

Office of Advocacy

**TESTIMONY**

**OF**

**JERE W. GLOVER**  
**Chief Counsel for Advocacy**  
**U. S. Small Business Administration**

**before the**

**SENATE COMMITTEE ON SMALL BUSINESS**  
**July 24, 1996**

**on**

**IMPLEMENTATION OF SBREFA**

Good morning Mr. Chairman and members of the Committee. I am Jere W. Glover, Chief Counsel for Advocacy, U. S. Small Business Administration. I am pleased to appear before the Committee to discuss what the Office of Advocacy is doing to implement provisions of the [Small Business Regulatory Enforcement Fairness Act of 1996 \(SBREFA\)](#). My comments this morning are my own and may or may not reflect those of the Administration.

The letter of invitation to this hearing asked me to comment on Subtitles, A, B, C and D of the Act, particularly Subtitle D, which amended the [Regulatory Flexibility Act](#). Since the Small Business Administration has obligations under subtitleS A, B and C, I have attached to my testimony a copy of Administrator Lader's response to Senator Bond, Chairman of this Committee, as to actions taken by the SBA to comply with these Subtitles.

**Judicial Review**

Small business has long sought judicial review. This was a major recommendation of the 1995 White House Conference on Small Business and Congress is to be commended for acting so swiftly to provided this most important avenue of redress for small business. This Committee and Chairman Bond played a pivotal role in successful passage of this legislative reform. Small Business is extremely gratified. In my opinion, the legislation is the most significant legislation to help small business in 20 years. It will make a significant difference in how government governs small business.

As you know, this amendment to the [Regulatory Flexibility Act](#) allows a small entity to appeal from an agency's final action and have the courts review an agency's:

- \* definition of small entity or small business;
- \* final regulatory flexibility analysis;
- \* certification that a rule will not have a significant economic impact on a substantial number of small entities;
- \* small business outreach;
- \* delay in completing a [final regulatory flexibility analysis](#); and
- \* periodic review of rules.

### Agency Briefings

It is very clear that agencies are now paying greater attention to the Regulatory Flexibility Act. In the past month, the Office of Advocacy has conducted three briefings to advise agencies how to comply with the Act. (Committee staff were invited to attend.) Over 200 agency personnel representing 14 executive branch agencies, 14 independent agencies and the Office of Management and Budget attended the sessions. Another session is scheduled for July 31 for agency economists and policy analysts. We distributed a draft guide at these briefings asking for agency input, reaction, requests for clarification, etc. Copies of this guide were provided to the Committee's staff prior to this hearing. Once we review the comments and complete a final edit, the guide will be printed and re-distributed to those who attended the briefing. The guide will also be made available to agencies when we find analyses and compliance to be deficient.

In addition, we are currently reviewing questions raised at the briefings to see if a Q and A handout should be developed and/or incorporate the information into the Guide itself.

We have also held briefings with individual agencies to review their regulatory agendas and to explain their RFA obligations. Attendance at these agency specific briefings was in the neighborhood of 250-300.

The heightened level of agency interest in the [Regulatory Flexibility Act](#) is clearly due to the possibility of having certifications and regulatory flexibility analyses reviewed and rules set aside when agencies have not fully complied with the law.

Some agencies know they have been delinquent in the past.

In our [annual reports](#) to Congress, we have reported on the number and kind of letters we submitted to agencies commenting on their regulations and compliance with the Regulatory Flexibility Act. We also reported on the level of agency compliance. Some agencies have been very good. Others have a mixed record

such as the Department of Agriculture where some branches are very good, but others recalcitrant.

As the chart I have brought with me shows, we have been commenting on more regulations with a decreasing number of staff. As an aside, the unusually large number of letters written by Advocacy in 1992 is an anomaly since most of those letters were form letters that did not include comments on the substance of the regulations. Advocacy has used its comment letters to educate agencies on the provisions of the Regulatory Flexibility Act, to show them how to comply and to comment on the substantive impact of the rule on small business. We have done this, for example, by raising questions agencies needed to ask and answer in their analyses which they had failed to do.

The legal and regulatory staff is organized around issues. A list of the individuals, the issues they cover and the agencies involved is attached for your use and information.

We also work closely with the Office of Information and Regulatory Affairs (OIRA). Pursuant to the "Exchange of Letters" between OIRA and Advocacy, we have been submitting copies of our letters to that office and OIRA in return has been asking for our input when agencies submit final rules for OIRA clearance to see if more needs to be done before a rule is cleared for final publication.

#### Trade Association Outreach

Within two months of the President signing the 1996 Act, Advocacy printed a publication highlighting the provisions of the new law and distributed it to small business trade associations. (Copies of this document were also given to committee staff prior to this hearing.) Trade associations are giving the new law great visibility. We anticipate conducting another briefing for the associations once we finalize the Compliance Guide referred to earlier in my testimony.

#### Other Outreach

Provisions of the new law were summarized in the April issues of Advocacy's SMALL BUSINESS ADVOCATE that is sent to a mailing list of approximately 8,000 small businesspeople, elected officials, libraries, media, etc. And I wrote an article for the May issue of the ST. LOUIS SMALL BUSINESS MONTHLY. (Copies of both are attached.)

In toto we have reached approximately 500 federal agency personnel, 100 trade association representatives and numerous others through the referenced publications.

#### Lessons Learned

Advocacy has learned several things as the result of the agency briefings.

1. Size standard definitions have become increasingly important.
2. Data on the industry characteristics have taken on new significance not just for Advocacy and its statutory obligation to publish annually the State of Small Business but for
  - \* agencies attempting to identify different segments of an industry for analytical purposes, and, also,
  - \* for trade associations and small businesses as they try to evaluate agency definitions and regulatory alternatives.
3. Some issues cannot be neatly defined; some will have to be decided on a case-by-case basis and others left to the courts.

Size Standards Small business definitions are now reviewable by the courts. This places greater burdens on SBA's Office of Size Standards and the Office of Advocacy to provide guidance to agencies to help them segment the industries they are regulating. Advocacy has worked out a procedure with SBA's Office of Size Standards to ensure consistent guidance to agencies. In addition, we have discussed this issue at length in our briefings, explaining what agencies need to do to comply with the Small Business Act as well as the [Regulatory Flexibility Act](#).

#### Data on Industry Characteristics

If agencies are to assess the impact of their regulations on small business, they need to know the characteristics of the industry they are regulating.

- What is a small business in the context of a particular industry?
- How should it be defined under the regulation?
- How much of the problem addressed by the regulatory proposal is caused by the small businesses in the industry?
- What conduct causes the problem?
- What is the appropriate "regulatory fix" and what will it cost?
- Will the proposal hurt small businesses; if so, is this the pre-ordained result or are there alternatives that achieve the same objectives?
- If small business were exempt from the rule, would the objective still be accomplished?

Answers to all these questions require economic data, much of which can be provided by the Office of Advocacy. Each year, the Office purchases from the Bureau of the Census tabulations on small business by firm size. This data covers 1500 industries and is broken down by establishments, employment, revenues, payroll, etc. It is also broken down by state and forms the basis of our state profile publications furnished to Members of Congress. Advocacy is the sole custodian of

this Census information and the data is the foundation for all our economic reports. The data also supports our comments on rules. We rely on additional economic research to supply the detailed scientific, technical and economic information necessary to fulfill our responsibilities under RFA, especially in light of the 1996 amendments.

We fully expect agencies to look to the Office of Advocacy for information on small businesses by industry. It is for this reason that we are holding a fourth briefing session for economic and policy analysts from the agencies to discuss the kind of data the Office can provide.

### Unresolved Issues

The major issue that cannot be neatly defined is: what is a significant impact on a substantial number of small businesses? Industry data will be helpful on a case-by-case basis and the answer will turn on several factors: how small business is defined; how many small businesses there are and their market share; cost structure; how many employees; level of product output, etc. and the impact of the rule on such factors, namely how the factors will change and if the rule will erect unreasonable economic barriers. It is a judgment call in the context of a particular rule. We are urging the agencies to err on the side of small business. Ultimately, it will be a question for the courts.

### Small Business Advocacy Review Panels

This brings me to the Small Business Advocacy Review Panels, in which Advocacy plays a major role in the pre-proposal stage of OSHA and EPA regulations.

Small Business Representatives. As you know, Advocacy is to provide OSHA and EPA with information on individual representatives of the small entities to be affected by a rule. We are in the process of developing a data base of active small business trade associations and individuals. We have acquired names/lists from EPA and OSHA. In addition, each of our staff members has developed over time a list of individuals whom they consult on an ongoing basis to assess the impact of regulations on small business. All of these names will be included in the data base.

In addition, we have a nationwide network with which the Office is working on public policy issues. The network was developed after the 1995 White House Conference on Small Business and consists of over 100 individual delegates who are working on specific public policy issues. We also asked all 2000 delegates to indicate the issues on which they would be willing to work or testify. A directory of these individuals and their areas of interest was provided to every member of Congress. We are currently in the process of up-dating and refining the listing.

We are reaching out even further to broaden our contact base by writing to trade associations to get more up-to-date information on their members who can and are willing to be spokespersons for small businesses in their industry. We would welcome any additional names from members of this Committee.

#### Advocacy Review Panels

We have met on several occasions with representatives of OSHA, EPA and OIRA to discuss the panel process and how the agencies will involve small business representatives in the pre- proposal stage of regulatory development. We are in general agreement that the major thrust of this provision in the law is outreach to the small business community and the latter's meaningful involvement in the process. We are all committed to making sure that this happens and that the recommendations and issues are thoughtfully considered by the respective agencies.

#### CONCLUSION

The Office of Advocacy welcomes [SBREFA](#). We foresee good things happening for small business. We expect more early involvement of the Office of Advocacy in rule development; greater demands for economic data; and, hopefully, a greater awareness on the part of government agencies of the primary purpose of the [Regulatory Flexibility Act](#), namely, to regulate without hurting competition.

\* Last Modified: 6/18/01