

Summary of SBREFA

The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) was signed by President Clinton on March 29, 1996. The law provides new avenues for small businesses to participate in and have access to the federal regulatory arena. The SBREFA gives small businesses:

- more influence over the development of regulations;
- additional compliance assistance for Federal rules; and
- new mechanisms for addressing enforcement actions by agencies.

DEVELOPMENT OF REGULATIONS

Regulatory Flexibility Act

Small businesses' most significant mechanism for influencing the development of federal regulations is the 1980 Regulatory Flexibility Act (RFA). The Small Business Administration's (SBA) Office of Advocacy provides a guide to the law. This law requires agencies to take steps to collect input from small entities on regulations and to determine whether a rule is expected to have a significant economic impact on a substantial number of small entities. Moreover, federal agencies are required to identify alternative regulatory approaches for small businesses, small governmental jurisdictions and non-profit organizations.

Many agencies have failed to comply with the RFA over the past 16 years, and small businesses found little recourse in the courts due to the absence of any enforcement mechanism. The Small Business Regulatory Enforcement Fairness Act corrects that by permitting judicial review of agencies' compliance with the Regulatory Flexibility Act.

Whenever a small business is adversely affected or aggrieved by an agency rulemaking for failure to comply with the RFA, the small business may seek review of the rule in court. The RFA now also applies to previously exempt interpretative rulemakings promulgated by the Internal Revenue Service that have information collection requirements.

The Office of Advocacy will have greater responsibility and influence under the RFA because the new law gives the Chief Counsel for Advocacy enhanced authority to file amicus briefs in court proceedings involving an agency's violation of the RFA.

The following issues are subject to judicial review under the SBREFA:

- the final regulatory flexibility analysis including the agency's efforts to evaluate alternative regulatory approaches and reasons for rejecting or accepting them;
- the agency's effort to collect comments from small entities through a variety of mechanisms;
- the agency's decision to certify that a rule will not have a significant impact on a substantial number of small entities, and the factual basis for the certification;
- the agency's compliance with a requirement for periodic reviews at the 10-year anniversary of every rule or the enactment of the 1980 law, whichever is first.

The new law also updates the requirements of a final regulatory flexibility analysis -- including a description of the steps an agency has taken to minimize the significant economic impact on small businesses.

EPA and OSHA Regulatory Review Panels

The new law requires an extra step for the Environmental Protection Agency (EPA) and the Occupational Health and Safety Administration (OSHA) in the development of regulations. Specifically, the SBREFA requires that the agencies receive input from affected small business through the SBA's Office of Advocacy before proposed rules are published.

When an EPA or OSHA proposal is expected to have a significant impact on a substantial number of small entities, the agency must convene a panel of employees from the agency, the Office of Advocacy, and the Office of Management and Budget to review a copy of the draft proposed rule and related agency analyses under the Regulatory Flexibility Act.

The panel also will collect advice from small business representatives and submit a report to the agency within 60 days of convening of the panel. The agency will then review the report, make any appropriate revisions to the rule, and publish the proposed rule with the panel report as part of the record.

Congressional Review

The SBREFA provides for congressional review of Federal agencies' regulations. Before any rule goes into effect, agencies are required to forward the rule to Congress for review. Major rules--those with a \$100 million impact on the economy or a major impact on an industry, government or consumers, or those affecting competition, productivity or international trade--cannot go into effect until congressional review is complete. Congressional review is subject to a presidential veto. Congress may take up to 60 session days for review and use a variety of mechanisms to delay implementation.

COMPLIANCE ASSISTANCE

Compliance Guides

The agencies must publish compliance guides for all rules with a significant small business impact. These guides must explain in plain language how the firms can comply with the regulations.

If a small business is cited for a violation of a regulation, the court review may include the content of the small business compliance guide in assessing the reasonableness of the proposed penalty.

Compliance Inquiries

Agencies also are required to establish a system for addressing compliance inquiries from small business. Any guidance provided by an agency will be considered as evidence of the reasonableness of proposed penalties, fines or damages assessed against a small entity.

Small Business Development Centers

To step up compliance assistance, the SBREFA requires the Small Business Development Centers (SBDC) to be used as a point of distribution for compliance assistance. A listing of SBDC are available by calling the SBA at (800) U-ASK-SBA.

ENFORCEMENT ACTIONS

Complaint Process

The new law establishes a complaint process whereby small businesses may register complaints about enforcement actions with the newly-appointed SBA Ombudsman or a Small Business Regulatory Fairness Board.

Ombudsman -- The Small Business and Agriculture Regulatory Enforcement Ombudsman receives comments from small businesses concerning aggressive enforcement-related activities conducted by agency personnel. The Ombudsman reports annually to the Congress on agency enforcement efforts and their impact on small businesses.

Regional Boards -- Regional Small Business Regulatory Fairness Boards were established in each of SBA's ten regions to advise the Ombudsman on matters of concern to small business relating to the enforcement activities of agencies. Board members are small business owners and operators appointed by the SBA Administrator for terms no longer than three years.

Penalty Policy

Under the SBREFA, each agency must establish a policy to provide for the reduction, and under appropriate circumstances, for the waiver of civil penalties for violations of statutory or regulatory requirements by a small business. The language in this section was adopted from a statement and Executive memorandum issued by President Clinton in March 1995.

Equal Access to Justice

The SBREFA expands the ability of small businesses in litigation with the government to recover attorney fees under the 1980 Equal Access to Justice Act. In administrative and judicial proceedings, if the government's demand is unreasonable when compared to the judgment or decision, then the small business is awarded attorney fees and other expenses related to defending against the action. Allowable attorney fees were increased from \$75 under the current law to \$125 per hour.

FOR MORE INFORMATION

The Office of Advocacy of the U.S. Small Business Administration was established by Congress under Public Law No. 94-305 to advocate the views of small business before federal agencies and Congress. Advocacy also is required by the Regulatory Flexibility Act to monitor agency compliance with the RFA.

Advocacy's 1996 communications to federal agencies on their compliance with the Act can be reviewed on the [Legislative Actions](#) page. The public also may attain a copy of A Guide to the Regulatory Flexibility Act from the home page or by writing to Advocacy.

The Office of Advocacy encourages small businesses and their representatives to hold agencies accountable for full compliance with the Regulatory Flexibility Act and to always comment on proposed rules and regulatory economic impact analyses. Advocacy provides briefings and articles to organizations about small businesses' rights under SBREFA and the Regulatory Flexibility Act. For further information, contact:

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Agency Economic Analyses

For regulatory flexibility analyses, Advocacy fully asserts its responsibility to monitor agencies. Thorough assessments by federal agencies are expected. Economic generalizations are not acceptable. Industry-specific analysis is critical.

One common mistake of agencies' economic analyses is the use of general statistics to estimate impact. The aggregate or mathematical average of a regulation on all business is not an effective way to determine the impact of a regulation on small business. The objectives of the RFA will be achieved only if agencies complete thorough detailed analyses that isolate small business sectors. Variables should include different business size and industry classifications. For instance, a rule may have a very small impact on one sector, but a significant impact on another. Advocacy regularly critiques agencies' analyses and look for the proper definition of small business for each industry,

evaluation of economies of scale, and segregated industry analyses. Small businesses' right to question the economic assumptions of federal agency