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REGULATORY REFORM

Implementation of the Small Business Advocacy Review Panel Requirements





**United States
General Accounting Office
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General Government Division

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The Honorable Christopher Bond
Chairman, Committee on Small Business
United States Senate

The Honorable Roscoe G. Bartlett
Chairman, Subcommittee on Government
Programs and Oversight
Committee on Small Business
House of Representatives

The Honorable Sue W. Kelly
Chairman, Subcommittee on Regulatory
Reform and Paperwork Reduction
Committee on Small Business
House of Representatives

The Honorable Pete V. Domenici
United States Senate

Small businesses are a significant part of the nation's economy, accounting for about 50 percent of the gross domestic product and 53 percent of private industry's workforce. Small governments make up 97 percent of all of the local governments in the United States. However, small businesses and governments can be disproportionately affected by federal agencies' regulatory requirements, and agencies may inadequately consider the impact of those requirements on small entities when the requirements are implemented.¹

In response to concerns about the effect that federal regulations may have on small entities, Congress passed the Regulatory Flexibility Act (RFA) of 1980 (5 U.S.C. 601-612). The RFA requires federal agencies to analyze the anticipated effects of rules they plan to propose on small entities unless they certify that the rules will not have a "significant economic impact on a

¹Thomas D. Hopkins, A Survey of Regulatory Burdens, June 1995 report to the Small Business Administration, and Senate Report on the Unfunded Mandate Reform Act of 1995, Report 104-1, January 11, 1995, Committee on Governmental Affairs.

substantial number of small entities.”² The Small Business Administration’s (SBA) Office of Advocacy is responsible for monitoring federal agencies’ compliance with the RFA and for reviewing federal rules for their impact on small businesses.

On March 29, 1996, Congress passed the Small Business Regulatory Enforcement Fairness Act (SBREFA) to strengthen the RFA’s protections for small entities. Among other things, SBREFA requires that, before publishing a notice of proposed rulemaking that may have a significant economic impact on a substantial number of small entities, the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA) is to convene a small business advocacy review panel for the draft rule³ (5 U.S.C. 609). During the advocacy review panel process, the panel must collect the advice and recommendations of representatives of affected small entities about the potential impact of the draft rule. SBREFA requires that the panel is to 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 SBA’s Chief Counsel for Advocacy. The statute also requires the regulatory agencies, the Chief Counsel, and the panels themselves to undertake certain actions within specified timeframes. SBREFA’s advocacy review panel requirements took effect on June 28, 1996.

This report responds to your request that we examine EPA’s and OSHA’s implementation of SBREFA’s advocacy review panel requirements. As agreed with your offices, our specific objectives were to (1) determine whether EPA and OSHA had applied the advocacy review panel requirements to all rules that they proposed between June 28, 1996, and June 28, 1997, that may have a significant economic impact on a substantial number of small entities; (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 for panels convened

²The RFA defines “small entities” as small businesses, small organizations, and small governmental jurisdictions. The RFA incorporates the generally accepted meanings of a small business as established by the SBA through size standards that define whether a business entity is small. The RFA defines a small organization as any not-for-profit enterprise that is independently owned and operated and is not dominant in its field. The RFA defines a small governmental jurisdiction as governments of cities, counties, towns, townships, villages, school districts, or special districts with a population of fewer than 50,000 citizens. These definitions hold unless an agency establishes, after an opportunity for public comments, an alternative definition(s) that is appropriate to the activities of the agency and publishes the definition in the *Federal Register*. This requirement only applies to rules for which the agency must publish a general notice of proposed rulemaking.

³In this report, we use “draft rule” to indicate a rule that is being developed by an agency but has not yet been published in the *Federal Register* under a notice of proposed rulemaking.

between June 28, 1996, and November 1, 1997, and whether there were differences among the panels in how the statute's requirements were implemented; (3) identify the changes, if any, that EPA and OSHA made to notices of proposed rulemaking as a result of the panels' recommendations; and (4) identify any suggestions that agency officials and small entity representatives may have regarding how the advocacy review panel process could be improved. Because of the volume of rules that EPA proposed between June 28, 1996, and June 28, 1997, we limited our review of EPA rules in our first objective to those that were subject to review by OIRA pursuant to Executive Order 12866.⁴

Results in Brief

During the first year of the SBREFA 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 published 17 other proposed rules during the first year of the panel requirements that were reviewed by OIRA and 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. The Chief Counsel said that EPA should have convened panels for 2 of these 17 proposed rules—the national ambient air quality standards for ozone and for particulate matter. Some of the small entity representatives that we contacted also said that EPA should have convened advocacy review panels for these two proposed rules. EPA said that there is nothing it could do in setting the ambient air quality standards to tailor state implementation measures as they apply to small entities because any effect on small entities would occur only when the states specifically determine how to implement these rules. It is unclear whether EPA should have convened panels for these two rules because there are no governmentwide criteria for determining whether a draft rule will have a significant economic impact on a substantial number of small entities. In particular, it is unclear whether federal agencies can separate the establishment of a rule from the

⁴Executive Order 12866 permits OIRA to review certain agencies' regulatory actions that are likely to result in rules that may (1) have an annual effect on the nation's economy of \$100 million or more or adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the president's priorities, or the principles set forth in the executive order.

subsequent implementation of that rule by state governments or other entities.

The EPA and OSHA panels, the regulatory agencies themselves, and the SBA Chief Counsel for Advocacy generally followed SBREFA's advocacy review panel procedural requirements in the five panels that had been convened as of November 1, 1997. However, the panels did not meet some of the specific deadlines that SBREFA established. For example, three of the five panels took a few days longer than the SBREFA-mandated 60-day period to issue their reports (i.e., the period beginning on the date the panel is convened until the panel's final report is issued). The EPA panels' decisions to make the panel reports publicly available only when the proposed rules were published, although consistent with the intent of SBREFA, was of concern to some small entity representatives.

There were some differences in how the five panels were conducted, including the amount of contact that agency officials had with the small entity representatives before the panels were convened, how the regulatory agencies and SBA's Chief Counsel for Advocacy identified potential small entity representatives, the availability of the materials that EPA and OSHA provided for the panels and the small entity representatives to review, and how the panels obtained comments from the small entity representatives. Some of these differences appeared to occur because the panel process is new and evolving; however, the panels have made adjustments to their procedures as they have gained experience.

The five panels' recommendations to the regulatory agency heads focused on the agencies' consideration of additional regulatory alternatives and clarification of what the draft rules would require. As of November 1, 1997, EPA and OSHA each had published one notice of proposed rulemaking for which they had convened advocacy review panels. The agencies primarily responded to the panels' recommendations in the preambles of those notices, soliciting public comments on issues that the panels had recommended. OSHA also made some changes to the text of its draft rule. However, because the rulemaking process has not been completed, it is unclear whether the panels' recommendations will result in any changes to the final rules.

Many of the small entity representatives that we interviewed suggested ways to improve the panel process. These suggestions primarily focused on the following four issues: (1) adjusting the time frames in which the panels are conducted, (2) ensuring that there is an adequate mix of

representatives from the small entities that could be affected by the rule, (3) enhancing the methods that the panels used to gather comments, and (4) improving the background materials provided by the regulatory agencies. Agency officials also offered suggestions and observations regarding the panel process.

Background

The Administrative Procedure Act (5 U.S.C. 553) generally requires federal agencies to publish notices of proposed rulemaking in the Federal Register and to permit interested individuals to participate in the rulemaking process by submitting written data, views, or arguments. Notices of proposed rulemaking may include a preamble that contains supplementary information providing a context for the proposed rule and the text of the proposed rule representing the agency's preferred regulatory option. Agencies are to consider the comments received during the public comment period and then publish the final rule in the Federal Register. Agencies may incorporate suggested changes in the text of the final rule or provide other insights into their consideration of public comments in the rule's preamble. After publication in the Federal Register as a final rule, the text of the rule is then to be codified in the Code of Federal Regulations.

The RFA requires agencies to prepare an initial regulatory flexibility analysis for each draft rule, unless the head of the agency certifies in the Federal Register that "the rule will not have a significant economic impact on a substantial number of small entities." If a draft rule is expected to have a significant economic impact on a substantial number of small entities, agencies must publish their initial regulatory flexibility analysis, or a summary of it, in the Federal Register when they publish the proposed rule. Section 603 of the RFA requires that the initial regulatory flexibility analysis describes the expected impact of the rule on small entities and describes (1) why the agency is considering the regulatory action; (2) the objectives and legal basis for the rule; (3) the type and, where feasible, an estimate of the number of small entities to which the rule will apply; (4) the projected reporting, recordkeeping, and other compliance requirements of the rule; (5) all federal rules, to the extent practicable, that may duplicate, overlap, or conflict with the proposed rulemaking; and (6) significant alternatives to the rule that would minimize the impact on small entities while accomplishing the purpose of the statute. Section 604 of the RFA requires agencies to conduct a similar final regulatory flexibility analysis when they promulgate the final rule and publish the final analysis, or a summary thereof, with the final rule. However, agencies do not have

to conduct either the initial analysis or the final analysis if they certify that the rule will not have a significant economic impact on a substantial number of small entities and they explain the reasons for the certification.

Before publication of an initial regulatory flexibility analysis, section 609 of the RFA, as amended by SBREFA, requires the appropriate regulatory agency (EPA or OSHA) to notify the SBA Chief Counsel for Advocacy and to provide information on the draft rule's potential impacts on small entities and the type of small entities that might be affected. Section 609 also requires the Chief Counsel, within 15 days of this notification, to identify representatives of affected small entities for the purpose of obtaining advice and recommendations from those individuals about the potential impacts of the draft rule. The Chief Counsel may waive the requirements to convene a panel under certain circumstances if he or she, in consultation with representatives of affected small entities and the Administrator of OIRA, finds that the panel requirements would not advance the effective participation of small entities in the rulemaking process.

SBREFA also requires each panel to consist of full-time federal employees from the office within the agency responsible for carrying out the draft rule and from OIRA and SBA's Chief Counsel for Advocacy. SBREFA requires the panel to report on the comments received from small entities and on the panel's recommendations no later than 60 days after the panel is convened, and states that the panel's report shall be made public as part of the rulemaking record. Finally, SBREFA requires the heads of EPA and OSHA to each designate a small business advocacy chair to act as a permanent chair of each agency's panels no later than April 29, 1996.

Scope and Methodology

To determine whether OSHA and EPA convened all required advocacy review panels for rules that they proposed in the first year after the panel requirements took effect, we first did an electronic search of the Federal Register to identify all OSHA- and EPA-proposed rules published between June 28, 1996, and June 28, 1997. That search indicated that OSHA had published 2 proposed rules during the period, and that EPA had published more than 350 proposed rules. Because of the large number of EPA-proposed rules, we decided to limit our review of EPA rules to the 17 that were subject to review by OIRA.

We asked SBA's Chief Counsel for Advocacy whether he agreed with OSHA's and EPA's certifications that these 19 proposed rules would not have a

significant economic impact on a substantial number of small entities. We interviewed officials from SBA's Office of Advocacy, EPA, OSHA, and OIRA and reviewed the RFA, as amended by SBREFA, to identify any criteria that could be used to determine what constitutes a "significant economic impact on a substantial number of small entities." We also examined the legislative history of the RFA and SBREFA to determine if there were any discussions relevant to defining this term or providing criteria for its implementation.

To determine whether the EPA and OSHA panels, the regulatory agencies themselves, and SBA's Chief Counsel for Advocacy followed the advocacy review panel procedural requirements and whether there were differences in how the panels were conducted, we interviewed (1) selected officials from EPA, OSHA, SBA's Office of Advocacy, and OIRA who participated in the panels that had been convened as of November 1, 1997, and (2) 32 of the 63 small entity representatives who were identified by the agencies and were asked to provide advice and recommendations to the panels.⁵ We selected the agency officials by contacting at least one official from each agency for each panel. We selected the small entity representatives by contacting every other small entity representative that EPA and OSHA listed for each panel.

We also interviewed representatives of five associations who had been identified as possible small entity representatives so that we could determine why they decided not to participate in the panels. In addition, we interviewed 13 of the small entity representatives who provided advice and recommendations to an unofficial panel that EPA convened for a draft implementation strategy that related to EPA's rules establishing national ambient air quality standards for ozone and particulate matter.

Finally, we reviewed documents pertaining to the panels, including the panel requirements in SBREFA; materials that EPA and OSHA provided to the small entity representatives; and the final reports prepared by each panel.

To identify any changes that EPA and OSHA made to their draft rules as a result of the panels, we compared the recommendations in the panels' final reports with the related notices of proposed rulemaking as published in the Federal Register. As of November 1, 1997, only two of the five draft rules for which panels had been conducted had been published as

⁵After the period of our review, EPA convened another panel on centralized waste treatment effluent guidelines.

proposed rules.⁶ To obtain suggestions about how the advocacy review panel process could be improved, we asked officials from EPA, OSHA, OIRA, and SBA's Office of Advocacy and the 32 small entity representatives we interviewed to identify possible improvements in that process.

Because EPA and OSHA had convened only five advocacy review panels at the time of our review (four at EPA and one at OSHA), our review results should be viewed as preliminary information on the operation of the panel provisions. Our first objective was to determine whether any EPA- or OSHA-proposed rules should have triggered the advocacy review panel requirements but did not. As previously mentioned, we limited our review of EPA rules to those that were subject to review by OIRA pursuant to Executive Order 12866. However, there may have been other EPA rules that had a significant economic impact on a substantial number of small entities but were not subject to OIRA review. Because EPA panel reports for three of its panels were not publicly available as of November 1, 1997, we did not include them in our report. As of November 1, 1997, OSHA had published a notice for proposed rulemaking for the panel it had held. However, EPA had not published notices of proposed rulemaking for three of the four panels it had held by that date. Therefore, we only could identify changes related to one OSHA and one EPA rule.

We did our work between August 1997 and January 1998 in Washington, D.C., in accordance with generally accepted government auditing standards. We requested comments on a draft of this report from the Director of OMB, the Secretary of Labor, and the Administrators of EPA and SBA or their designees. Their comments are discussed near the end of this letter.

Whether EPA Should Have Convened Additional Advocacy Review Panels Is Unclear

We reviewed a total of 19 notices of proposed rulemaking that EPA and OSHA published (17 and 2 notices, respectively) during the first year's implementation of SBREFA's advocacy review panel requirements. (See app. I for a list of these 19 proposed rules.) The agencies did not convene panels for any of these proposed rules because they certified that the rules would not have a significant economic impact on a substantial number of small entities. SBA's Chief Counsel for Advocacy agreed with OSHA's certifications that neither of its two proposed rules required an advocacy review panel. However, the Chief Counsel said that EPA should have convened advocacy review panels for 2 of its 17 proposed rules—the

⁶After November 1, 1997, EPA published two additional notices of proposed rulemaking for which it had convened advocacy review panels—industrial laundries (Dec. 17, 1997) and stormwater phase II (Jan. 9, 1998).

national ambient air quality standards for ozone and for particulate matter.⁷

EPA's certification of these two rules was based on EPA's interpretation of the term "impact" under the RFA. EPA concluded that the term refers to the impact of a proposed rule on small entities subject to the rule's requirements because the purpose of a regulatory flexibility analysis is to consider ways of easing a rule's requirements as they will apply to small entities. According to EPA, that purpose could not be served in the case of rules such as these national ambient air quality standards, which do not themselves impose requirements that apply to small entities. Because, according to EPA, the only choice it has in promulgating the national ambient air quality standards is the level of the standard and not its implementation, EPA stated that there is nothing it can do in setting these standards to tailor state implementation measures as they apply to small entities. EPA said that any effect on small entities would occur only when states specifically determine how they will implement these rules.

In a November 18, 1996, letter to the EPA Administrator, SBA's Chief Counsel for Advocacy said that EPA should have convened advocacy review panels for the ozone and particulate matter rules. He said that the promulgation of these proposed rules cannot be separated from their implementation, and that certain effects on small entities flow "inexorably" from the standards that these proposed rules would establish. Also, 6 of the 13 small entity representatives we interviewed who provided comments to an unofficial advocacy review panel on a draft implementation strategy related to these 2 rules said that they thought EPA should have convened panels for these standards. One of these representatives said that by not convening advocacy review panels for these rules, he believed that EPA had circumvented the intent of SBREFA.⁸

We could not determine whether EPA should have convened advocacy review panels for the ozone and particulate matter proposed 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." The RFA does not define "significant economic impact" or "substantial number of small entities," and neither SBA nor any other

⁷The rules establishing the national ambient air quality standards for ozone and for particulate matter were proposed on December 13, 1996 (61 Fed. Reg. 65716 and 65638), and finalized on July 18, 1997 (62 Fed. Reg. 38856 and 38652).

⁸The issue of whether EPA properly promulgated the ozone and particulate matter rules has been questioned by Congress and is currently under litigation in the United States Court of Appeals for the District of Columbia Circuit. See *American Trucking Associations, Inc., et. al., v. United States Environmental Protection Agency* (97-1441, July 18, 1997).

agency has issued governmentwide guidance regarding the meaning of these terms. In particular, there is no governmentwide guidance or criteria about whether health standards that an agency establishes by regulation should be considered separable from implementation requirements established by state governments or other entities.⁹ Therefore, it is unclear whether EPA's ozone and particulate matter rules should have triggered the requirements for an initial regulatory flexibility analysis and, therefore, the advocacy review panel requirements.

Officials from SBA's Office of Advocacy said that they are frequently asked to define the phrase "significant economic impact on a substantial number of small entities." However, the officials said that the Office of Advocacy has not taken a definitive position on the meaning of this phrase, and no case law has clearly established its meaning. Although no governmentwide criteria exist, both EPA and OSHA have issued guidance to help their staffs determine when a draft rule may have a significant economic impact on a substantial number of small entities and guidance on conducting the SBREFA advocacy review panel process. Nevertheless, agencies ultimately determine the meaning of the phrase on a case-by-case basis, and their decisions are subject to comment by the public and SBA's Office of Advocacy, as well as judicial review.

In our 1991 report on the RFA and small governments, we found that each of the four federal agencies we reviewed had a different interpretation of key RFA provisions.¹⁰ In our 1994 report on the RFA, we noted that, although the act required SBA's Chief Counsel for Advocacy to monitor agencies' compliance with the act, the RFA did not expressly authorize SBA to interpret key provisions in the statute and did not require SBA to develop criteria for agencies to follow in reviewing their rules.¹¹ We concluded that this lack of authority and responsibility for interpretation and guidance contributed to what the Chief Counsel considered to be some agencies' noncompliance with the RFA. We said that if Congress wanted to

⁹There are other instances, beyond the scope of this review, where the question of whether a standard can be separated from its subsequent implementation by states or other entities is at issue. For example, three business groups filed suit on January 5, 1998, citing violations of SBREFA (*West Virginia Chamber of Commerce v. Browner*, No. 98-1013, 4th Cir.) because EPA did not assess the impact of the proposal on small entities before it proposed requiring certain states to submit state implementation plans on measures to reduce the regional transport of ozone. In its notice of proposed rulemaking, EPA proposed the levels of nitrogen oxide emissions that each of the affected states would be required to achieve.

¹⁰Regulatory Flexibility Act: Inherent Weaknesses May Limit Its Usefulness for Small Governments ([GAO/HRD-91-61](#), Jan. 11, 1991). The four agencies included in this review were EPA, the Departments of Labor and Transportation, and the Federal Communications Commission.

¹¹Regulatory Flexibility Act: Status of Agencies' Compliance ([GAO/GGD-94-105](#), Apr. 27, 1994).

strengthen the implementation of the RFA, it should consider amending the act to (1) provide SBA with clearer authority and responsibility to interpret the RFA's provisions and (2) require SBA, in consultation with OMB, to develop criteria as to whether and how federal agencies should conduct RFA analyses. Although Congress amended the RFA when it enacted SBREFA, it did not adopt these recommendations.

The Panels, Agencies, and Chief Counsel Generally Followed SBREFA's Procedural Requirements

By November 1, 1997, OSHA and EPA 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. However, OSHA had not convened any additional panels as of November 1, 1997. EPA convened panels between June 1996 and November 1, 1997, 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);¹² and (4) effluent limitations guidelines and standards for the transportation equipment-cleaning industry (July 16, 1997). Appendixes II through VI provide descriptions of the five draft rules that the panels reviewed as well as detailed information about the time frames for the panels and the number and types of small entity representatives who provided advice to the panels.

The EPA and OSHA panels, the regulatory agencies themselves, and the SBA Chief Counsel for Advocacy generally followed SBREFA's procedural requirements in these five panels, as shown in the examples below.

- EPA and OSHA notified the Chief Counsel before each of the five panels to inform him that they planned to convene a panel to review the draft rules. As part of that notification, they provided the Chief Counsel with required information on the draft rules' potential impacts and the types of entities that might be affected.
- The Chief Counsel responded to EPA and OSHA no later than 15 days after the date of receipt of these materials and helped identify individuals representative of affected small entities for the purpose of obtaining advice and recommendations about the potential impacts of the draft rules. For each of EPA's four panels, the Chief Counsel reviewed a list of potential candidates that EPA provided and in some cases supplemented

¹²On January 9, 1998, EPA published a notice of proposed rulemaking in which the Administrator certified that the stormwater phase II proposed rule would not have a significant economic impact on a substantial number of small entities.

the list. The Chief Counsel initially identified most of the small entity representatives for OSHA's panel in consultation with OSHA officials.

- The EPA and OSHA panels consisted of full-time federal employees from the office within the agency responsible for carrying out the draft rule and officials from OIRA and SBA's Chief Counsel for Advocacy.
- Each of the five panels reviewed materials the regulatory agencies had prepared and collected advice and recommendations from small entity representatives.

However, a few of the panels' and agencies' actions had minor inconsistencies with SBREFA's specific statutory requirements. For example, SBREFA requires that the advocacy review panels report on the comments of the small entity representatives and their findings not later than 60 days after the date the regulatory agency convened the panels. However, three of the five panels took a few days longer than the allotted 60-day period to prepare the panels' final reports. OSHA's tuberculosis and EPA's industrial laundries panels took 63 days to prepare their final reports, and the transportation equipment-cleaning panel took 69 days.

SBREFA also required both EPA and OSHA to designate by April 29, 1996, using existing personnel to the extent possible, a small business advocacy chair to be responsible for implementing the panel requirements and to act as a permanent chair of the agency's advocacy review panels. Both agencies appointed officials as panel chairs who were already employed by the agencies. OSHA designated its chair in March 1996, before the statutory deadline.¹³ However, EPA did not designate a small business advocacy chair until June 11, 1996, about 6 weeks later than required by the statute.

SBREFA states that the advocacy review panels shall "report" within 60 days, "provided that such report shall be made public as part of the rulemaking record." However, the statute does not specify to whom the report is to be directed and when the reports should be made available to the public. OSHA's panel issued its final report to the Assistant Secretary for Occupational Safety and Health on November 12, 1996, and OSHA made the report publicly available on December 10, 1996—10 months before the draft rule was published as a proposed rule. EPA's panels issued their final reports to the EPA Administrator. However, the EPA panels decided that they would make the final panel reports available to the public by placing

¹³From January to November, 1997, the Chair also served as Acting Assistant Secretary for Occupational Safety and Health. As a result, any panel recommendations during this period would have been made from the panel he chaired to himself. However, OSHA did not convene any advocacy review panels during this period, so the potential conflict never arose.

them in the public rulemaking docket only when the related proposed rules were published in the Federal Register. This determination appears to be consistent with SBREFA's procedural requirements and congressional intent.¹⁴ However, this approach has resulted in several months delay between the issuance of the panels' final reports and their availability to the public.¹⁵ Some of the small entity representatives that we interviewed said they would have liked to have seen how the panel reports reflected their comments as soon as the reports became final rather than having to wait until EPA published the associated notice of proposed rulemaking. To accommodate the small entities representatives' concerns regarding the delay in releasing these reports, EPA's Chair said that he briefed some of the representatives about the content of the panels' final reports and how their comments had been reflected in these reports.

Implementation of the Panels Differed

Although the five advocacy review panels convened as of November 1, 1997, generally followed SBREFA's procedural requirements, there were differences among the panels in how those requirements were implemented and in the general operation of the panels. Some of those differences appeared to occur because the panel process was new and evolving, and the panels made adjustments to their procedures as they gained experience.

One of the differences among the panels was the degree of prepanel contact that the agencies had with the small entity representatives, which in turn had implications for other aspects of the panel process. For example, although OSHA had done some outreach with small entities before its tuberculosis panel, it had not previously dealt with some of the types of small entities that were expected to be affected by the draft tuberculosis exposure rule. As a result, it was difficult for OSHA and SBA's Chief Counsel for Advocacy to identify representatives from those small entities to participate on that panel. In contrast, many of the small entity representatives to the EPA panel regarding stormwater phase II guidelines had worked with EPA on a related federal advisory committee for 2 years before the date that EPA convened the advocacy review panel. As a result, it was relatively easy for EPA and the Chief Counsel to identify small entity

¹⁴See 142 Cong. Rec. S3242, S3245 (daily ed. Mar. 29, 1996) (Stmt. of Sen. Bond) and 142 Cong. Rec. E571, 574 (daily ed. Apr. 19, 1996) (Stmt. of Rep. Hyde).

¹⁵EPA published its proposed rule on nonroad diesel engine emissions about 4 months after the panel issued its final report. EPA has published two additional proposed rules for which it convened panels. It released the August 8, 1997, final report for the industrial laundries' panel on December 17, 1997, and the August 7, 1997, final report for the stormwater phase II panel on January 9, 1998. As of February 1, 1998, EPA had not yet published a notice of proposed rulemaking related to the SBREFA panel on the transportation equipment-cleaning industry. This panel's final report was made on September 23, 1997.

representatives to provide input to that panel. Also, because of their extensive background on this issue, some of the small entity representatives said that it was relatively easy for them to review the materials that EPA gave them.

The panels also differed in the availability of information for the small entity representatives to review. SBREFA states that the advocacy review panels “shall review any material the agency has prepared,” but the statute does not specify what information the regulatory agencies must make available to the small entity representatives. In the five panels convened as of November 1, 1997, EPA and OSHA provided the small entity representatives with information about the draft rules before the representatives provided input to the panels. That information usually included a copy of the initial economic analyses or data on costs the regulatory agency had prepared for the draft rules.¹⁶ However, EPA did not prepare an initial economic analysis for its draft stormwater phase II rule until after the small entity representatives had provided their comments to the panel. Some of the small entity representatives to this panel said that their comments were not as valuable or as well-grounded as they could have been because they lacked the information in the initial economic analysis. This economic analysis, however, led EPA to conclude that the stormwater phase II rule would not have a significant economic impact on a substantial number of small entities. Therefore, if EPA had completed its initial economic analysis before it convened the advocacy review panel in June 1997, it probably would not have convened a panel for this draft rule.

The panels also differed in how they obtained comments from the small entity representatives. Before EPA convened its four panels, the agency held face-to-face meetings with the representatives to discuss the draft rules.¹⁷ Officials from OIRA and SBA’s Office of Advocacy were invited to attend all of these meetings, and they attended most of them. None of the EPA panels held face-to-face meetings with small entity representatives after the panels were convened. However, three of the four EPA panels had telephone conference calls with the representatives during the 60-day panel process. The panel that did not have a telephone conference call was EPA’s stormwater phase II panel. The EPA Chair said that because most of

¹⁶Although the materials for EPA’s first panel (on nonroad diesel engine emissions) did not include a separate economic or cost analysis, cost considerations were included with descriptions of some of the alternatives. For example, one alternative established a cost-effectiveness threshold for the regulation of various equipment types.

¹⁷Before EPA convened the panel for the nonroad diesel engine emissions draft rule, it conducted outreach efforts with small entities and developed a statement of principles for the rule, which the small entities reviewed prior to the panel.

the small entity representatives had worked to develop this draft rule and had previously provided their comments, he did not believe that either face-to-face meetings or a telephone conference call was necessary. Instead, he sent a letter to the small entity representatives asking them if they had any additional comments for the panel. In response, one small entity representative resubmitted his comments, which had been previously received by EPA a few days before the panel convened.

OSHA held individual telephone conference calls with each of the small entity representatives who provided input to its panel. Unlike EPA's approach to telephone conference calling, the small entity representatives who were individually called by OSHA's panel were unable to hear the other representatives' comments. Some of these small entity representatives said that they would have liked to have been able to hear the other representatives' comments.

Another difference among the panels was in how the small entity representatives were identified. EPA initially identified most of the small entity participants for its four panels, and then confirmed their lists of representatives with SBA's Office of Advocacy. OSHA, on the other hand, collaborated with the Office of Advocacy in its initial efforts to identify potential representatives for its panel on tuberculosis exposure. OSHA officials said that they intend to identify small entity representatives and conduct outreach efforts related to the panel process before convening future panels.

EPA and its panels changed some of their procedures as they gained experience with the panel process. For example, EPA convened its first panel on nonroad diesel engine emissions by sending a draft panel report summarizing the agency's prepanel outreach efforts to the panel members. However, EPA's Chair said that subsequent panels changed this practice because some Members of Congress and congressional staff viewed convening the panel by sending the draft report as an attempt to prejudice the panel members' considerations. For subsequent panels, EPA developed a summary of prepanel comments it received regarding the draft rules and submitted these summaries to the panels, and the panels then drafted their final reports. EPA's Chair also said that EPA plans to clarify its guidance on panel procedures for collecting input from small entity representatives. He said that by sending a letter to the small entity representatives they contacted before the panel was convened, the stormwater phase II panel followed SBREFA's requirements that the panel itself obtain the advice and recommendations from the representatives. However, after this panel, he

said that EPA realized that its guidance did not specifically address how the panel should obtain small entities representatives' input. Therefore, he said that EPA plans to amend its SBREFA guidance to clarify that the panels themselves must conduct outreach to collect advice and recommendations from the small entity representatives.

Notices of Proposed Rulemaking Contained Some Panel Recommendations

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 occupational exposure to tuberculosis and EPA's proposed rule to control nonroad diesel engine emissions. As previously mentioned, EPA's panels do not release their reports until EPA publishes the related notice of proposed rulemaking in the *Federal Register*. Because three of the panels' reports were not publicly available as of November 1, 1997, this report does not discuss the degree to which EPA reflected the panel recommendations for three of the four draft rules for which EPA convened panels.

The OSHA tuberculosis exposure panel's and the EPA nonroad diesel engine panel's recommendations focused on providing small entities with compliance flexibility and on considering potentially overlapping local, state, and federal regulations and enforcement. OSHA and EPA primarily responded to the panels' recommendations in the supplementary information sections of their notices of the proposed rulemakings, although OSHA also made some changes to the text of its draft rule as a result of its panel's recommendations. SBA's Office of Advocacy officials told us they believed that discussing panel recommendations in the preamble helps to highlight and elicit comments on the issues raised by the panels, and that such discussions do not relieve the agencies of the responsibility to make appropriate changes in the text of the rules themselves. However, until EPA and OSHA conclude the public comment periods for these proposed rules and publish them as final rules, it is too early to tell whether the rules will reflect the panels' recommendations.

OSHA Tuberculosis Exposure Panel

The panel for OSHA's draft standards for occupational exposure to tuberculosis made dozens of recommendations in its final report.¹⁸ Most of the panel's recommendations were that OSHA should clarify certain terms or processes, request comments on certain issues, obtain additional information, or explain OSHA's regulatory role in relation to other state and

¹⁸The notice of proposed rulemaking (62 Fed. Reg. 54160, Oct. 17, 1997) listed the panel's recommendations and described how OSHA was responding to them on pages 54229-54231.

federal agencies. OSHA responded to almost all of the panel's recommendations in the supplementary information section of the notice of proposed rulemaking. For example, one of the panel's major recommendations was for OSHA to reexamine the application of the draft rule to homeless shelters. In the supplementary information, OSHA said that it was conducting a special study of this issue and would hold hearings on issues related to tuberculosis exposure in homeless shelters before issuing the final rule. Other panel recommendations were that OSHA should clarify a number of terms regarding the coverage of the draft rule and provide additional explanations and analyses. OSHA responded to these recommendations by, among other things, incorporating definitions of several terms in the supplementary information (e.g., defining an "establishment" versus a "facility") and describing OSHA's assumptions about some of the rule's costs. OSHA officials said that they found the small entity representatives' suggestions to improve clarity and readability to be very helpful.

A few of the OSHA panel's recommendations resulted in changes in the text of the draft rule. For example, the panel recommended that OSHA examine the potential cost savings associated with allowing tuberculosis training that a worker received in one place of employment to be used to satisfy training requirements in another place of employment. The panel also recommended that OSHA examine the need for annual retraining of employees. In response, OSHA changed the text of the draft rule to allow the portability of nonsite specific training and to allow employers to demonstrate to regulators that their employees are knowledgeable in the area of occupational exposure to tuberculosis, rather than provide annual retraining.

EPA Nonroad Diesel Engine Panel

EPA's panel on its draft rule to control nonroad diesel engine emissions recommended that EPA solicit comments on five alternative implementation strategies in its notice of proposed rulemaking. These alternative strategies included gradually phasing in the requirements, offering manufacturers flexible exemptions, allowing manufacturers to purchase credits to sell equipment with noncomplying engines, providing exemptions for certain engine models, and instituting a hardship relief appeals process. According to its final report, the panel believed that these alternative strategies would maximize compliance flexibility for small manufacturers of nonroad equipment and small businesses that modify

diesel engines for marine use.¹⁹ In the supplementary information section of the notice of proposed rulemaking, EPA presented these five alternative strategies and requested public comments on them.²⁰

The panel also recommended that EPA continue to seek information and conduct analyses relating to the number of small entities potentially affected by the draft rule, consider the potential overlap of the rule with OSHA regulations related to ambient carbon monoxide levels, and design the proposed rule to minimize the need for recordkeeping and reporting. In the supplementary information section, EPA requested additional information, comments, and suggestions on the number of small entities and on the potential overlap with OSHA's regulations. EPA also said that it was taking steps to minimize recordkeeping and reporting requirements.

According to EPA's Chair, the small entity representatives suggested several ideas that EPA previously had not considered, and the draft rule was changed as a result of these contributions. An official from SBA's Office of Advocacy said that EPA's experience in developing this proposed rule was an excellent example of how the panels have improved the agencies' rulemaking process.

Small Entity Representatives' Views

About one-third (11 of 32) of the small entity representatives that we interviewed (including those who commented on draft rules that had not been published) said they believed that the agencies planned to make some changes to the draft rules as a result of their comments. For example, four of the six small entity representatives that we interviewed who provided comments to EPA's nonroad diesel engine emissions panel said that they believed EPA changed the rule in response to their comments. A representative who provided input to EPA's stormwater phase II panel said that the draft rule had "reflected many people's comments and was well balanced." Another representative said that EPA seemed to take the small entity representatives' suggestions seriously; therefore, he expected that some of the comments would be reflected in the proposed rule when it is published.

However, one-third (10 of 32) of the small entity representatives that we interviewed said that they did not believe that their comments would

¹⁹Some of these alternative implementation strategies had been among a list of 10 alternative strategies developed by EPA staff on the basis of input from small entity representatives and other commenters on the supplemental advanced notice of proposed rulemaking.

²⁰The EPA draft rule to control nonroad diesel engine emissions was proposed on September 24, 1997 (62 Fed. Reg. 50151).

result in any changes to the proposed rules.²¹ Six of the representatives said they believed that the regulatory agency officials had already decided how the rules would be written before convening the panel, and that the officials were not interested in making any significant changes to the rules. One of these representatives, who provided input to EPA's stormwater phase II panel, said that he did not believe that the regulatory agency would change the rule in "any meaningful way," and that word changes were "just window dressing." Another representative, who also provided input to this panel, said that he perceived the panel process as another opportunity for EPA to defend its draft rule as written. Some of the small entity representatives we interviewed said that they would have liked a more open, give-and-take discussion with the agency officials on the issues related to the draft rule.

Small Entity Representatives Offered Suggestions to Improve the Panel Process

Most of the small entity representatives we spoke with who participated in the advocacy review panel process said that they thought the process was worthwhile. About three-fourths of the 32 small entity representatives suggested changes to improve how the agencies have implemented the panel 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 rule that the agencies provided for the small entities representatives' review.

Time Frames

Seven of the 32 small entity representatives who participated in the panel process said that they would have liked to have had more advance notice of panel meetings and telephone conference calls with the panels. Some of these representatives said that short advance notice had prevented them from participating in certain efforts. One individual, who had been identified as a possible small entity representative, said that short notice of these meetings prevented him from participating in the panel process at all.²² Most of those who voiced this concern said that they would have liked at least 1 additional week of advance notice for panel meetings and telephone conference calls to avoid conflicts with other scheduled commitments.

²¹The remaining one-third of the small entity representatives said they did not know whether their comments would result in any changes to the proposed rules.

²²Other potential small entity representatives said that they did not participate in the panel process because of scheduling conflicts or lack of interest in the draft rules.

Eighteen small entity representatives we interviewed said that they had sufficient time to study the materials that the agencies provided to them before being asked to provide comments on the draft rules. However, 14 representatives said they felt that they were not given enough time to study those materials. Many of these representatives said that an additional 1 to 2 weeks would have allowed them to consult with others (e.g., members of their professional associations) before providing comments. One small entity representative said that requiring comments from the representatives shortly after they receive materials from the agencies prevents them from providing the panels with an in-depth perspective regarding the draft rule.

Five small entity representatives recommended holding the panels earlier in the rulemaking process. They said that, in some cases, decisions were made regarding the draft rules before the panels were convened. As a result, they said, it was less likely that the panels would have much impact on the draft rules.

Composition of Small Entity Representatives' Groups

The 32 small entity representatives we interviewed were evenly split on whether they believed that the individuals and organizations providing comments to their panels adequately represented the types of entities that would be affected by the associated draft rule. Fourteen small entity representatives said they thought the representation was adequate. However, 14 other small entity representatives said they thought the composition of the panels could be improved.²³ Specifically, they said that (1) they would have liked the panels to hear from more representatives from individual small entities, in addition to representatives from associations; (2) certain types of affected small entities were not included (e.g., representatives from certain geographical areas); and (3) those entities that would bear the burden of implementing the draft rule were underrepresented (e.g., small municipalities).

In some cases, the small entity representatives who provided input to the EPA panels had been working with the agency for some time to assist in developing the draft rules. Some of the small entity representatives who provided input to one EPA panel said they thought that the mix of those providing advice to the panels should have included other representatives who would have been reviewing and commenting on the draft rule for the

²³The remaining four small entity representatives that were interviewed said they were unsure whether the representatives' composition was adequate.

first time, and who, therefore, might have been able to provide a fresh perspective or some different ideas to the panel.

Methods Used to Gather Representatives' Comments

Although EPA officials met face-to-face with small entity representatives before EPA convened its panels, none of the panels themselves met with the representatives to obtain their comments about the draft rules after the panels had been convened.²⁴ The OSHA panel and all but one of the EPA panels convened as of November 1, 1997, relied on telephone conference calls with the small entity representatives to gather input during the panel process. The remaining EPA panel only obtained input during the panel process as a result of a letter from the Chair to the small entity representatives requesting any additional comments that had not already been provided during prior outreach and federal advisory committee efforts regarding the draft rule.

Four small entity representatives said that they viewed telephone conference calls as an efficient way to gather comments from the representatives. However, nine small entity representatives felt that telephone conference calls limited the amount of discussion that could take place between them and the panels. Most of these representatives also expressed a preference for face-to-face meetings instead of telephone conference calls because they believed the discussions would be fuller and would provide greater value to the panels. When telephone conference calls were used, four of the small entity representatives said they found it confusing when there were numerous participants on the phone at once. One of these representatives, for example, suggested setting an agenda to clarify participation in the telephone conference calls.

Materials Provided to Representatives

Twenty-four small entity representatives said the materials that the agencies provided to them about the draft rules permitted an intelligent and informed discussion of the rules' potential effects on small entities. However, eight of the representatives said they believed that the materials that the regulatory agencies provided could have been improved. Six of the representatives who believed the materials could be improved said that the materials were too vague or did not provide enough information regarding the potential economic impact on small entities. Conversely, two representatives said that the materials were too voluminous and complex to review expeditiously. Three of the small entity representatives for EPA's

²⁴An OSHA official said that OSHA offered the small entity representatives the option of having a face-to-face meeting, but that all of the representatives chose the telephone conference option.

industrial laundries panel said that EPA seemed unwilling to share information with the small entity representatives.

Agency Officials' Suggestions and Observations

The agency officials we interviewed offered fewer suggestions for improving the panels than the small entity representatives. EPA's and OSHA's Chairs and some of the agency officials we interviewed said that it may be a good idea to hold future panels earlier in the rulemaking process. SBA's Office of Advocacy officials said that they thought it was beneficial for EPA and OSHA to identify small entity representatives and start conducting outreach efforts before convening the panel. Officials from the Office of Advocacy also suggested improving the adequacy and timing of the materials that the regulatory agencies provide to small entity representatives and the panels. They said that the small entity representatives and the panels cannot comment without appropriate and timely materials. However, the Chair of EPA's panels said that some of the panels and the small entity representatives wanted data or types of analyses that were not available. He said that EPA is willing to provide additional information and analysis to the panels "within reason," given the time constraints of the rulemaking process.²⁵ For two of its panels, EPA provided background materials and held a meeting with the small entity representatives before convening the panel to determine what information would be needed for that panel.

Many of the agency officials we spoke with said that the 60-day period that SBREFA mandates for the panels is adequate. Both SBA's Office of Advocacy and EPA officials said that, although 60 days is a tight time frame, it encourages agencies and small entity representatives to focus on the issues and get the job done. They said that additional time might just expand the panel process without producing better results. Several agency officials also said that telephone conference calls were an effective and efficient method for panel members to gather small entity representatives' comments within the 60-day period. For example, the EPA Chair said that telephone conference calls save travel expenses and time away from work for the small entity representatives.

Many of the agency officials we interviewed also said that the process has changed and will continue to change as the agencies gain more experience with the panel process. Some EPA and OSHA officials also said that the demands of the panel process should be placed in the context of their

²⁵An EPA official said that some of the data that the small entity representatives wanted to see were confidential business information regarding industrial laundries, which EPA could not share with the small entity representatives.

agencies' other efforts to conduct a timely rulemaking process. These agency officials pointed out that there are costs associated with the advocacy review panel process in terms of the time and resources expended. A few EPA and OSHA program officials who had each participated in one panel also said that there are other opportunities for small entities to provide input during the public comment period. For example, an EPA official said that in some cases, such as when the small entity representatives did not have the opportunity to comment to the advocacy review panel on an initial economic analysis, the representatives could provide their views and any relevant information during the public comment period after the rule is proposed.

Although there were some individual small entities included in all but one of the groups of small entity representatives that provided input to the panels, most of the representatives to the panels were from associations, such as those associations representing the health care industry, the construction industry, or local governments. Some agency officials told us that they believed it was important for agencies to identify representatives from individual small entities and not to rely solely on representatives from associations. However, SBA's Office of Advocacy officials pointed out that representatives from associations may have more resources and expertise available to participate in the advocacy review panels than do individual small entities.

Finally, although some officials in OSHA, EPA, OIRA, and SBA's Office of Advocacy said they had already noticed benefits from the panels, they also said that it is too soon to tell whether the panel process would result in better rules until after the public comments have been received for the rules and the rules are finalized.

Conclusions

Although federal agencies' experiences with the advocacy review panels have been limited thus far, some initial observations about the panel process can be made. Agency officials and small entity representatives generally agreed that the panel process is worthwhile, providing valuable insights and opportunities for participation in the rulemaking process. Many of the panel participants we interviewed said they welcomed the panel process because it has provided an opportunity to identify significant impacts on small entities and has given the agencies a better appreciation of small entities' concerns.

However, implementation of the panel process has not been without controversy or concern. The SBA Chief Counsel for Advocacy and some small entity representatives believe that EPA should have convened advocacy review panels for two rules for which advocacy review panels were not held. EPA and three of the five panels that were held did not meet some of the specific time requirements of the statute. In addition, although consistent with the statute, the EPA panels' policy regarding when their final reports can be made public may result in reports not being made available to the small entity representatives or the public until months after the reports are provided to the EPA Administrator. Some of the small entity representatives believe that the panels should be held earlier in the rulemaking process, that the materials provided to the representatives could be improved, that they should have more time to review those materials, and that the agencies should improve the means by which they obtain small entity representatives' comments.

Some of the concerns that small entity representatives expressed about the panel process appear to be inconsistent and may be difficult to resolve. For example, when panels are held early in the rulemaking process, some of the data and analyses that the small entity representatives said they need to have an informed discussion about a draft rule are less likely to be available than later in the process. Conversely, delaying the panels until the data are available may limit the panels' opportunity to influence key decisions.

Some EPA and OSHA program officials who had each participated in one panel made comments regarding the panel process that indicated they did not fully appreciate the intent of the process. For example, an EPA official said that small entity representatives who did not have an opportunity to review and comment on a draft rule's initial economic analysis could do so during the standard public comment period for the proposed rule. However, this view fails to recognize that Congress established the advocacy review panel process as an addition to the public comment period to facilitate receiving the views of small entities at an earlier stage of the rulemaking process. Therefore, the standard public comment period cannot substitute for the panel process.

How agencies implement the advocacy review panel process will have a pronounced effect on the continued viability of that process. If small entity representatives can discuss the issues related to draft rules that they believe are important and see that their input is seriously considered, 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. Similarly, if panels continue to make adjustments to the process as they learn from their experiences, they can help alleviate some of the concerns voiced by the small entity representatives.

Many of the suggestions that small entity representatives made regarding the panel process would not require changes to SBREFA. For example, although SBREFA requires that agencies convene panels before a notice of proposed rulemaking is published, the statute does not preclude convening the panels even earlier in the rule development process, as the small entity representatives suggested. Although some of the representatives said they needed more advance notice of meetings and telephone conference calls and more time to review background materials provided by the agencies, those changes would not necessarily require increasing the 60-day period that SBREFA allows between the date the panels are convened and the issuance of their final reports. The regulatory agencies could provide representatives with materials before the panels convene; better planning could alleviate the short advance notice problem.

The lack of clarity regarding whether EPA should have convened advocacy review panels for its two proposed rules on ozone and particulate matter is traceable to the lack of agreed-upon governmentwide criteria as to whether a rule has a “significant economic impact on a substantial number of small entities” under the RFA. We raised this issue in our 1994 report on the RFA, in which we said that “[i]f Congress wishes to strengthen the implementation of the RFA, it should consider amending the act to (1) provide SBA with clearer authority and responsibility to interpret the RFA’s provisions and (2) require SBA, in consultation with OMB, to develop criteria as to whether and how federal agencies should conduct RFA analyses.” 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. Governmentwide guidance could, for example, address the specific question at issue with regard to these two rules—whether establishment of regulatory standards by a federal agency should be separated from their implementation requirements imposed by the individual states (or other entities) for purposes of compliance with the RFA and SBREFA.

Matter for Congressional Consideration

If Congress wishes to clarify and strengthen the implementation of the RFA and SBREFA, it should consider providing SBA or another entity with clearer authority and responsibility to interpret the RFA's provisions on a governmentwide basis. Congress could also consider establishing, or requiring SBA or another entity to develop, governmentwide criteria defining the phrase "significant economic impact on a substantial number of small entities." Those criteria should specify whether the establishment of regulatory standards by a federal agency should be separated from their implementation requirements imposed by other entities for the purposes of the RFA and SBREFA.

Agency Comments and Our Evaluation

We provided copies of a draft of this report to the Director of OMB, the Secretary of Labor, and the Administrators of EPA and SBA for review and comment. The comments we received from officials at OIRA, OSHA, EPA, and SBA's Office of Advocacy generally agreed with the information presented in this report. An OIRA official said that the SBREFA panel process is a valuable aid to the rulemaking process and that the initial panels have worked well. EPA and OSHA officials suggested some specific clarifications and technical changes to the draft, which we have incorporated into the text of the final report as appropriate. For example, at EPA's and OSHA's suggestion we clarified the methodology we used to select the proposed rules we reviewed to determine whether they should have been subject to the panel process.

Our draft report indicated that it was unclear whether SBREFA permits SBA's Chief Counsel for Advocacy to initially identify individuals representative of affected small entities in consultation with the regulatory agencies, or whether that initial identification should be done without receiving input from the regulatory agency. Officials from SBA's Office of Advocacy said that they believed it was prudent to use the regulatory agencies' list of small entity representatives as a starting point in the process of identifying small entity representatives, thereby building on the agency's prior outreach efforts. The officials also said that their additional contacts with small entities can enable them to identify additional small entities that should be asked to provide advice and recommendations to the advocacy review panels. After considering the officials' comments and researching the legislative history of the provision, we changed the text in this report to indicate that SBA's use of draft agency lists was consistent with the statutory requirements.

EPA officials said that they strongly believe that they correctly interpreted the RFA and SBREFA regarding the ozone and particulate matter rules, and that convening advocacy review panels for those rules was not required. In this report, we expanded our discussion of EPA's position on this issue, but we continued to describe both sides of this argument and to note that the issue was under litigation.

EPA officials also expressed concerns regarding our draft report's Matter for Consideration section in which we suggested, conditionally, that Congress should require SBA to develop governmentwide criteria regarding RFA analyses. The officials said that EPA had developed detailed, interim guidance on the RFA, as amended by SBREFA, including guidance regarding the panel process and determination of what constitutes a "significant economic impact on a substantial number of small entities." They stated that governmentwide criteria on what constitutes a significant economic impact on a substantial number of small entities cannot be both prescriptive enough to be authoritative, but flexible enough to take into account the many section-by-section, statute-by-statute, and agency-by-agency variations that must be considered. EPA officials said that EPA's guidance allows it to use its judgment in making case-by-case determinations. The officials said that they would prefer to maintain the agency's flexibility in making certifications and to rely on Department of Justice decisions resolving any disputes in interpretations among agencies as well as any case law that arises under the new judicial review provisions of SBREFA regarding agencies' interpretations of the RFA.

Although agency-specific guidance may also be needed, we believe that governmentwide criteria regarding RFA analysis could help promote a more consistent and less contentious approach for agencies to use in complying with the RFA and SBREFA requirements. In our 1991 report on the RFA, we identified instances of agencies' interpreting key provisions of the RFA differently. Congress enacted the RFA and SBREFA to ensure that small entities' views are taken into consideration in developing notices of proposed rulemaking. Establishing governmentwide criteria could help small entities as well as agencies more clearly understand when and how the RFA and SBREFA requirements should be applied. While we recognize that governmentwide criteria need to be flexible enough to allow for some agency-by-agency variations, we believe that the criteria should be sufficiently standardized to provide for consistent implementation among federal regulatory agencies. Although challenging to develop, a set of criteria would help ensure that the intent of the RFA and SBREFA requirements is understood and fairly implemented. Therefore, we

retained the Matter for Congressional Consideration section in which we suggest that governmentwide criteria be established, and we stated that those criteria should specify whether the establishment of regulatory standards by a federal agency should be separated from their implementation requirements imposed by other entities for the purpose of the RFA and SBREFA.

EPA officials also said that, if governmentwide criteria were to be developed, SBA should not be the agency designated to develop these criteria. They said that previous SBA interpretations of the RFA have differed from those of many other agencies, and in some instances, from the language of the statute. EPA officials also said that giving SBA the authority to interpret the RFA could bind the regulatory agencies to a single (and possibly incorrect) view of the statute's requirements. For example, both EPA and OSHA officials disagree with SBA's interpretation that a "significant economic impact" could be either a positive or negative impact. EPA and OSHA officials said that the language in the statute as well as the great weight of its legislative history clearly indicate that the purpose of the RFA is to consider regulatory alternatives that would minimize negative impacts on affected small entities, and the officials do not consider positive or beneficial regulatory effects to constitute a "significant economic impact" under the RFA. In response to these officials' comments, we indicated in the Matter for Congressional Consideration section that Congress could establish, or could require SBA or another entity to develop, governmentwide criteria defining the phrase "significant economic impact on a substantial number of small entities."

We are sending copies of this report to the Ranking Minority Members of the Senate Committee on Small Business and the House Committee on Small Business' Subcommittees on Government Programs and Oversight, and Regulatory Reform and Paperwork Reduction; the Director of OMB; the Secretary of Labor; and the Administrators of EPA and SBA. We will also make copies available to others on request.

Major contributors to this report are listed in appendix VII. Please contact me on (202) 512-8676 if you or your staff have any questions concerning this report.

A handwritten signature in black ink that reads "L. Nye Stevens". The signature is written in a cursive style with a large, stylized "L" and "S".

L. Nye Stevens
Director, Federal Management
and Workforce Issues

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Abbreviations

EPA	Environmental Protection Agency
NPDES	National Pollutant Discharge Elimination System
OIRA	Office of Information and Regulatory Affairs
OMB	Office of Management and Budget
OSHA	Occupational Safety and Health Administration
RFA	Regulatory Flexibility Act
SBA	Small Business Administration
SBREFA	Small Business Regulatory Enforcement Fairness Act
TB	tuberculosis

Selected EPA- and OSHA-Proposed Rules for Which Panels Were Not Held

This appendix lists the proposed rules that the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA) published under notices of proposed rulemaking in the Federal Register during the first year's implementation of the Small Business Regulatory Enforcement Fairness Act (SBREFA) advocacy review panel process. EPA and OSHA did not convene advocacy review panels for these proposed rules because they certified that the rules would not have a significant economic impact on a substantial number of small entities. Because of the large volume of proposed rules that EPA published in the Federal Register during this period (June 28, 1996, through June 28, 1997), we limited our review of EPA-proposed rules to those that were subject to review by OIRA, pursuant to Executive Order 12866.

Appendix I
Selected EPA- and OSHA-Proposed Rules
for Which Panels Were Not Held

Table I.1: Selected EPA-Proposed Rules Published in the First Year of the SBREFA Advocacy Review Panel Process for Which Panels Were Not Held

Date	Proposed rule
July 9, 1996	Transportation Conformity Rule Amendments: Flexibility and Streamlining
July 23, 1996	Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR)
August 14, 1996	Hazardous Waste Management System; Identification and Listing of Hazardous Waste; Solvents; CERCLA Hazardous Substance Designation and Reportable Quantities
September 26, 1996	National Emission Standards for Hazardous Air Pollutants for Source Categories; National Emission Standards for Hazardous Air Pollutants for Primary Aluminum Reduction Plants
December 13, 1996	National Ambient Air Quality Standards for Particulate Matter: Proposed Decision
December 13, 1996	National Ambient Air Quality Standards for Ozone: Proposed Decision
December 13, 1996	Proposed Requirements for Designation of Reference and Equivalent Methods for Particulate Matter (PM) _{2.5} and Ambient Air Quality Surveillance for Particulate Matter
December 27, 1996	Acid Rain Program: Permits, Allowance System, Sulfur Dioxide Opt-Ins, Continuous Emission Monitoring, Excess Emissions, and Appeal Procedures
January 2, 1997	Proposed Implementation Requirements for Reduction of Sulfur Oxide (Sulfur Dioxide) Emissions
February 11, 1997	Emission Standards for Locomotives and Locomotive Engines
March 28, 1997	Regulation of Fuels and Fuel Additives: Modification of the Covered Areas Provision for Reformulated Gasoline
March 28, 1997	Transitional and General Opt Out Procedures for Phase II Reformulated Gasoline Requirements
April 2, 1997	National Emission Standards for Hazardous Air Pollutants Pharmaceuticals Production
May 6, 1997	Regulation of Fuels and Fuel Additives: Baseline Requirements for Gasoline Produced by Foreign Refiners
May 7, 1997	Addition of Dioxin and Dioxin-Like Compounds; Modification of Polychlorinated Biphenyls (PCBs) Listing; Toxic Chemical Release Reporting; Community Right-to-Know
May 12, 1997	Land Disposal Restrictions Phase IV: Second Supplemental Proposal on Treatment Standards for Metal Wastes and Mineral Processing Wastes, Mineral Processing and Bevill Exclusion Issues, and the Use of Hazardous Waste as Fill
May 21, 1997	Protection of Stratospheric Ozone

Source: The [Federal Register](#) for the relevant dates.

Appendix I
Selected EPA- and OSHA-Proposed Rules
for Which Panels Were Not Held

**Table I.2: OSHA-Proposed Rules
Published in the First Year of the
SBREFA Advocacy Review Panel
Process for Which Panels Were Not
Held**

Date	Proposed rule
July 22, 1996	Miscellaneous Changes to General Industry and Construction Standards; Proposed Paperwork Collection, Comment Request for Coke Oven Emissions and Inorganic Arsenic
September 10, 1996	Exit Routes (Means of Egress)

Source: The [Federal Register](#) for the relevant dates.

OSHA Panel on Occupational Exposure to Tuberculosis

In October and November, 1995, OSHA held a series of meetings with representatives from labor unions, professional organizations, trade associations, state and federal governments, and employees of business and industry to receive input on the approaches OSHA was considering for its draft rule on occupational exposure to tuberculosis (TB). According to OSHA, the draft rule would set standards requiring employers to protect TB-exposed employees by means of infection prevention and control measures that had been demonstrated to be effective.

In a letter dated August 16, 1996, OSHA's Small Business Advocacy Chair notified the Small Business Administration's (SBA) Chief Counsel for Advocacy that the OSHA draft rule might have a significant economic impact on a substantial number of small entities. The OSHA Chair also identified the types of entities that might be affected by the rule. The Chief Counsel consulted with OSHA officials and identified 11 small entity representatives who he believed could provide comments on the draft rule to the panel. However, a number of these representatives withdrew from participating or recommended other representatives as being more appropriate. Ultimately, eight small entity representatives provided input to the panel—one representative from a homeless shelter, two representatives from homeless shelter associations, two representatives from health care associations, one representative from a home health care service, one emergency medical care service representative, and one representative from a ventilation and air conditioning contractor.

The OSHA Chair convened the review panel at a meeting on September 10, 1996. The panel formally consisted of the Deputy Assistant Secretary of Labor, OSHA (Panel Chair); the Associate Solicitor for Occupational Safety and Health, Department of Labor; the Director of the Directorate of Health Standards Programs, OSHA; the Director of the Office of Regulatory Analysis, OSHA; the Chief Counsel for Advocacy, SBA; and the Administrator of the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA). However, OIRA's Administrator was represented on the panel by OIRA staff members.

On September 13, 16, and 24, 1996, OSHA provided the eight small entity representatives with background materials on the draft rule, including the text of the draft rule. In a letter dated September 16, 1996, the OSHA Chair instructed the small entity representatives to provide the panel with their written comments on the background materials within 30 days. All of the small entity representatives provided written comments, although some representatives took more than the allotted 30 days. On October 7, 1996,

the panel met and addressed the questions of the small entity representatives through a conference telephone call. About 3 weeks later, on October 30, 1996, and November 1, 1996, the panel met to review the comments and recommendations they had received from the small entity representatives and to draft the panel's report. The panel's report was completed on November 12, 1996, and was signed by the Chair, the Administrator of OIRA, and the SBA Chief Counsel for Advocacy. OSHA then made the final report available to the public in the docket related to this draft rule on December 10, 1996. OSHA published the proposed rulemaking for the TB standards nearly a year later, on October 17, 1997. This notice of proposed rulemaking asked for public comments on, among other things, the advocacy review panel's recommendations.

The review panel's final report included what the panel characterized as 22 major recommendations and 24 other recommendations. Several of the major recommendations stated that OSHA should take the following actions:

- Simplify and clarify the text of the proposed rule and define such terms as “firm” and “facility” so that they are readily understood.
- Consider analyzing additional size classes of small entities where existing analysis suggests that such examination would provide opportunities to minimize small entity impacts while accomplishing statutory objectives.
- Either change the definition of a “suspect case” or develop an alternative approach for homeless shelters.
- Reexamine the costs and impacts of some of the standard's requirements for homeless shelters and substance abuse treatment centers.
- More carefully address the economic impacts of the proposed rule on facilities, including a reexamination of the ability of various facilities to pass on costs (especially those facilities receiving Medicare and Medicaid funding), and incorporate the results into its determination of feasibility.
- Solicit comments on whether there are any conflicts between OSHA regulations and those of other regulatory and voluntary organizations, and on ways OSHA could better coordinate with these groups. The panel's final report said OSHA should specifically include a discussion of similar state requirements in the preamble to the rule, examine possible interaction with Health Care Financing Administration rules, and provide greater detail on how OSHA's proposed standard compares with Centers for Disease Control guidelines.

Although the panel's final report contained a single set of major and other recommendations, the report indicated that the panel members were not

Appendix II
OSHA Panel on Occupational Exposure to
Tuberculosis

always in agreement regarding certain issues. For example, OIRA and SBA's Office of Advocacy panel members suggested that OSHA analyze the potential impact of the draft rule on volunteers. However, OSHA panel members said that such an analysis was not necessary because the Occupational Safety and Health Act does not cover volunteers. The panel report ultimately recommended that OSHA consider estimating the rule's effect on volunteers and include a discussion explaining that the draft rule does not apply to volunteers, although some states may choose to do so.

EPA Panel on Nonroad Diesel Engine Emissions

As part of the process by which EPA developed its draft rule on the control of air pollution emitted by nonroad diesel engines, EPA conducted outreach efforts with a number of organizations that were expected to be affected by the rule, including small entity representatives. In this draft rule, EPA plans to establish new emission standards for nonroad diesel engines that are used in equipment, such as tractors, and some marine applications. The draft rule includes a program that consists of stringent new emission standards, requirements to ensure that engines maintain their level of emission performance as they age, provisions allowing compliance flexibility to engine and equipment manufacturers, and a voluntary program to encourage the introduction of low-emitting engines.

In a letter dated November 13, 1996, EPA's Small Business Advocacy Chair notified SBA's Chief Counsel for Advocacy that this draft rule might have a significant economic impact on a substantial number of small entities, thereby triggering the SBREFA advocacy review panel requirements. The Chair also provided the Chief Counsel with a suggested list of six small entity representatives to provide advice and recommendations to the panel. As required by SBREFA, the Chief Counsel responded within 15 days and agreed with EPA's suggested list of small entity representatives. Subsequently, EPA and SBA's Office of Advocacy agreed to add five additional representatives to the panel process. The 11 representatives consisted of 1 small nonroad diesel engine manufacturer, 3 association representatives, 1 individual business representative of small nonroad equipment manufacturers, 4 representatives of small businesses that modify engines for marine use ("marinizers"), and 2 association representatives of engine rebuilders or remanufacturers.

In January 1997, EPA published and sought comments on a statement of principles in a Supplemental Advance Notice of Proposed Rulemaking in the Federal Register. The statement of principles, which called for more stringent emission standards, had been signed earlier by EPA, the California Air Resources Board, and members of the nonroad diesel engine industry. EPA also held a workshop in Chicago, Illinois, during the comment period for this notice that devoted a significant amount of time to discussing equipment manufacturer regulatory flexibilities and small entity issues. The written comments received from the supplemental advance notice and suggestions received at EPA's workshop and other outreach efforts resulted in 10 concepts to make emission standards for nonroad diesel engines flexible and reduce the regulatory burden for small entities.

In a letter dated March 25, 1997, the EPA Chair convened the review panel, which consisted of the Director of the Office of Regulatory Management and Information, EPA (Panel Chair); the Director, Engine Programs and Compliance Division, EPA; the Chief Counsel for Advocacy, SBA; and the Administrator of OMB's OIRA. However, OIRA's Administrator was represented on the panel by an OIRA staff member.

On April 24, 1997, the Chair sent the 10 concepts developed during EPA's outreach efforts to the 11 small entity representatives and requested that they provide the panel with any written comments and recommendations on these concepts within 2 weeks. Four of the 11 representatives responded (2 businesses and 2 association representatives). On May 2, 1997, the panel held a telephone conference call with 7 of the 11 small entity representatives (3 of which also had provided written comments) during which they discussed and clarified potential regulatory options. The panel had a third meeting on May 14, 1997, and issued its final report to the EPA Administrator on May 23, 1997. The report's cover letter was signed by all four panel members. The report was made available to the public on September 24, 1997, when EPA published the associated notice of proposed rulemaking in the Federal Register.

In its final report, the review panel recommended that EPA (1) continue to seek information and conduct analyses relating to the number of small entities potentially affected by the proposed rule; (2) consider the potential overlap of the rule with OSHA regulations related to ambient carbon monoxide levels; (3) design the rule to minimize the need for recordkeeping and reporting; and (4) consider conducting further analysis on 5 of the 10 concepts that were considered to provide significant flexibility and burden reduction for small entities, and soliciting comments on these concepts when it published its notice of proposed rulemaking. The panel's final report stated that incorporating these five concepts into the notice of proposed rulemaking would allow EPA to meet the program's emission-reduction goals while maximizing the compliance flexibility for small manufacturers of nonroad equipment and small marinizers. These concepts addressed such issues as exemption and volume allowances, equity between engine size categories, engine program credits, and relief for hardship cases.

In the preamble of its notice of proposed rulemaking, EPA said that it was (1) requesting additional information, comments, and suggestions on the number of small entities potentially affected by the rule and the potential overlap with OSHA's carbon monoxide limits; (2) taking steps to minimize

**Appendix III
EPA Panel on Nonroad Diesel Engine
Emissions**

recordkeeping and reporting; and (3) proposing or soliciting comments on the five regulatory alternatives.

EPA Panel on Stormwater Phase II (National Pollutant Discharge Elimination System)

EPA began developing proposed revisions to its National Pollutant Discharge Elimination System (NPDES) regulations in 1992. To help the agency develop the draft rule, EPA convened a federal advisory committee comprised of various stakeholders, including municipalities, industrial and commercial sectors, and public interest groups. The advisory committee met 11 times between September 1995 and February 1997.

EPA's proposed revisions to the NPDES regulations were intended to address unregulated discharges of stormwater associated with small, municipal separate storm sewer systems and construction activities at small construction sites. Therefore, EPA concluded that the draft rule might have a significant economic effect on a substantial number of small entities.¹ On April 10, 1997, EPA's Small Business Advocacy Chair sent a letter to SBA's Chief Counsel for Advocacy notifying him that EPA believed its draft rule might trigger the requirements for an advocacy review panel.

The Chair also provided the Chief Counsel with a list of 10 small government and business representatives that EPA had been in contact with during the development of the draft rule since 1995, and that the agency believed could serve as small entity representatives for the panel process. The Chief Counsel responded within 15 days of EPA's notification, as required by SBREFA, and suggested adding 13 additional representatives. Ultimately, 29 small entity representatives participated in the panel process. These representatives included 12 individuals from associations representing city and county governments and the construction industry, individual municipalities, and Indian tribes, most of whom had previously served on the federal advisory committee that helped to develop the draft rule. The remaining 17 representatives were affiliated with industrial or commercial associations, many of whom were suggested by SBA. Twenty-two of the representatives were from business or small government associations, and 7 were individuals from small governments or Indian tribes.

EPA conducted telephone conference calls on May 14 and 15, 1997, and held an 1-day meeting at EPA headquarters in Washington, D.C., on May 22, 1997, to brief the small entity and streamlining representatives on the draft rule. Officials from OIRA and SBA's Office of Advocacy also participated in these telephone conference calls and the 1-day meeting. By June 13, 1997, 25 of the small entity representatives had submitted 12 sets of written

¹After completion of the panel process, additional data and analysis led EPA to conclude that the rule would not have such an impact. When EPA published the notice of proposed rulemaking on January 9, 1998, the EPA Administrator certified that the proposed rule would not have a significant economic impact on a substantial number of small entities.

**Appendix IV
EPA Panel on Stormwater Phase II
(National Pollutant Discharge Elimination
System)**

comments. Two sets of written comments had multiple signatures: 1 letter was signed by 6 municipal representatives and the other letter was signed by 13 industry representatives. Three representatives signed more than one set of letters sent to the panel.

The stormwater phase II advocacy review panel convened on June 19, 1997, and formally consisted of the Director of the Office of Regulatory Management and Information, EPA (Panel Chair); the Director of the Office of Wastewater Management, Office of Water, EPA; the Chief Counsel for Advocacy, SBA; and the Administrator of OIRA, OMB. For this meeting, OIRA's Administrator and the Chief Counsel were represented by members of their staffs. On June 23, 1997, the Chair sent a letter to each representative that summarized the comments that had been received by June 13, 1997, and requested any additional comments. In response, one small entity representative resubmitted his comments, which had been previously received by EPA a few days before the panel convened.

Because the panel's report was not publicly available as of November 1, 1997, we did not describe the panel's recommendations or EPA's reaction to those recommendations in this report.

EPA Panel on Effluent Limitations Guidelines and Pretreatment Standards for Industrial Laundries Point Source Category

On February 20, 1997, a Project Manager from EPA's Office of Water sent a letter to two individuals in the industrial laundry industry and five representatives of business and trade associations regarding the agency's draft effluent guidelines and standards for industrial laundries. The letter stated that the representatives had been identified as candidates to serve as small entity representatives for an anticipated SBREFA advocacy review panel regarding the draft rule. Attached to the letter was background information about the draft rule. The letter also reminded these representatives of a March 4, 1997, public meeting sponsored by EPA to discuss the development of the draft rule with interested parties.

In a letter dated March 3, 1997, EPA's Small Business Advocacy Chair notified SBA's Chief Counsel for Advocacy that EPA may convene a review panel for its draft rule on effluent limitations guidelines and standards for industrial laundries. The Chair also provided the Chief Counsel with a list of the seven individuals that EPA had identified in February 1997 who could provide advice and recommendations to the panel by serving as small entity representatives. As required by SBREFA, the Chief Counsel responded within 15 days. He agreed with EPA's list and suggested an additional name. Another representative was added following the March 4, 1997, public meeting on the draft rule. These nine small entity representatives included five trade association representatives and four representatives from individual businesses within the industrial laundries sector. EPA reported that it had been working with some of these representatives since 1992 to develop regulatory options for the draft rule.

On April 15, 1997, seven of the nine small entity representatives attended a meeting with EPA officials to discuss the background material the agency had sent to them and to provide EPA with some initial comments on the draft rule. Five small entity representatives subsequently responded to EPA's request for written comments on the background material by the agency's May 12, 1997, deadline. In a memorandum dated June 4, 1997, EPA's Chair provided a summary of the small entity representatives' advice and recommendations, as well as background material on the draft rule, to the panel members and the nine small entity representatives.

On June 6, 1997, the Chair convened the industrial laundries review panel, which formally consisted of the Director of the Office of Regulatory Management and Information, EPA (Panel Chair); the Director of the Office of Science and Technology, Office of Water, EPA; the Chief Counsel for Advocacy, SBA; and the Administrator of OIRA, OMB. OIRA's Administrator was represented in the panel meetings and telephone conference calls by

Appendix V
EPA Panel on Effluent Limitations
Guidelines and Pretreatment Standards for
Industrial Laundries Point Source Category

an OIRA staff member. EPA staff (not the panel) held a conference call on June 11, 1997, with five of the nine small entity representatives to discuss different exemptions, enforcement options, and other regulatory issues. On June 19, 1997, the panel held a conference call with five of the small entity representatives (four of whom had participated in the June 11, 1997, conference call) to address their questions and gather additional input. On June 27, 1997, EPA provided the panel members with additional analyses of regulatory alternatives requested by the panel during the June 19, 1997, conference call. Six of the nine small entity representatives (four association representatives and two representatives of individual businesses) provided written comments during the panel process. During a meeting on July 18, 1997, the review panel requested additional analysis and information from EPA, which was sent to the panel members on July 23, 1997. The panel issued its final report, with a cover letter signed by all four panel members, on August 8, 1997.

Because the panel's report was not publicly available as of November 1, 1997, we did not describe the panel's recommendations or EPA's reaction to those recommendations in this report.

EPA Panel on Effluent Limitations Guidelines and Standards for the Transportation Equipment-Cleaning Industry

EPA began developing a draft rule on effluent limitations guidelines and pretreatment standards for the transportation equipment-cleaning industry in 1992. The intent of the draft rule was to limit the discharge of pollutants into the nation's waters and the introduction of pollutants into publicly owned treatment works. Between 1992 and 1997, EPA officials made 39 visits to transportation equipment-cleaning facilities and attended numerous meetings to gather information to develop the draft rule. The agency also worked with three trade associations and several small businesses to identify potential regulatory options and compliance issues.

On April 10, 1997, EPA's Small Business Advocacy Chair sent a letter to SBA's Chief Counsel for Advocacy notifying him that EPA expected to convene a SBREFA review panel for this draft rule. In his letter, the EPA Chair suggested four small entity representatives (three of which had been involved with the draft rule's development) to provide advice and recommendations to the panel. The Chief Counsel responded to the EPA Chair's letter within 15 days and suggested two additional small entity representatives that EPA's panel could contact. The Chief Counsel and EPA officials agreed on six small entity representatives, all of whom were from trade associations related to the transportation equipment-cleaning industry. One of these additional representatives was later replaced by another association representative who came forward at a public meeting held on the draft rule.

EPA sent background material to the small entity representatives on June 6 and 27, 1997, and met with the representatives on July 2, 1997, to discuss the material. EPA held another meeting between EPA staff and one small entity representative on July 14, 1997, to clarify EPA's analyses involving some facilities that might be impacted by the draft rule.

On July 16, 1997, the EPA Chair convened the review panel by sending a letter to the panel members. At the same time, he provided additional background material to the small entity representatives on the draft rule's projected impacts and EPA's regulatory options. The panel held its first meeting on July 22, 1997, and held two subsequent meetings on August 13, 1997, and September 9, 1997. The panel formally consisted of the Director of the Office of Regulatory Management and Information, EPA (Panel Chair); the Acting Director, Engineering and Analysis Division, Office of Water, EPA; the Chief Counsel for Advocacy, SBA; and the Administrator of OIRA, OMB. However, OIRA's Administrator was represented on the panel by an OIRA staff member who had participated in related meetings and telephone conference calls.

**Appendix VI
EPA Panel on Effluent Limitations
Guidelines and Standards for the
Transportation Equipment-Cleaning
Industry**

By July 24, 1997, four of the six small entity representatives had provided the panel with their written comments and recommendations on the draft rule. In a July 29, 1997, letter, the EPA Chair informed all of the small entity representatives that any additional comments needed to be received by August 15, 1997. Two of the four small entity representatives who provided initial comments submitted additional comments by the August 15 deadline.

The panel held a telephone conference call with two of the six small entity representatives who were available on August 13, 1997, during which EPA officials agreed to provide additional information on compliance costs and other impacts on facilities in the transportation equipment-cleaning industry. On August 19, 1997, EPA sent a memorandum to the panel and the small entity representatives providing them with the agreed-upon information. The panel's final report was issued on September 23, 1997, summarizing the small entities' written and oral comments and listing the panel's recommendations. Each panel member signed the cover letter accompanying the final report.

Because the panel's report was not publicly available as of November 1, 1997, we did not describe the panel's recommendations or EPA's reaction to those recommendations in this report.

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