then was the diversity of its rulemaking -- the revenue procedures, private letter rulings and the like, to which I referred earlier. Obviously, no one in Congress wanted to subject every IRS decision affecting individual taxpayers, or on certain highly technical matters, to an RFA analysis.

But Congress did want to maintain the spirit of the RFA, which is to require analyses whenever a rule has "a significant economic impact on a substantial number of small

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[3] This process continues even today. In recent months, the Health Care Financing Administration has seized upon a rarely-used provision of the Administrative Procedure Act to try to exempt HCFA rules with major small business impact from the RFA. This matter may also need Congress' attention.

[4] The IRS sees the distinction as being based on the "degree of discretion" that Congress gives it.

businesses".[5] So language was drafted to accomplish that. Congress used the threshold required for IRS compliance with the Paperwork Reduction Act -- an Act the IRS had long been required to observe.

The "trigger" for IRS compliance is when an IRS rule entails a "collection of information" requirement.[6] When is that? It is "to the extent that"[7] IRS requires ten or more people to gather information,[8] including the keeping of specified records.[9]

This appeared to address the IRS' concerns, while maintaining the basic purpose of the RFA. But appearances can be deceiving.

IMPLEMENTATION OF 1996 SBREFA CHANGES

Three major SBREFA implementation problems have emerged:

(1) IRS frequently overlooks the "recordkeeping" part of the trigger.

The Service often seems to assume that if it isn't issuing some new form that taxpayers have to fill out, then it isn't collecting any information.

A good example of this was the proposed IRS regulation on the definition of limited partners for tax purposes.[10] While the rule contemplated no new "forms to fill out", it nevertheless based a partner's tax treatment on whether he or she participated in the business for more than 500 hours per year. Obviously, there is no way to document this for tax purposes without keeping records. And there is no doubt that this rule would have had a significant economic impact on a substantial number of small businesses. Ultimately, this rulemaking became so controversial that Congress passed a law to stop

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[5] See 5 USC 602, 605(b), 610(a), 610(c).

[6] 5 USC 603(a)

[7] 5 USC 603(a)

[8] 5 USC 601 (7)

[9] 5 USC 601(8)

[10] REG-209824-96, 13 January 1997

it [11] -- just the type of problem that careful RFA compliance probably could have prevented.

(2) IRS views its analysis responsibilities too narrowly.

Here we have a basic difference of opinion about the meaning of a phrase. Specifically, the phrase "to the extent that" in the last sentence of §603(a) of the RFA. Which says:

> "In the case of an interpretative rule involving the internal revenue laws of the United States, this chapter applies ... but only to the extent that such interpretative rules impose on small entities a collection of information requirement."

I am convinced that what Congress meant by "to the extent that" is "*whenever*". That is, whenever this trigger is met, analyze the full small business impact. The IRS takes a much different view. They believe Congress meant "*only insofar as*". In other words, if the trigger is met, analyze only the paperwork impact.

The distinction is obviously vital. If one takes the IRS view, then the RFA becomes, essentially, a second Paperwork Reduction Act.

Which raises some troubling questions: Why would Congress impose *two* Paperwork Reduction Acts on the IRS? And why just the IRS -- not any other agency? Why would Congress ask every *other* agency to analyze the *economic* impact of their actions, but not ask the IRS to do so?

Consider an example of how this plays out in practice.

Just last February 4th, the IRS published proposed and final rules on COBRA continuation health insurance coverage for group health plans.[12]

In its reasoning, the IRS said that there was no major small entity impact because the cost of filling out the forms it was proposing would be only $5-6 per employer annually.

But surely these are not the only small entity impacts of the rule. What about the cost of *implementing* new COBRA coverage? Costs to employers, to small insurance companies, to small hospitals, to small non-profits, to small units of government?

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[11] §935 of the Taxpayer Relief Act of 1997, P.L. 105-34, now §1402 of the Internal Revenue Code of 1986.

[12] REG-0121865 and TD 8812

(Yes, Congress told the IRS to do it. But is there only one way to do it? The whole point of the RFA is to discover other, better and cheaper ways to regulate.)

But there apparently won't be an RFA analysis of this rule, because the IRS' narrow focus on paperwork costs ($5 per employer, in this case) leads it to patently absurd outcomes like this.

(3) Certain important IRS rules should require RFA analyses, but don't.

There are at least two types of these. In both cases, the IRS would not be required to convene Review Panels, even if it were added to the RFA's list of "covered agencies".

(A) Instances where a rule likely will have a major impact on small entities, but has no "collection of information" requirement.

A recent example of this was an IRS rule on auditing guidelines for partnerships that have been modified.[13]

Narrowly speaking, this rule is about auditing, not recordkeeping. It would not *require* modified partnerships to do anything. Thus, there is no "collection of information" required. But such partnerships surely would be well-advised to keep their records in accordance with IRS' auditing guidelines. Indeed, *not* doing so would be exceedingly foolhardy; a subsequent audit could become a business catastrophe.

But the way the RFA applies to the IRS now, no analysis is required.

Yet consider: If a rule like this were proposed by any other agency -- by the Department of Transportation, say, for partnerships in the road-building business -- it would clearly fall under the RFA. Why should such a rule be exempt when the IRS proposes it?

Or consider some recent IRS rules on how IRS hearings will be structured prior to the imposition of liens or levies.[14] Talk about impact! Small entities deemed to be in arrears on their taxes stand to lose control of their most valuable assets in these hearings -- life or death for a small business. But there's no "collection of information" requirement, so there's no RFA analysis.

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[13] REG106564-98 and TD 8808, 26 January 1999

[14] REG-117620 and TD 8809, and REG 116824-98 and TD 8810, 22 January 1999

(B) Rules with indirect, but significant, small entity impact. Unfortunately, the RFA is unclear about these situations as they pertain to any agency, not just the IRS. Indeed, it's a core issue in the current RFA litigation concerning EPA rules that are handed off to the states to enforce.

In the tax area, consider IRS' proposed rule on deductions for interest paid on qualified education loans.on deductions for interest paid on qualified education loans. [15] True enough, the direct impact of the rule falls on the individual students who claim this deduction, and they would not be not covered by the RFA. But what about the impacts on the small lending institutions that make the loans? The small colleges that use them to attract students?

In short, simply adding IRS to the list of "covered agencies" that must convene Advocacy Review Panels will not solve the underlying IRS compliance problems.

It may well *help*. Requiring IRS to convene the panels will spotlight the current compliance problems, which would be beneficial. Also, even if only a few panels are convened, the IRS probably will discover that the panels help produce better rules. And that, in turn, could reduce the bureaucratic resistance to convening more panels.

So, as stated earlier, we favor adding IRS to the "covered agencies". But additional steps need to be taken at the same time.

Here are our three basic recommendations to the Subcommittees.

#1. Add IRS to the list of "covered agencies" under §609(d) of the Regulatory Flexibility Act. *At the same time, make a technical correction to §605(a) of the Act to clarify its coverage of IRS rules.*

In the last sentence of §605(a), strike the words "*but only to the extent that*" and insert in lieu thereof the word "*whenever*". After that sentence, insert a new sentence: *"The analysis of such interpretative rules shall include both economic and reporting costs, and shall include indirect costs which would have a significant economic impact on a substantial number of small entities."*

#2. Explore ways to capture the "indirect impact" of rules on small entities under the RFA.

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[15] REG 116826, 21 January 1999

Technical changes in the RFA can eliminate problems (1) and (2), as well as (3)(A), as described above. But not (3)(B). That is the thorny problem of the indirect impact of rules.

Solving that problem will require more extensive study by Congress. How far does the concept of indirect impact extend? To second- and third-order impacts? How should agencies measure these impacts? What guidance should Congress and SBA provide?

However tricky this problem may be, it nevertheless needs addressing. It would be a worthy subject for economic research as well as Congressional hearings.

#3. Work to see that both the SBA Office of Advocacy and IRS have the resources they need to make the resulting panels work.

Advocacy is already dangerously overextended in handling EPA and OSHA Review Panels, while shouldering its other responsibilities. Congress and the Administration have repeatedly cut Advocacy's budget and personnel, even as it was being assigned more responsibilities. This has to end, and now is the time to end it.

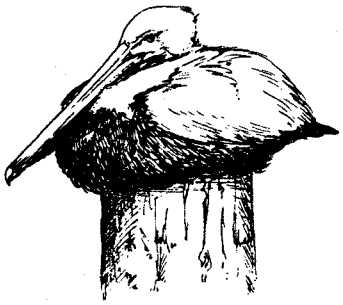
The IRS similarly needs adequate resources to comply. No doubt the resource issue has been a factor in the Service's past reluctance to deal fully with the RFA.

Obviously, this is primarily a matter for the Appropriations Committees of the House and Senate. But as an authorizing committee, the House Small Business Committee could exert some positive influence on this process.

Finally, we would say to the IRS itself: in many ways, you are on the right track with your restructuring. To make your new focus on customer service stronger, you need to better involve your small entity customers in your rulemaking. That will lead to better rules, which are easier to implement and enforce, and which draw a far more positive reaction from small entities and from Congress.

That concludes my testimony. Thank you for giving me the opportunity to appear here today. I would be happy to accept any questions at this time.

Statement required pursuant to rule IX, clause 2(g)(4) of the Rules of the House of Representatives: Neither the National Association for the Self-Employed (NASE), nor any entity represented by it or by Mr. Morrison has received any contract, subcontract, or grant from any federal source during the last two fiscal years.



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THE SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT AND THE REGULATORY FLEXIBILITY ACT: COULD A SINGLE WORD DOOM THE NEW NAAQS?

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The Small Business Regulatory Enforcement Fairness Act and the Regulatory Flexibility Act: Could a Single Word Doom the New NAAQS?

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At the heart of EPA's certification of the proposed NAAQS rule was the Agency's interpretation of the word "impact" as used in the RFA. Is the "impact" to be analyzed under the RFA a rule's impact on the small entities that will be subject to the rule's requirements, or the rule's impacts on small entities in general, whether or not they will be subject to the rule?[1]

It is hard to imagine that the fate of the new National Ambient Air Quality Standards (NAAQS) for ozone and particulate matter might turn on the meaning of a single word. Sifting through the hundreds of pages of Federal Register notices, or the thousands of pages of supporting documentation, it is easy to get lost in the complexity of the numerous scientific and legal issues raised by the ozone and particulate matter NAAQS rules. In one respect, however, the debate over the validity of the new NAAQS rules is remarkably simple. As the Environmental Protection Agency (EPA or the Agency) admits in the preamble to the final ozone NAAQS rule, a question lies at the heart of these rulemakings

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1. National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38,856, 38,887 (1997) (to be codified at 40 C.F.R. pt. 50).

of how to interpret the word "impact" as used in the Regulatory Flexibility Act (RFA or Reg Flex).[2]

In order to understand how the meaning of this word could affect the fate of the ozone and particulate matter rules, a little background is necessary on the RFA,[3] the recent amendments made by the Small Business Regulatory Enforcement Fairness Act (SBREFA),[4] and the EPA's interpretation of the word "impact" as set forth in the preamble to the rules.[5] To the many small businesses and small business trade associations who have petitioned for review of the proposed NAAQS rules, these materials suggest that the agency has misinterpreted the word "impact" and failed to properly implement the RFA. This view is bolstered by the EPA's own actions in other rulemakings affecting small businesses.[6] If the EPA's interpretation is wrong, then it has failed to complete a fundamental legal obligation of the rulemaking process, a failure that could doom both rules.

I. THE REGULATORY FLEXIBILITY ACT

The RFA was enacted in 1980 out of a concern that "uniform Federal regulatory and reporting requirements have in numerous instances imposed unnecessary and disproportionately burdensome demands ... upon small businesses, small organizations and small governmental jurisdictions with limited resources."[7] In the view of Congress, "the practice of treating all regulated businesses, organizations, and governmental jurisdictions as equivalent may lead to inefficient use of regulatory agency resources, enforcement problems, and in some cases, to actions inconsistent with the legislative intent of health, safety, environmental, and economic welfare legislation."[8] To address these concerns, the RFA established a series of procedural requirements federal agencies must use to assess the effects of regulations on "small entities."

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2. Regulatory Flexibility Act, 5 U.S.C. §§ 601-612 (1994 & Supp. II 1996). For an early assessment of the RFA, see Paul Verkuil, *A Critical Guide to the Regulatory Flexibility Act, Report to the Administrative Conference of the U.S.*, *in* 1982 DUKE L.J. 213. The statute defines the term "small entity" to mean small municipalities of less than 50,000 people, small nonprofit organizations and "small business concern[s]" as that term is defined by the Small Business Administration. 5 U.S.C. § 601(3-6).

3. *See* 5 U.S.C. §§ 601-612.

4. Contract with America Advancement Act of 1996, Pub. L. No. 104-121, Title II, 110 Stat. 847 (1996) (codified as amended in scattered sections of 5 U.S.C.).

5. *See* National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. at 38,887.

6. *See, e.g.*, *infra* text accompanying notes 80, 81, 87, 89, 90.

7. Regulatory Flexibility Act, Pub. L. No. 96-354, § 2(a)(3), 94 Stat. 1164 (1980), *reprinted in* 5 U.S.C. § 601 annot. at 551 (1994).

8. Regulatory Flexibility Act § 2(a)(6), 94 Stat. 1165, *reprinted in* 5 U.S.C. § 601 annot. at 551.

The purpose of these requirements is "to establish as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organization and governmental jurisdictions subject to regulation."[9]

The structure of the RFA is fairly simple. When a federal agency publishes a notice of proposed rulemaking, the RFA directs the agency to conduct an initial regulatory flexibility analysis (IRFA).[10] The RFA describes the content of an IRFA in two ways. In general, an IRFA "shall describe the impacts of the proposed rule on small entities."[11] In addition, the RFA sets out a number of specific elements which must be included as part of an IRFA, such as estimates of the number and type of small entities which will be subject to the rule.[12]

When an agency publishes a final rule, it must reassess the impacts of the rule on small entities and publish a final regulatory flexibility analysis (FRFA).[13] The FRFA must contain each of the elements required of the IRFA plus

> a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.[14]

The requirement to perform these analyses is not, however, absolute. An agency need not perform either an IRFA or FRFA if "the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."[15] If an agency decides that a rule meets this test, it must publish a certification to that effect as part of the initial or final rule.[16]

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9. Regulatory Flexibility Act § 2(b), 94 Stat. at 1165, *reprinted in* 5 U.S.C. § 601 annot. at 552.

10. *See* Regulatory Flexibility Act, 5 U.S.C. § 603(a) (Supp. II 1996).

11. *Id.*

12. *See* 5 U.S.C. § 603(b) (1994). The minimum elements of an IRFA are: (1) a description of the reasons why action by the agency is being considered; (2) a succinct statement of the objectives of, and legal basis for, the proposed rule; (3) a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply; (4) a description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rule; and (5) an identification of relevant duplicative, overlapping or conflicting Federal rules. *Id.*

13. *See id.* § 604(a) (Supp. II 1996).

14. *Id.* § 604(a)(5).

15. *Id.* § 605(b).

16. *See id.*

As originally enacted in 1980, the RFA contained a prohibition on judicial review of agency compliance with its requirements.[17] Perhaps because of this prohibition, the RFA became something of a footnote to administrative law. Yet within the small business community, the lack of judicial review of the RFA became a *cause célèbre*. In June 1995, the White House Conference on Small Business made a series of policy recommendations.[18] One of the most sought after policy changes was to allow judicial review of agency compliance with the RFA.[19]

Within a year of the White House Conference, Congress responded by passing the Small Business and Regulatory Enforcement Fairness Act of 1996 (SBREFA).[20] The SBREFA partially rewrote the RFA along the lines recommended by the White House Conference. Among other changes, the SBREFA amended the required elements of a FRFA set out in RFA Section 604[21] and required a more detailed explanation of certifications of no impact under RFA Section 605.[22] SBREFA also amended RFA Section 611 to explicitly allow judicial review of federal agency compliance with Sections 604 and 605.[23]

II. THE NAAQS RULEMAKINGS

Prior to the publication of the proposed NAAQS rulemakings, the EPA appeared to believe that the rules would require regulatory flexibility analyses. In the May 1996 Unified Agenda of Federal Regulatory and Deregulatory Actions, the EPA indicated that it would conduct a regulatory flexibility analysis for both the ozone and particulate matter rules.[24] This position was consistent with the EPA's past practice on RFA certifications, which assessed the impacts of state regulations that would

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17. *Id.* § 611.

18. *See generally* WHITE HOUSE CONFERENCE ON SMALL BUSINESS, FOUNDATION FOR A NEW CENTURY, A REPORT TO CONGRESS AND THE PRESIDENT (1995).

19. *See id.* at 27.

20. Contract with America Advancement Act of 1996, Pub. L. No. 104-121, Title II, 110 Stat. 847 (1996) (codified as amended in scattered sections of 5 U.S.C.). The SBREFA originated as S. 942, introduced by Senator Christopher Bond (R-MO). After S. 942 passed the Senate unanimously on March 19, 1996, companion legislation was added onto H.R. 3136, the Contract with America Advancement Act, by the Hyde amendment. When H.R. 3136 passed the House of Representatives on March 28, 1996, the SBREFA was Title III of that Act. However, the original Title II of H.R. 3136, dealing with the line item veto, was separately enrolled. As a result, SBREFA became Title II of Public Law 104-121.

21. *Id.* § 241(b) (codified at 5 U.S.C. § 604(a) (Supp. II 1996)).

22. *Id.* § 243 (codified at 5 U.S.C. § 605(b) (Supp. II 1996)).

23. *Id.* § 247 (codified at 5 U.S.C. § 611(a) (Supp. II 1996)).

24. Unified Agenda of Federal Regulatory and Deregulatory Actions, 61 Fed. Reg. 23,679, 23,679-80 (1996).

likely be needed to implement NAAQS rules.[25] As the EPA had stated in the recent NAAQS rule for sulfur oxide:

> Additional [State Implementation Plan (SIP)] requirements will be needed only for those areas or sources which are designated as nonattainment for the existing primary standards now or in the future. Given the current air quality and attainment status, however, it is very unlikely that new SIP requirements would be required that would significantly affect a substantial number of small entities.[26]

However, as the publication date for the proposed ozone and particulate matter NAAQS rules approached, Congress and the Small Business Administration's (SBA) Chief Counsel for Advocacy became increasingly concerned that the EPA would not follow through with the earlier decision to conduct a regulatory flexibility analysis. On October 9, 1996, six Senators wrote to EPA Administrator Carol Browner out of concern for the impact of the NAAQS rules on small businesses stating:

> We understand that the Agency is currently deliberating over whether SBREFA applies to these regulations. The test of whether a Regulatory Flexibility Analysis must be performed is whether the rule will have a "significant economic impact on a substantial number of small entities." We note that the proper analysis for this test is not limited to small entities that are directly subject to the rule, but all small entities that are impacted by the rule . . . Congress envisioned precisely these types of regulations to be covered by SBREFA.[27]

In addition, the SBA's Chief Counsel for Advocacy, Mr. Jere Glover, wrote to Administrator Browner on November 18, 1996, objecting to any certification of the proposed ozone NAAQS rule. His letter stated:

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25. *See, e.g.*, National Ambient Air Quality Standards for Sulfur Oxides (Sulfur Dioxide)—Reproposal, 59 Fed. Reg. 58,958, 58,975 (1994). EPA's initial position is also consistent with other rules that, like the NAAQS, apply in the first instance to states, but apply to the private sector through state implementing regulations. *See, e.g.*, Inspection/Maintenance Program Requirements, 57 Fed. Reg. 52,950, 52,986 (1992) (Clean Air Act rulemaking on State inspection and maintenance programs) (codified at 40 C.F.R. pt. 51); Operating Permit Program, 57 Fed. Reg. 32,250, 32,294 (1992) (Clean Air Act rulemaking on State operating permit programs) (codified at 40 C.F.R. pt. 70).

26. National Ambient Air Quality Standards for Sulfur Oxides (Sulfur Dioxide): Final Decision, 61 Fed. Reg. 25,566, 25,577 (1996) (to be codified at 40 C.F.R. pt. 50). For other examples of regulatory flexibility analyses of NAAQS rulemakings based on the impacts of state regulations under hypothetical implementation scenarios, see Review of the National Ambient Air Quality Standards for Carbon Monoxide, 50 Fed. Reg. 37,484, 37499 (1985) and Revisions to the National Ambient Air Quality Standards for Particulate Matter, 52 Fed. Reg. 24,634, 24,654 (1987).

27. Letter from Senators Robert Bennett (R-UT), Christopher Bond (R-MO), John H. Chafee (R-RI), Larry E. Craig (R-ID), Dirk Kempthorne (R-ID), Don Nickles (R-OK), Craig Thomas (R-WY), and John W. Warner (R-VA) to Carol Browner, Administrator, EPA (Oct. 9, 1996) (on file with author).

> In the draft regulation, EPA avoids preparing a regulatory flexibility analysis by making a certification under the Regulatory Flexibility Act [citation omitted] that the revision of the ozone NAAQS will not have a "significant economic impact on a substantial number of small entities." Considering the large economic impacts suggested by EPA's own analysis that will unquestionably fall on tens of thousands, if not hundreds of thousands of small businesses, this would be a startling proposition to the small business community.[28]

Despite these clear indications from Congress and the Chief Counsel for Advocacy that the law required the EPA to conduct a regulatory flexibility analysis, the EPA did not do so when it published the proposed NAAQS rules on December 13, 1996.[29] Instead, Administrator Browner made a certification under Section 605 that both the ozone and particulate matter rules would not have "a significant economic impact on a substantial number of small entities."[30] In justifying Administrator Browner's certification, the EPA pointed to the structure of the Clean Air Act (CAA).[31]

The CAA requires the EPA to issue regulations establishing national air quality standards.[32] These standards, or NAAQS, set ambient levels of air pollution that all areas of the country must attempt to meet.[33] This level is to be achieved through the adoption of state implementation plans (SIPs).[34] The CAA requires each state to develop a SIP containing regulations that will result in sufficient reductions in emissions to allow all areas in the state to achieve the NAAQS.[35] If a state fails to have its SIP approved by the EPA, the EPA develops a federal implementation plan containing regulations necessary to achieve the NAAQS.[36]

The NAAQS rules are thus bifurcated rulemakings. The imposition of regulatory controls is divided into a two-step process of first, setting a

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28. Letter from Jere Glover, Chief Counsel for Advocacy, Small Business Administration, to Carol Browner, Administrator, EPA (Nov. 18, 1996) (on file with author).

29. National Ambient Air Quality Standards for Particulate Matter: Proposed Decision, 61 Fed. Reg. 65,638, 65,669 (1996) (proposed Dec. 13, 1996); National Ambient Air Quality Standards for Ozone: Proposed Decision, 61 Fed. Reg. 65,716, 65,747 (1996) (proposed Dec. 13, 1996).

30. National Ambient Air Quality Standards for Particulate Matter: Proposed Decision, 61 Fed. Reg. at 65,669; National Ambient Air Quality Standards for Ozone: Proposed Decision, 61 Fed. Reg. at 65,747.

31. National Ambient Air Quality Standards for Particulate Matter: Proposed Decision, 61 Fed. Reg. at 65,669; National Ambient Air Quality Standards for Ozone: Proposed Decision, 61 Fed. Reg. at 65,747.

32. *See* CAA § 109(a), 42 U.S.C. § 7409(a) (1994).

33. *See* CAA § 110(a), 42 U.S.C. § 7410(a).

34. *See id.*

35. *See id.* § 110(a)(2), § 7410(a)(2).

36. *See id.* § 110(c), § 7410(c).

general standard, followed at a later point by the application of that general standard to particular entities and the approval of each state's SIP. No one can be directly and immediately subject to a NAAQS rule in the sense that no one will ever face fines or penalties for violating a national ambient standard. However, hundreds of thousands of businesses may face new regulation under state SIPs as a direct result of an EPA rule adopting or tightening a NAAQS standard. In the ozone and particulate matter NAAQS rulemakings, the EPA took the position that the term "impact" as used in the RFA only applies to small entities that are subject to a rule.[37] Because of the bifurcated nature of the NAAQS rules, no one is "subject to" the rule. In the EPA's view, there will be zero impact from the NAAQS rules for purposes of the RFA, clearly less than the "significant economic impact on a substantial number of small entities" required for certification.[38]

When the EPA published the final ozone and particulate matter NAAQS rules on July 18, 1997, it did not publish a FRFA or a certification for either the particulate matter rule or the ozone rule.[39] Instead, the EPA pointed to the certifications made at the time of the proposed rulemakings and indicated that despite comments to the contrary, it felt its certifications of the rules were proper.[40]

III. THE EPA'S INTERPRETATION OF "IMPACT" IN THE RFA

In the preambles to the proposed and final NAAQS rules, the EPA explained its interpretation of the word "impact" as used in Section 605 of the RFA.[41] The EPA first looked at the purposes of the RFA and the statutory requirements for regulatory flexibility analyses.[42] The EPA

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37. *See* National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. 38,652, 38,702-03 (1997) (to be codified at 40 C.F.R. pt. 50); National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38,856, 38,888 (1997) (to be codified at 40 C.F.R. pt. 50).

38. *See* National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. at 38,702-03; National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. at 38,888.

39. *See* National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. at 38,702-03; National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. at 38,888.

40. *See* National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. at 38,706; National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. at 38,892. The EPA's position in the NAAQS rules suggests that a certification at the proposal stage may be final agency action regarding the application of the RFA to a particular rule.

41. *See* National Ambient Air Quality Standards for Particulate Matter: Proposed Decision, 61 Fed. Reg. 65,638, 65,669 (1996) (proposed Dec. 13, 1996); *see also* National Ambient Air Quality Standards for Ozone: Proposed Decision, 61 Fed. Reg. 65,716, 65,747 (1996) (proposed Dec. 13, 1996); 5 U.S.C. § 605 (1994 & Supp. II 1996); National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. at 38,702; National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. at 38,888.

42. *See* National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. at 38,702; National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. at 38,888.

noted that Congress was concerned with one-size-fits-all regulations and that small businesses are at a competitive disadvantage in complying with uniform rules.[43] The EPA interpreted Congress's direction to agencies to "fit regulatory and informational requirements to the scale of [small entities] subject to regulation,"[44] not to refer to all small entities that are affected by a regulation, but only to those small entities that are directly and immediately subject to the regulation.[45]

In examining the text of the RFA, the EPA cited several sections limiting a portion of the RFA assessment to only those entities that will be "subject to" a particular rulemaking.[46] For example, listed among the required elements of regulatory flexibility analyses in subsections 603(b) and 604(a) is a description of "the number of small entities to which the proposed rule will apply" and "an estimate of the classes of small entities which will be subject to the requirement."[47] From this assessment, the EPA concluded that Section 605 should likewise be read to limit the assessment of impacts to impacts on entities subject to the rule.[48]

Next, the EPA examined the limited case law involving the RFA. The EPA cited *Mid-Tex Electric Cooperative, Inc. v. FERC*[49] and *United Distribution Cos. v. FERC*[50] for the proposition that the test for certification under Section 605 should be limited to assessing impacts on small entities that are subject to the requirements of the rule.[51] The EPA

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43. *See* National Ambient Air Quality Standards for Particulate Matter: Proposed Decision, 61 Fed. Reg. at 65,669; *see also* National Ambient Air Quality Standards for Ozone: Proposed Decision, 61 Fed. Reg. at 65,746-47; 5 U.S.C. § 605 (1994 & Supp. II 1996); National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. at 38,702-07; National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. at 38,888-92.

44. Regulatory Flexibility Act, Pub. L. No. 96-354, § 2(b), 94 Stat. 1165 (1980), *reprinted in* 5 U.S.C. § 601 annot. at 552 (1994).

45. *See* National Ambient Air Quality Standards for Ozone: Proposed Decision, 61 Fed. Reg. at 65,669; *see also* National Ambient Air Quality Standards for Ozone: Proposed Decision, 61 Fed. Reg. at 65,746-47; 5 U.S.C. § 605 (1994 & Supp. II 1996); National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. at 38,702-07; National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. at 38,888-92.

46. *See* National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. at 38,703; National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. at 38,888.

47. Regulatory Flexibility Act, 5 U.S.C. §§ 603(b)(3), (4) (1994); 604(a)(3), (4) (Supp. II 1996).

48. *See* National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. at 38,703; National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. at 38,888.

49. 773 F.2d 327 (D.C. Cir. 1985).

50. 88 F.3d 1105 (D.C. Cir. 1996).

51. *See* National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. at 38,703; National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. at 38,888; *see also* Mid-Tex Elec. Coop., Inc. v. FERC, 773 F.2d 327, 342 (D.C. Cir. 1985) (holding that FERC correctly determined that it does not need to prepare a regulatory flexibility analysis under the Reg Flex Act where it has proposed a rule that the Agency has determined will not have a significant impact on a substantial number of small entities); United Distribution Cos. v. FERC,

appeared to believe that Congress would support its narrow reading of the term "impact," claiming that "Congress let this interpretation stand when it recently amended the RFA in enacting SBREFA."[52]

Finally, the EPA noted the bifurcated nature of NAAQS rulemakings, but rejected the possibility of conducting regulatory flexibility analyses at the second phase during which the EPA decides whether to approve each state's SIP. "EPA's approval of SIPs for the new or revised NAAQS also will not establish new requirements, but will simply approve requirements that a State is already imposing."[53] Apparently, the EPA's position is that any impacts of a NAAQS rule on small entities will occur after the promulgation of the rule, but before the approval of state SIPs. Thus, small entities would never have an opportunity to benefit from a regulatory flexibility analysis of the regulatory burdens they will face as a result of the NAAQS rules.

IV. CONGRESSIONAL REACTION

The response from the congressional authors of SBREFA came soon after the EPA published its certification of the rules. On January 7, 1997, both the Chairman and the ranking Democrat of the Senate Small Business Committee wrote Administrator Browner expressing their strong disapproval of the EPA's reading of the statutory test for RFA certifications.[54] These two Senators had been the principal authors of the Senate version of SBREFA, S. 942, and were chiefly responsible for its unanimous passage in the Senate.

> It seems overly legalistic to attempt to separate the direct and indirect compliance consequences of new standards, and these arguments simply are not persuasive in the context of what Congress has required of federal agencies under Reg Flex and SBREFA. EPA surely is aware of the

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88 F.3d 1105, 1170 (D.C. Cir. 1996) (concluding that under the RFA, FERC has no obligation to conduct a small entity impact analysis of effects on entities which it does not regulate).

52. National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. at 38,703; National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. at 38,888.

53. National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. at 38,705; National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. at 38,890; *see also* Approval and Promulgation of Air Quality Implementation Plans; Approval of the Carbon Monoxide Implementation Plan Submitted by the State of Connecticut Pursuant to Sections 186-187 and 211(m) ("A SIP approval does not create any new requirements, but simply approve [sic] requirements that the State is already imposing. Therefore, because the federal SIP-approval process does not impose any new requirements, I certify that it does not have a significant impact on any small entities affected.").

54. Letter from Senators Christopher S. Bond (R-MO) and Dale Bumpers (D-AR) to Carol Browner, Administrator, EPA (Jan. 7, 1997), *reprinted in Nomination of Aida Alvarez to be Administrator of the United States Small Business Administration: Hearing Before the Committee on Small Business, United States Senate*, 105th Cong. 24 (1997).

> consequences of these new standards, and the range of possible implementation scenarios to attain the new standards has no doubt been considered at length by EPA and its staff. The fact that some discretion is given to the states, and that economic impact may not be ascertainable with precision or certainty, is appropriate for discussion in the analyses prepared under Reg Flex. EPA's knowledge and experience should provide a basis for reasonable estimates of the likely range of economic impact on small entities. The existence of several possible outcomes clearly does not mean the standards will have no significant economic impact at all, and cannot excuse EPA from its statutory obligations under Reg Flex and SBREFA.
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> EPA's own Regulatory Impact Analyses (RIAs) accompanying the NAAQS rulemakings provide estimates of the impact on small entities, including small businesses, cities and towns. The particulate matter RIA states that, "At least one or more small establishments in up to 30 or 40 percent of affected industries . . . may experience potentially significant impacts." For ozone, the RIA states that, "At least one or more small establishments in up to 18 percent of affected U.S. industries . . . may experience potentially significant impacts." These statements seem to be at odds with a certification of no impact under section 605. In the context of claiming the benefits expected to accrue from the new standards as justification for their issuance, EPA assumes implementation and compliance will be achieved. EPA cannot simultaneously disclaim these implementation and compliance consequences of the new standards when it comes time to satisfy its statutory obligations under the plain language of Reg Flex to "describe the impact of the proposed rule on small entities."[55]

V. A BETTER READING OF THE RFA AND SBREFA

How could the EPA have so badly misjudged the intent of the SBREFA's congressional authors on the proper application of the RFA? Is there a better reading of SBREFA and the RFA, one that would be closer to the text and purposes of the statutes? The answer to these questions begins with a closer reading of the text of the RFA, and a reexamination of the case law on which the EPA has relied. Ultimately, the answer brings us back to the EPA. Other EPA program offices have adopted an alternative reading of the RFA that is more in keeping with the spirit of the statute and the views of the SBREFA's congressional authors.

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55. *Id.* At the hearing, Senator Bond summed up the EPA's application of the RFA in the NAAQS rules to bear hunting:

> In other words, if you go bear hunting and you aim a gun and you pull a trigger of a gun aimed at a bear and the bullet kills the bear, it is the bullet that kills the bear and the EPA is saying the person who pointed the gun and pulled the trigger has absolutely no responsibility for what the bullet did.

Id. at 23.

A better reading of the RFA would start with a closer look at the text of the statute. The test for making a certification under Section 605 is whether or not the rule will have a "significant economic impact on a substantial number of small entities."[56] At its core, the EPA's view is that we should read the statute as if Congress had written the phrase "that are subject to the requirements of the rule" at the end of the sentence, thus limiting the analysis required by Section 605.[57] The fundamental question is whether the EPA is justified in reading this restrictive language into the statute.

An examination of the RFA as a whole reveals that the scope of some requirements of the RFA is explicitly limited to small entities that are subject to the rule.[58] Other adjacent sections do not contain this limitation. As the EPA notes, certain elements of IRFAs and FRFAs are limited by Sections 603(b) and 604(a) to small entities that are subject to the rule.[59] For example, agencies issuing a rule are required to describe "the classes of small entities which will be subject to the requirement"[60] and "the number of small entities to which the proposed rule will apply."[61] However, the EPA neglects to mention that Section 603(a) mandates that an agency's "analysis shall describe the impact of the proposed rule on small entities."[62] Section 603(a) appears to create an overarching obligation that an IRFA assess impacts on entities beyond those "subject to" the rule.[63] To be consistent, the EPA's logic would require us to rewrite the RFA by inserting language of limitation into this section as well as Section 605.

Why go to all this trouble when a less tortured reading is available? The EPA could accept the interpretation that Congress intended Sections 603(a) and 605 to require a broad consideration of impacts, as suggested by the lack of limiting language, while Sections 603(b) and 604(a) are intended to list specific elements of the analyses focused on small entities that are subject to the rule. This reading would also have the virtue of comporting with the principle of statutory construction that, "where Congress includes particular language in one section of a statute but omits

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56. Regulatory Flexibility Act, 5 U.S.C. § 605(b) (Supp. II 1996).

57. *See* National Ambient Air Quality Standards for Ozone: Proposed Decision, 61 Fed. Reg. 65,716, 65,746-47 (1996) (proposed Dec. 13, 1996) (quoting Mid-Tex Elec. Coop, Inc. v. FERC, 773 F.2d 327, 342 (D.C. Cir. 1985)); National Ambient Air Quality Standards for Particulate Matter: Proposed Decision, 61 Fed. Reg. 65,638, 65,669 (1996) (proposed Dec. 13, 1996) (quoting *Mid-Tex Elec. Coop*, 773 F.2d at 342).

58. *See* 5 U.S.C. §§ 601-612 (1994 & Supp. II 1996).

59. *See, e.g.*, 5 U.S.C. §§ 603(b), 604(a) (1994).

60. *Id.* § 603(b)(4) (1994).

61. *Id.* § 603(b)(3), (4) (1994).

62. *Id.* § 603(a) (Supp. II 1996).

63. *Id.*

it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion."[64] Far from confirming the EPA's interpretation of the word "impact," the structure of the RFA suggests that the analysis required for a certification must encompass impacts on entities beyond those that are directly and immediately subject to the rule.

VI. *MID-TEX* AND *UNITED DISTRIBUTION*

The EPA's reliance on case law is also misplaced. While the *Mid-Tex* and *United Distribution* decisions might appear to support the EPA's position, a closer reading of the two cases shows that both are consistent with the view that a certification of the NAAQS rules is improper.[65] The key to this conclusion is an understanding of the wide variety of impacts a regulation can trigger, and the precise kind of impacts the petitioners in *Mid-Tex* and *United Distribution* sought to bring within the RFA.

In *Mid-Tex*, the petitioners were wholesale customers of electrical utilities regulated by the Federal Energy Regulatory Commission (FERC).[66] The alleged impacts on these parties consisted of potential increases in the prices they paid for wholesale electricity.[67] Their central claim was that the FERC had sanctioned a new accounting method that would allow regulated electrical utilities to increase their rate bases.[68] This increase, in turn, would result in higher wholesale prices and a "price squeeze" that would impair wholesale customers' abilities to compete with the utility for retail customers.[69]

In *United Distribution*, a number of public utility commissions (PUCs) claimed that FERC's Order 636, which mandated the unbundling of natural gas pipeline sales and transportation services and required a change in pipeline rate structures, would have impacts on natural gas local distribution companies (LDCs).[70] The PUCs alleged that because of the FERC's mandated pipeline rate structure, LDCs would face increased prices when they sought to obtain natural gas from the regulated gas companies.[71]

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64. Rodriguez v. United States, 480 U.S. 522, 525 (1987) (quoting Russello v. United States, 464 U.S. 16, 23 (1983) (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972))).

65. *See* Mid-Tex Elec. Coop., Inc. v. FERC, 773 F.2d 327, 330 (D.C. Cir. 1985); United Distribution Cos. v. FERC, 88 F.3d 1105 (D.C. Cir. 1996).

66. *See Mid-Tex Elec. Coop*, 773 F.2d at 330.

67. *See id.* at 335.

68. *See id.* at 335-36.

69. *See id.*

70. *See United Distribution Cos.*, 88 F.3d at 1168-70.

71. *See id.* at 1129 n.26.

In both cases, the impacts that these petitioners sought to bring within the RFA did not flow from any new regulatory costs that might be imposed on small entities. The impacts arose from the potential for the regulated utilities' costs to be passed through to their customers in the form of higher prices for electricity or gas. In *Mid-Tex*, the court concluded that the possibility that small entities would face increased electricity costs was an "indirect impact" that need not be considered in an RFA certification. "Congress did not intend to require that every agency consider every indirect effect that any regulation might have on small businesses in any stratum of the national economy."[72]

Like the FERC orders at issue in *Mid-Tex* and *United Distribution*, the NAAQS rulemakings are likely to have a potentially infinite number of effects on small entities as the costs associated with meeting the new standards ripple through the economy. However, in contrast to *Mid-Tex* and *United Distribution*, the NAAQS rules also trigger the imposition of regulatory costs directly on small entities. These impacts are described in some detail in the Regulatory Impact Analyses (RIA) of the NAAQS rules.[73]

A brief description of the RIA demonstrates how the regulatory impacts of the NAAQS rules differ from the economic impacts at issue in *Mid-Tex* and *United Distribution*. Like any assessment of regulations prior to their implementation, the RIA requires the EPA to make an educated guess about the future.[74] In order to conduct the quantitative cost analyses in the RIA, the EPA uses a "hypothetical implementation scenario."[75] For each local nonattainment area, the EPA identifies a set of industry-specific pollution control requirements that would allow the area to reach attainment in the least-cost manner.[76] The hypothetical scenario includes many new regulations applicable to small entities.[77]

While states are not under an obligation to adopt the set of control measures assumed in the RIA, the hypothetical scenario is sufficiently robust for the EPA to make reasonable predictions about the foreseeable

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72. *Mid-Tex Elec. Coop*, 773 F.2d at 343; *see also* Motor & Equip. Mfg. Ass'n v. Nichols, Nos. 96-1392 and 96-1397, 1998 WL 193662, at *19 (D.C. Cir. Apr. 24, 1998).

73. THE OFFICE OF AIR QUALITY PLANNING AND STANDARDS, EPA, REGULATORY IMPACT ANALYSES FOR THE PARTICULATE MATTER AND OZONE NATIONAL AMBIENT AIR QUALITY STANDARDS AND PROPOSED REGIONAL HAZE RULE § 11.9 (1997) [hereinafter REGULATORY IMPACT ANALYSES].

74. *See id.* § 11.8.1.

75. *See id.* § 11.8.3.

76. *See id.* app. B.1 at 33.

77. *See id.* § 11.9. For a description of how specific control measures were selected for the ozone and particulate matter hypothetical implementation scenarios, see E.H. PECHAN AND ASSOCIATES, CONTROL MEASURE ANALYSIS FOR OZONE AND PM ALTERNATIVES: METHODOLOGY AND RESULTS 53 (1997) (EPA Contract No. 68-D3-0035).

costs of the rule. Given the technique used to develop the hypothetical scenario, it appears that any state that deviates from the scenario will needlessly increase the overall costs of achieving the new NAAQS. As the RIA suggests, the hypothetical implementation scenario "may be very useful as States design the actual implementation strategies to meet the NAAQS."[78] Thus, the EPA's documentation for the NAAQS rules identifies specific regulatory costs that are likely to be imposed on small entities as a direct and foreseeable consequence of the promulgation of the NAAQS rules.

Mid-Tex and *United Distribution* may stand for the proposition that the impact on small entities of possibly having to pay increased prices for various goods and services may be so indirect as to properly be excluded from consideration under the RFA. However, the EPA's certifications in the NAAQS rules would require a significant expansion of the holdings in those cases to exclude the impacts on small entities of complying with new regulations that are likely to be imposed on them as a direct and foreseeable consequence of a rulemaking. Acceptance of this expansion would mean that all bifurcated rulemakings would be exempt from the RFA, a proposition for which there is no suggestion in the statute or legislative history.

VII. RFA PRACTICE IN OTHER EPA PROGRAM OFFICES

The EPA's invitation to expand the holdings of *Mid-Tex* and *United Distribution* should also be rejected because it conflicts with the Agency's own practice of conducting regulatory flexibility analyses in other program offices.[79] As an illustration, consider the analyses prepared by the EPA's Office of Water when it issues regulations establishing effluent limitations guidelines and pre-treatment standards.[80]

Pre-treatment standards apply to indirect dischargers who release their effluent into public sewer systems where the effluent is subject to further treatment before being discharged.[81] These indirect dischargers are "subject to" the rule in that they can be fined for failing to comply

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78. REGULATORY IMPACT ANALYSES, *supra* note 73, § 11.8.3.

79. *See* Mid-Tex Elec. Coop., Inc. v. FERC, 773 F.2d 327, 343 (D.C. Cir. 1985); United Distribution Cos. v. FERC, 88 F.3d 1105, 1170 (D.C. Cir. 1996).

80. *See* LYNNE G. TUDOR, EPA, EPA 821-R-93-012, ECONOMIC IMPACT ANALYSIS OF FINAL EFFLUENT LIMITATIONS GUIDELINES AND STANDARDS FOR THE PESTICIDE MANUFACTURING INDUSTRY (1993); LYNNE G. TUDOR, EPA, EPA 821-R-95-022, ECONOMIC IMPACT ANALYSIS OF PROPOSED EFFLUENT LIMITATIONS GUIDELINES AND STANDARDS FOR THE METAL PRODUCTS AND MACHINERY INDUSTRY (PHASE I) (1995); LYNNE G. TUDOR, EPA, EPA 821-R-96-017, ECONOMIC IMPACT ANALYSIS OF FINAL EFFLUENT LIMITATIONS GUIDELINES AND STANDARDS FOR THE PESTICIDE FORMULATING, PACKAGING, AND REPACKAGING INDUSTRY (1996).

81. *See* Clean Water Act, 33 U.S.C. § 1317(b) (1994).

with the standards.[82] On the other hand, effluent limitations guidelines do not directly apply to anyone, but guide permit writers in establishing site-specific limits for direct discharges.[83] Direct dischargers are not "subject to" the rule, in that they can not be fined for violating an effluent limitations guideline.[84] They only become subject to regulation when a state implements the guidelines in site-specific permits.[85]

For example, in the final rule for effluent limitations and standards for the pesticide manufacturing industry, the EPA specifically looked at the impacts of the rule on direct dischargers in determining whether to make an RFA certification.[86] "Under the final effluent limitations, no facility closures are projected for direct dischargers. One direct discharging facility and one zero discharge facility are expected to close product lines.... Because two firms do not constitute a 'substantial number of small entities,' no regulatory flexibility analysis is required."[87] However, by the EPA's logic in the NAAQS rules, these impacts should not even be considered in making an RFA certification because direct dischargers are not immediately "subject to the rule."[88]

In another example, occurring at almost the same time that the EPA decided to certify the proposed NAAQS rules, the EPA decided to certify the final rule for effluent limitations for the pesticide formulating industry.[89] In making its RFA certification, the EPA assessed the impacts

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82. *See id.* §§ 1317(d) (making operation in violation of standards unlawful), 1319(c), (d), (f), (g) (imposing penalties for violations of § 1317).

83. *See id.* § 1314(b) (directing Administrator to promulgate effluent limitations).

84. *See id.* § 1319(c), (d), (g) (penalty provisions do not include noncompliance with § 1314 as a violation subject to penalties).

85. *See id.* §§ 1342(b) (governing state implementation of National Pollutant Discharge Elimination System permit program), 1319(c), (d), (g) (imposing penalties for violating conditions or limitations of permits issued pursuant to § 1342).

86. *See* LYNNE G. TUDOR, EPA, EPA 821-R-93-012, ECONOMIC IMPACT ANALYSIS OF FINAL EFFLUENT LIMITATIONS GUIDELINES AND STANDARDS FOR THE PESTICIDE MANUFACTURING INDUSTRY § 8.2.A (1993); *see also* Pesticide Chemicals Category Effluent Limitations Guidelines, Pretreatment Standards, and New Source Performance Standards, 58 Fed. Reg. 50,638, 50,676 (1993); Effluent Limitations Guidelines, Pretreatment Standards, and New Source Performance Standards: Metal Products and Machinery, 60 Fed. Reg. 28,210, 28,250 (1995); LYNNE G. TUDOR, EPA, EPA 821-R-95-022, ECONOMIC IMPACT ANALYSIS OF PROPOSED EFFLUENT LIMITATIONS GUIDELINES AND STANDARDS FOR THE METAL PRODUCTS AND MACHINERY INDUSTRY (PHASE 1) 10.12 (1995) (separately assessing impacts on direct dischargers as part of the initial regulatory flexibility analysis).

87. LYNNE G. TUDOR, EPA, EPA-R-93-012, ECONOMIC ANALYSIS OF FINAL EFFLUENT LIMITATIONS GUIDELINES AND STANDARDS FOR THE PESTICIDE MANUFACTURING INDUSTRY 8.2.A (1993).

88. National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38,856, 38,887 (1997) (to be codified at 40 C.F.R. pt. 50).

89. *See* Pesticide Chemicals Category, Formulating, Packaging and Repackaging Effluent Limitations Guidelines, Pretreatment Standards, and New Source Performance Standards, 61 Fed. Reg. 57,518, 57,538-39 (1996); *see also* LYNNE G. TUDOR, EPA, EPA 821-R-96-017,

of the rule on two classes of small entities that are clearly not subject to the rule: small publicly owned treatment works that are responsible for implementing the rule, and small communities that may contain facilities adversely affected by the regulation.[90] Here, the EPA adopted an even broader interpretation of "impact," one that appears to include the reasonably foreseeable impacts of a rule on small entities, regardless of whether they will ever be subject to regulation.

The impacts of rules establishing effluent limitations guidelines on small entities regulated by state-issued direct discharge permits are analogous to the impacts of the NAAQS rules on the small entities that will be regulated under state implementation plans. In both cases, the impacts do not arise from the rule itself, but from regulatory burdens imposed as a direct and foreseeable consequence of the rule. However, the EPA's Office of Water includes impacts on direct dischargers within its RFA assessments while the Office of Air and Radiation attempts to exclude the impacts of the NAAQS rules on small entities.

The broad interpretation of the word "impact" used by the EPA in rules promulgated under the Clean Water Act does not appear to pose any great difficulty for the Agency's Office of Water. One wonders why the Agency's Office of Air and Radiation would go to such great lengths to attempt to justify a contrary and more restrictive interpretation for the NAAQS rules.

VIII. CONCLUSION

Any new regulation can have a potentially infinite number of impacts on entities, both large and small, as the costs of implementing the regulation ripple throughout the economy. In deciding whether, under the RFA, to certify that a rule will not significantly impact small entities, an agency must cut off its assessment of impacts at some point. It may apply a rule of reason to distinguish between reasonably anticipated impacts and highly speculative ones. It may distinguish between the regulatory impact of complying with new legal requirements and the economic impact of paying more for goods and services. However, it may not ignore new regulatory burdens that will be imposed on small entities as a direct and foreseeable result of a rule simply because of an intervening

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ECONOMIC ANALYSIS OF FINAL EFFLUENT LIMITATIONS GUIDELINES AND STANDARDS FOR THE PESTICIDE FORMULATING, PACKAGING, AND REPACKAGING INDUSTRY § 4.2 (1996).

90. *See* Pesticide Chemicals Category, Formulating, Packaging and Repackaging Effluent Limitations Guidelines, Pretreatment Standards, and New Source Performance Standards, 61 Fed. Reg. 57,518, 57,538-39 (1996); *see also* LYNNE G. TUDOR, EPA, EPA 821-R-96-017, ECONOMIC ANALYSIS OF FINAL EFFLUENT LIMITATIONS GUIDELINES AND STANDARDS FOR THE PESTICIDE FORMULATING, PACKAGING, AND REPACKAGING INDUSTRY § 4.2.2 (1996).

step such as a state's issuance of a permit or implementing regulations. The EPA's certification of the NAAQS is at odds with the statute, the case law, and the EPA's own practice in other rulemakings.

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Legal & Regulatory Group

March 15, 1999

The Honorable Sue Kelly
Committee on Small Business
U.S. House of Representatives
ATTN: Larry McCredy
B-363 Rayburn
Washington, D.C. 20515

Dear Madam Chairwoman:

The National Automobile Dealers Association (NADA) represents 20,000 franchised automobile and truck dealers who sell new and used motor vehicles and engage in service, repair and parts sales. Together they employ in excess of 1,000,000 people nationwide, yet over 80% are small businesses as defined by the Small Business Administration.

NADA was pleased to see that a joint Small Business Subcommittee hearing was held on March 11, focusing on improvements to the Regulatory Flexibility Act (RFA) and the Small Business Regulatory Enforcement Fairness Act (SBREFA). As you may recall, NADA was privileged to testify before the Government Programs and Oversight and Regulatory Reform and Paperwork Reduction Small Business Subcommittees during a similar hearing held on March 18, 1998. NADA would like to reiterate its general support for the small business advocacy review panel process and, at the same time, to urge the Small Business Committee to move forward with the adoption of amendments to Section 609 designed to improve upon the panel process.

To date, NADA has participated directly in three Section 609 RFA processes initiated by the Environmental Protection Agency (EPA). In all three, the pre-proposal background information provided to the small entity representatives (SERs) was either inadequate or too voluminous to review in the time provided. Since such information is essential to the formulation of useful advice and recommendations on draft rules, it is imperative to the panel process that SERs receive adequate information and enough time to review it.

NADA also strongly supports adding the Internal Revenue Service (IRS) to the list of covered agencies that must convene small business advocacy review panels when appropriate. The IRS has all too often inadequately considered the concerns of small entities when promulgating its regulations. Including the IRS under SBREFA should cause the agency to become more aware of the potentially negative and unnecessary impacts of its regulations on small businesses and, hopefully, to avoid one-size-fits-all approaches to rulemaking.

On behalf of NADA, I thank the Chairwoman for the opportunity to submit comments on this matter.

Respectfully submitted,

Douglas I. Greenhaus

Douglas I. Greenhaus
Director, Environment, Health and Safety

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