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Regulatory Flexibility Act

Implementation of the Small Business Advocacy Review Panel Requirements

Statement of L. Nye Stevens
Director, Federal Management and Workforce Issues
General Government Division



Regulatory Flexibility Act: Implementation of the Small Business Advocacy Review Panel Requirements

Mr. Chairman, Madam Chairwoman, and Members of the Subcommittees:

I am pleased to be here to discuss our report that is being issued today, which examines the Small Business Regulatory Enforcement Fairness Act's (SBREFA) advocacy review panel provisions.¹ These provisions took effect on June 28, 1996, and require the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA) to convene advocacy review panels for draft rules that may have a significant economic impact on a substantial number of small entities. The review panels are to collect advice and recommendations from representatives of affected small entities about the potential impact of draft rules before they are published as notices of proposed rulemaking in the Federal Register. SBREFA requires that several specific procedural steps be followed in convening the panels, and that the panels consist of employees from the regulatory agency responsible for the draft rule—EPA or OSHA—the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA), and the Small Business Administration's (SBA) Chief Counsel for Advocacy.

Our review focused on how the advocacy review panel process has worked in the early period of its implementation. Our specific objectives were to (1) determine whether EPA and OSHA had applied the advocacy review panel requirements to all applicable rules that they proposed in the first year of the panel requirements; (2) determine whether the EPA and OSHA panels, the regulatory agencies themselves, and SBA's Chief Counsel for Advocacy followed the statute's procedural requirements; (3) identify any changes that EPA and OSHA made to the draft rules as a result of the panels' recommendations; and (4) identify any suggestions that agency officials and small entity representatives had regarding how the advocacy review panel process could be improved.

As of November 1, 1997, EPA and OSHA had convened five review panels. EPA and SBA's Chief Counsel for Advocacy disagree regarding the applicability of the panel requirements to two other rules that EPA proposed in December 1996—the national ambient air quality standards for ozone and for particulate matter. Specifically, EPA and the Chief Counsel disagree regarding whether the effects of states' implementation of these health standards can be separated from the standards themselves in determining whether EPA's rules may have a significant economic impact on a substantial number of small entities. In our report being

¹Regulatory Reform: Implementation of the Small Business Advocacy Review Panel Requirements (GAO/GGD-98-36, Mar. 18, 1998).

issued today, we suggest that Congress resolve this issue by taking steps to clarify the meaning of the term “significant impact.”

The agencies and the panels generally met SBREFA’s procedural requirements, but there were several differences in how the panels operated. The panels’ recommendations regarding the two proposed rules that had been published as of November 1, 1997, focused on various issues, such as providing small entities with greater compliance flexibility and considering the effects of potentially overlapping regulations. The agencies generally responded to those recommendations in the supplementary information sections of the proposed rules. Finally, the small entity representatives with whom we spoke and, to a lesser extent, the agency officials we interviewed offered several suggestions to improve the advocacy review panel process.

EPA and SBA’s Chief Counsel for Advocacy Disagree Regarding Whether EPA Should Have Convened Additional Advocacy Review Panels

During the first year of the advocacy review panel requirements’ implementation, OSHA convened a panel for one draft rule and published two other proposed rules for which panels were not held. SBA’s Chief Counsel for Advocacy agreed with OSHA’s certification that neither of these two proposed rules required an advocacy review panel.

As of November 1, 1997, EPA had convened advocacy review panels for four draft rules. EPA also published 17 other proposed rules that were reviewed by OIRA for which panels were not held because EPA certified that the proposed rules would not have a significant economic impact on a substantial number of small entities. SBA’s Chief Counsel said that EPA should have convened panels for 2 of these 17 proposed rules—the rules setting national ambient air quality standards for ozone and for particulate matter. Some of the small entity representatives that we interviewed also said that EPA should have convened advocacy review panels for these two proposed rules.

EPA officials said that review panels were not required for the ozone and particulate matter rules because they would not, by themselves, have a significant economic impact on a substantial number of small entities. The officials said that any effects that the rules would have on small entities would only occur when the states determine how the standards will be specifically implemented. However, SBA’s Chief Counsel for Advocacy disagreed with EPA’s assessment. He said that the promulgation of these two rules cannot be separated from their implementation, and that effects on small entities will flow “inexorably” from the standards EPA established.

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We could not determine whether EPA should have convened advocacy review panels for the ozone and particulate matter rules because there are no clear governmentwide criteria for determining whether a rule has a “significant economic impact on a substantial number of small entities.” Specifically, it is unclear whether health standards that an agency establishes by regulation should be considered separable from implementation requirements established by state governments or other entities. The Regulatory Flexibility Act (RFA), which SBREFA amended, does not define the term “significant economic impact on a substantial number of small entities.” Although the RFA requires the SBA Chief Counsel for Advocacy to monitor agencies’ compliance with the act, it does not expressly authorize SBA or any other entity to interpret key provisions. In a previous report we noted that agencies had different interpretations regarding how the RFA’s provisions should be interpreted.² In another report, we said that if Congress wishes to strengthen the implementation of the RFA it should consider amending the act to provide clear authority and responsibility to interpret key provisions and issue guidance.³

In our report that is being issued today, we again conclude that governmentwide criteria are needed regarding what constitutes a “significant economic impact on a substantial number of small entities.” Therefore, we said that if Congress wishes to clarify and strengthen the implementation of the RFA and SBREFA, it should consider providing SBA or another entity with clear authority to interpret the RFA’s key provisions. We also said that Congress could consider establishing, or requiring SBA or some other entity to develop, governmentwide criteria defining the phrase “significant economic impact on a substantial number of small entities.” Specifically, those criteria should state whether the establishment of regulatory standards by a federal agency should be separated from implementation requirements imposed by other entities. Governmentwide criteria can help ensure consistency in how the RFA and SBREFA are implemented across federal agencies. However, those criteria must be flexible enough to allow for some agency-by-agency variations in the kinds of impacts that should be considered “significant” and what constitutes a “substantial” number of small entities.

²Regulatory Flexibility Act: Inherent Weaknesses May Limit Its Usefulness for Small Governments (GAO/HRD-91-61, Jan. 11, 1991).

³Regulatory Flexibility Act: Status of Agencies’ Compliance (GAO/GGD-94-105, Apr. 27, 1994).

Panels, Regulatory Agencies, and SBA's Chief Counsel for Advocacy Generally Followed Statutory Requirements, but Panel Procedures Differed

As of November 1, 1997, EPA and OSHA had convened five advocacy review panels. OSHA convened the first panel on September 10, 1996, to review its draft standard for occupational exposure to tuberculosis (TB). EPA convened panels to review the following four draft rules: (1) control of emissions of air pollution from nonroad diesel engines (Mar. 25, 1997); (2) effluent limitations guidelines and pretreatment standards for the industrial laundries point source category (June 6, 1997); (3) stormwater phase II—national pollutant discharge elimination system (June 19, 1997); and (4) effluent limitations guidelines and standards for the transportation equipment-cleaning industry (July 16, 1997).

The panels, EPA and OSHA, and SBA's Chief Counsel for Advocacy generally followed SBREFA's procedural requirements on how those panels should be convened and conducted. For example, as required by the statute:

- EPA and OSHA notified the SBA Chief Counsel before each of the panels and provided him with information on the potential impacts of the draft rules and the types of small entities that might be affected.
- The Chief Counsel responded to EPA and OSHA no later than 15 days after receipt of these materials and helped identify individuals representative of the affected small entities.
- Each of the five panels reviewed materials that the regulatory agencies had prepared and collected advice and recommendations from the small entity representatives.

However, there were a few minor inconsistencies with SBREFA's specific statutory requirements in the five panels we reviewed. For example, three of the panels took a few days longer than the 60 days allowed by the statute to conclude their deliberations and issue a report. Also, EPA did not formally designate a chair for its panels until June 11, 1996—about 6 weeks later than the statute required.

Although generally consistent with SBREFA's requirements, the panels differed in some respects, including the degree of prepanel contact that the agencies had with the small entity representatives and the amount and types of information about the rules that were provided to the small entity representatives for review. At least some of the differences between the panels appeared to occur because the panel process was new and evolving, and the agencies and the panels made adjustments to their procedures as they gained experience. For example, EPA convened its first panel by sending a draft report summarizing the agency's prepanel outreach to the panel members. However, EPA's panel chair said that some

Members of Congress and congressional staff viewed this as an attempt to prejudice the panel members' consideration, and the practice was changed. For subsequent panels, EPA developed a summary of the comments it had received from small entities before the panels were convened, which it provided to the panel members. The panel members themselves then gathered advice and recommendations from the small entity representatives and drafted the final reports.

Agencies Responded to Panel Recommendations in Proposed Rules

As of November 1, 1997, two of the draft rules for which EPA and OSHA held advocacy review panels had been published as notices of proposed rulemaking in the Federal Register—OSHA's proposed rule on the occupational exposure to TB and EPA's proposed rule to control nonroad diesel engine emissions. The panels' recommendations for these draft rules focused on providing small entities with flexibility in how to comply with the rules and on the need to consider potentially overlapping local, state, and federal regulations and enforcement. OSHA and EPA primarily responded to the panels' recommendations in the supplementary information sections of the proposed rules, although OSHA also made some changes to the text of its rule.

For example, one of the TB panel's major recommendations was that OSHA reexamine the application of the draft rule to homeless shelters. In the supplementary information section of the proposed rule, OSHA said that it was conducting a special study of this issue and would hold hearings on issue\ related to TB exposure in homeless shelters. The TB panel also recommended that OSHA examine the potential cost savings associated with allowing TB training that a worker received in one place of employment to be used to satisfy training requirements in another place of employment. In response, OSHA changed the text of the draft rule to allow the portability of nonsite specific training.

Although EPA and OSHA appeared to have been responsive to the panels' recommendations in the proposed rules, it is too early to tell whether the final rules will reflect the panels' recommendations. The 32 small entity representatives we interviewed were evenly split on whether they thought that changes would be made to the rules as a result of their comments. About one-third of the representatives believed that the agencies would make changes, and another one-third were unsure whether changes would be made. A final one-third of the small entity representatives said that they did not believe that the agencies would change the rules as a result of their comments. Some of these representatives said that the regulatory agency

officials had already decided how the rules would be written before convening the panels, and that the officials were not interested in making any significant changes to the rules.

Small Entity Representatives and Agency Officials Offered Suggestions to Improve the Panel Process

Although most of the 32 small entity representatives with whom we spoke said that they thought the review panel process was worthwhile, about three-fourths of them suggested changes to improve that process. Their comments primarily focused on the following four issues: (1) the time frames in which the panels were conducted, (2) the composition of the groups of small entity representatives commenting to the panels, (3) the methods the panels used to gather comments, and (4) the materials about the draft rules that the regulatory agencies provided.

Seven of the small entity representatives said they would have liked more advance notice of panel meetings and telephone conference calls with the panels. Some of these representatives said that short notices had prevented them from participating in certain panel efforts. Fourteen representatives said they were not given enough time to study the materials provided before being asked to comment on the draft rules. Five representatives suggested holding the panels earlier in the rulemaking process to increase the likelihood that the panels could affect the draft rules.

Fourteen small entity representatives thought that the composition of those providing input to the panels could be improved. Specifically, they said that the panels should have obtained input from more representatives of (1) individual small entities, not just representatives from associations; (2) certain types of affected small entities that were not included (e.g., from certain geographic areas); (3) small entities that would bear the burden of implementing the draft rules (e.g., small municipalities); and (4) small entities that were reviewing the draft rule for the first time, and that had not been previously involved in developing the draft rules.

Nine of the small entity representatives said that the conference calls that OSHA and EPA typically used to obtain their views limited the amount of discussion that could take place. Most of these representatives expressed a preference for face-to-face meetings because they believed the discussions would be fuller and provide greater value to the panels.

Although most of the small entity representatives said that the materials the regulatory agencies provided to them permitted an intelligent and

informed discussion of the rules' potential impacts on small entities, eight representatives said they believed the materials could have been improved. Six thought the materials were too vague or did not provide enough information. However, two representatives said that the materials were too voluminous and complex to expeditiously review.

The agency officials we interviewed also offered suggestions for improving the panels. Because you will be hearing from those same officials later in this hearing, I will not go into detail about those suggestions. However, their comments centered on some of the same issues raised by the small entity representatives, including the timing of the panels, the materials provided to the representatives, and the manner by which comments are obtained.

Conclusions

Many of the agency officials and small entity representatives that we interviewed said they believed the panel process has provided an opportunity to identify significant impacts on small entities and has given the agencies a better appreciation of the small entities' concerns. However, implementation of the panel process has not been without controversy or concern.

Our greatest concern about the panel process is the lack of clarity regarding whether EPA should have convened advocacy review panels for its national ambient air quality standards for ozone and for particulate matter. That concern is directly traceable to the lack of agreed-upon governmentwide criteria as to when a rule has a "significant economic impact on a substantial number of small entities" under the RFA. If governmentwide criteria had been established regarding when initial regulatory flexibility analyses should be prepared (and, therefore, when SBREFA advocacy review panels should be convened), the dispute regarding whether EPA should have convened additional panels would likely not have arisen. In particular, governmentwide criteria should address whether the establishment of regulatory standards by a federal agency should be separated from the subsequent implementation requirements imposed by states or other entities.

Some of the concerns that small entity representatives expressed about the panel process may be difficult to resolve. When panels are held earlier in the process, it is less likely that the materials will be fully developed to provide detailed data and analyses to the small entity representatives.

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However, delaying the panels until such data are available could limit the opportunity for small entities to influence key decisions.

How agencies implement the advocacy review panel process will have a pronounced effect on its continued viability. If small entity representatives are given the opportunity to discuss the issues they believe are important and see that their input is taken seriously, it is likely that they will continue to view the panel process as a useful opportunity to provide their comments on draft rules relatively early in the rulemaking process.

Mr. Chairman and Madam Chairwoman, this completes my prepared statement. I would be pleased to answer any questions.

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