

Office of Advocacy

**TESTIMONY**

of

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before the

**SUBCOMMITTEE ON ENERGY AND MINERAL RESOURCES COMMITTEE  
ON RESOURCES  
Unites States House of Representatives**

**June 19, 1997**

on

**Compliance with the Regulatory Flexibility Act: Final Rule on Bonding of Hardrock Mining Operations by the Department of Interior Bureau on Land Management**

Good afternoon Madam Chairwoman and members of the Subcommittee. I am Jere W. Glover, Chief Counsel for Advocacy of the U.S. Small Business Administration.(1) I am pleased to appear before you today to discuss [Regulatory Flexibility Act](#) compliance issues as they relate to the final rule on bonding of hardrock mining operations promulgated by the Department of Interior Bureau of Land Management (BLM)(2). I am also here to address whatever questions the Subcommittee may have regarding discussions between the Office of Advocacy and the BLM on the issue of compliance. With me today are Jennifer Smith and Shawne Carter McGibbon, two of the attorneys on my staff who have been advising me on this issue.

The Regulatory Flexibility Act (RFA) establishes that agencies shall endeavor to fit regulatory and informational requirements to the scale of the businesses, organizations and governmental jurisdictions subject to regulation. Under the law, Federal agencies are required to determine whether a regulation has a significant economic impact on a substantial number of small entities. Agencies also are required to consider flexible regulatory alternatives for small entities and assure that such proposals are given serious consideration. The Office of Advocacy reviews approximately 2500 RFA certifications annually. I am happy to provide you a copy of our [1996 annual report on implementation of the RFA](#). [PDF File]

The specific question I have been asked to address today is whether the BLM complied with the RFA as it relates to establishing the definition of a small entity- in this instance, a small miner. In defining "small business," the RFA refers to Section 3 of the Small Business Act which defines the term as an entity independently owned and operated and not dominant in its field. The statutory definition must be interpreted using the Small Business Administration's established industry classifications found in 13 CFR 121, Small Business Size Standards. According to SBA's regulations, a small miner is one with 500 or fewer employees. If an agency wishes to deviate from this standard, the RFA requires that the agency seek the approval of the Administrator of the SBA. Furthermore, if an agency wishes to deviate from the standard for purposes of the RFA analysis, they must consult with the Office of Advocacy before doing so. In both instances the SBA must certainly be contacted prior to publication of a final rule. The only exception to this rule is where size is defined by some other statutory authority.

In this particular case, the BLM promulgated the final rule and contacted the Office of Advocacy after the fact regarding whether or not they had complied with the [RFA](#). Initially, my staff was asked to review the size standard issue out of the context of the entire rule. In so doing, my staff concluded that the requirements of the RFA had not been met with regard to establishing a size standard different from the one outlined in SBA's regulations.

Discussions between my staff and the BLM focused on the size issues raised in your correspondence, Madam Chairwoman, dated March 24, 1997. My staff briefed the BLM staff on the requirements of the RFA. At this point, the BLM indicated for the first time that the size standard was mandated by statute. We advised them that that was an exception to the RFA requirements on size. However, we subsequently learned that the statute to which they were referring was the Omnibus Budget Reconciliation Act of 1993, and not a statute of particular applicability.

In all of this discussion about size a major issue was lost; namely, no matter what size standard is chosen, the impact of the rule is directly related to the amount of acreage and not the size of the firm.

Having said this, the larger problem is the faulty certification. According to the [RFA](#), an agency head must certify that a rule will not have a significant economic impact on a substantial number of small entities. The BLM certified that the final rule would not have a significant economic impact on a substantial number of small entities without proper justification. In fact, we are unable to ascertain whether the impact is significant or not based on the information provided in the final rule. Although the BLM provides information about the cost of the rule and about the steps taken to minimize the impact on small business, the BLM provided no information on industry structure so that impact on different sized firms could be analyzed. For example, the BLM asserts that smaller firms may not

be able to undertake new projects in the future because of the economic impact of this rulemaking, but the agency does not state the likely or actual economic loss that a small firm may experience or the impact that it may have on a firm's earnings or viability.

We encourage the BLM and other agencies to consult with the Office of Advocacy early in the rulemaking process to avoid situations such as this. Based on numerous conversations with the BLM, we believe that the agency has a better understanding of its obligations under the [RFA](#). The BLM staff have demonstrated substantial interest in heading-off compliance problems in the future.

Thank you for the opportunity to appear today. I am happy to answer any questions that you may have about my testimony.

#### EMDNOTES

1. The Office of Advocacy, established by Public Law 94-305, is an independent office charged with representing the views and interests of small businesses before the Federal government and monitoring compliance with the Regulatory Flexibly Act. 5 U.S.C. §§ 601 *et seq.*

2. The notice of proposed rulemaking for this rule was published in the *Federal Register* in 1991, prior to my appointment to Chief Counsel. *See* 56 Fed. Reg. 31,602 (July 11, 1991).

\* Last Modified: 6/18/01