

Office of Advocacy

TESTIMONY

of

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before the

**SUBCOMMITTEE ON NATIONAL ECONOMIC GROWTH, NATURAL
RESOURCES AND REGULATORY AFFAIRS
COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT**

United States House of Representatives

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**Environmental Protection Agency's
Particulate Matter and Ozone Proposed Rulemakings**

Good morning, Mr. Chairman and members of the committee. My name is Jere W. Glover. I am Chief Counsel for Advocacy with the Small Business Administration (SBA). Before proceeding to my testimony, I wish to note that the views expressed here are my own and do not necessarily reflect the views of SBA or the Administration. With me today is Kevin Bromberg, Assistant Chief Counsel for environmental policy.

Office of Advocacy's Role

The Office of Advocacy was established 20 years ago by Congress to be an independent voice for small business within the policy making bodies of government. The Chief Counsel, by law, must be appointed from the private sector (15 USC § 634a). Having served both in government and the private sector, having helped form several small businesses and having served on the corporate boards of several small businesses, I bring first-hand experience to my current position - namely, how small business views regulations and copes with the regulatory process.

Congress has struggled for years to determine how to address the problem of regulatory burdens on small business; how to make agencies consider the value of small business to the economy; and how to get agencies to solve public policy issues by getting to the root cause of problems without imposing "one size fits all" regulatory solutions, but, instead, customizing solutions that maximize impact and compliance.

In an effort to address this concern, Congress established the Office of Advocacy 20 years ago with the mandate to serve as "a focal point for the receipt of...criticisms and suggestions concerning the policies and activities of...any...Federal agency which affects small business (15 USC § 634c)." Congress recognized that small businesses do not have the resources to represent their interests at the national level. To help equalize the process and to ensure balanced input from all sectors, the Office of Advocacy was established to represent the interests of small business and to collect small business data and information for regulators to consider during the regulatory process.

This was only the first step. In response to recommendations from the 1980 White House Conference on Small Business, Congress enacted the [Regulatory Flexibility Act \(RFA\)](#) (5 USC § 601 *et seq.*). This law was intended to institutionalize an analytical process that considers regulatory alternatives and measures the regulatory impacts on small business. The law also requires agencies to document, in the public record, their regulatory analyses for public comment. The Office of Advocacy was charged with the important task of monitoring agency compliance with the law. Also in that year, the Paperwork Reduction Act (44 USC § 35 *et seq.*) was passed, which forced agencies to focus on the reporting and paperwork burden imposed by regulations. This law was amended and strengthened in 1995 (P.L. 104-13).

[Small Business Regulatory Enforcement Fairness Act](#)

As evidence surfaced that these laws were not having the intended salutary impact, Congress enacted the Small Business Regulatory Enforcement Fairness Act of 1996 (P.L. 104-121), which established new procedures to ensure small business involvement in regulatory development and gave small business a new weapon -judicial review of agency compliance with the Regulatory Flexibility Act. This change was long sought by small businesses and was in direct response to a recommendation of the 1995 White House Conference on Small Business.

Until recently, the Office of Advocacy was like a tree that falls in the forest - the sound unheard and the falling unnoticed. Comments submitted to regulatory agencies by the Office of Advocacy on regulatory proposals often went ignored. Some agencies complied fully with the [Regulatory Flexibility Act](#), while others failed to comply or simply ignored it. The vast majority of agencies inconsistently complied. The compliance problems with the law have been documented in Advocacy's annual reports to Congress on the RFA.

The enactment of the [Small Business Regulatory Enforcement Fairness Act \(SBREFA\)](#) seems to have changed agencies' attitudes. SBREFA made an important amendment to RFA by allowing judicial review of agency compliance with the law, and it reinforced the Office of Advocacy's authority to file *amicus curiae* briefs in court appeals. As a result, agencies are becoming more aware of the Office of Advocacy's role and of the importance of small businesses in regulatory development. We have witnessed new interest in our views and are experiencing increased requests for consultation.

Some of this new visibility is due, in part, to the efforts the Office of Advocacy to ensure agency awareness of SBREFA. We held a series of seminars last year with over 600 Federal officials discussing SBREFA. We have also held special meetings with the Federal Communications Commission, the Department of Labor, the Department of Agriculture and the National Oceanic and Atmospheric Administration, among others. Advocacy also hosted a special briefing for agency economists; [SBREFA](#) has elevated the importance of data to the entire process—data on small business industry structure and data on regulatory impacts.

Furthermore, we have not ignored our constituency in the private sector. We held an initial meeting with the leadership of small business trade associations upon passage of SBREFA, providing them with a guide to the law. Currently, we are holding forums with trade association staff to discuss how their members can use the law to ensure small business participation and representation in the regulatory process.

On an ongoing basis, Advocacy consults with small businesses through roundtable meetings to discuss procurement, environment, telecommunications, taxation, employee and industrial safety, specific regulatory proposals, small business concerns, etc. We also maintain regular communications through conference calls with a network of delegates to the 1995 White House Conference on Small business.

Small Business Advocacy Review Panels

An important focus of today's hearing is on a special provision of SBREFA—Section 244 which requires Small Business Advocacy Review Panels to be convened by the Occupational Safety and Health Administration (OSHA) or the Environmental Protection Agency (EPA). By way of background, before either of these agencies publish the proposed rule that is expected to have a significant economic impact on a substantial number of small entities, they must notify the Chief Counsel for Advocacy of the potential impacts of a proposed rule on small entities. The law spells out a process that these two agencies are to follow in order to consult with and solicit comments from small entities that would be affected by the rule. Part of that process is the convening of a panel consisting of the agency's Chairperson and staff, the Chief Counsel for Advocacy and the Office of Information and Regulatory Affairs of the Office of Management and Budget.

The panel is required to review materials furnished by the agency to small entities, "collect advice and recommendations of each individual small entity representative" and within 60 days develop a report for the public record as to the "...comments of the small entity representatives and its findings." These finding will include information such as the number of entities affected, the reporting requirements of the proposal, and possible overlap or conflict with other regulations. Importantly, the findings also must address regulatory alternatives "...which minimize any significant economic impact of the proposed rule on small entities."

The first panel was convened by OSHA on its proposal to reduce employee exposure to tuberculosis infections. The panel submitted its report on November 12, 1996, and we are awaiting publication of its proposal in the *Federal Register* for public comment. EPA convened its first panel yesterday on a draft proposed rule to reduce air pollution from nonroad diesel engines.

This process is new, and agencies, Advocacy and small businesses are all learning together how to facilitate effectively the input from small entities; what kind of information entities need in order to develop informed comments; how extensive the consultation should be to ensure valuable input in the earliest stages of regulatory development; how the panel should relate to and interact with the small entities, etc. What seems clear, even from this limited experience, is that consultation with small entities at the earliest possible juncture can only enhance the process. It will introduce regulators to some hands-on real life experiences, not merely through comments on paper, but through actual conversations with small business people.

OSHA has started working with the Office of Advocacy to receive early input from small entities for a draft proposed rule for safety and health programs. An official panel will be convened following regional meetings that are to be held throughout the United States to solicit comments.

EPA's NAAQS Rulemaking

The primary issue in today's hearing is whether the EPA was obliged by [SBREFA](#) to convene a Small Business Advocacy Review Panel for the proposed rules for National Ambient Air Quality Standards (NAAQS) for ozone and particulate matter.

Let me start by saying that the Office of Advocacy is fully aware of the difficult task EPA has to implement provisions of the Clean Air Act. Searching for and culling the kind of scientific information needed to develop such standards is not an easy task. It appears that EPA has done extensive outreach and study on the issue. EPA is also under a court imposed deadline to promulgate a standard for particulate matter by July 19, 1997.

Having said that, the Office of Advocacy maintains that EPA should have convened a Small Business Advocacy Review Panel, in compliance with SBREFA for the NAAQS proposals for ozone and particulate matter. In a letter dated November 18, 1996, we formally notified the EPA of our position (letter attached). We advanced this position through staff discussions throughout the summer of 1996. Ultimately, the EPA disagreed with our position.

The EPA has maintained that SBREFA does not apply to these standards since the standards in and of themselves do not require small entities to comply. The EPA contends that because they are not regulating the small businesses directly there is no obligation to consider the potential impacts. The direct regulatory impact of the standards, according to the EPA, only result from the actions set out in the EPA-required state implementation plans. In developing this position, the EPA relied on two court cases that interpreted regulatory agency obligations under the Regulatory Flexibility Act. Those cases held that compliance with the RFA did not require agencies to assess the *indirect* impacts of their regulations on small entities. Advocacy has contended that these cases do not apply to the EPA's situation since the agencies involved in the referenced cases had no regulatory jurisdiction over the entities that would experience *indirect* impacts, unlike EPA's standards, which will have a *direct* impact on small entities.

While maintaining its position, the EPA did agree, however, voluntarily to conduct a SBREFA-like panel process. It has held two meetings with small entities, the results of which, we are advised, EPA will submit for the record. As of this date, we have not received a notice from EPA of plans to convene a panel of the three agencies, in response to our November 18, 1996 letter.

Whether or not EPA is required by SBREFA to convene a Small Business Advocacy Review Panel for this rulemaking is a question about which reasonable people can disagree. Two groups of lawyers have interpreted the court decisions differently. Resolution of the disagreement ultimately is up to the courts to decide. Advocacy has no veto power over agency decisions; we cannot compel an agency to do anything. It can only by persuasion and, yes, by *advocacy* on behalf of small business interests, urge agencies to alter their regulatory proposals and remind agencies of their obligations under the RFA. We believe that the intent of the law was clear (i.e., significant small business impacts must be considered through the panel process). SBREFA has both elevated the importance of this task and complicated it at the same time because of difficulties in getting reliable data on the impact of regulations on small business.

Comments that Advocacy submits on regulations take on an added importance in the public record given judicial review. We take our responsibilities seriously. Advocacy comments on the EPA's obligations under SBREFA are now on the record. All we can do is await court action by small entities, if one is initiated, on the standards. If appropriate, the Office of Advocacy may use its enhanced authority to file *amicus curiae* briefs in a court appeal.

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

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