



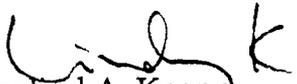
**U.S. Department of
Transportation**

Office of the Secretary
of Transportation

Memorandum

Subject: Small Business Regulatory
Enforcement Fairness Act

Date: December 18, 1996

From: 
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Deputy General Counsel

Reply to Neil Eisner
Attn. of: X64723

To: Secretarial Officers
Heads of Operating Administrations

Subtitles A-D of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) establish a number of new requirements concerning small businesses and other small entities and amend existing requirements in the Regulatory Flexibility Act and the Equal Access to Justice Act. The attached Guidance Manual provides a detailed summary of those requirements applicable to DOT as well as advice on how to implement the requirements. The document was prepared by my office but circulated throughout the Department in draft for comments from your offices; we appreciate the suggestions we received.

In addition to the Guidance Manual, I have also attached to this memorandum a short summary of subtitles A-D of SBREFA.

Subtitle E of SBREFA establishes a new requirement for Congressional review of rules. My office has already provided briefings to senior departmental officials and others on these requirements and distributed other information to help implement them. We have been meeting with other government agencies to discuss a variety of implementation issues that arise under these requirements (e.g., requirements for the submission of guidance material). We have also been meeting with the Government Accounting Office to discuss its needs under these provisions, including the possible need for a government-wide submission form. If appropriate, we will prepare and distribute further guidance on Subtitle E.

It is important that you ensure that not only your rulemaking staff but also your compliance, enforcement, and litigation staffs are aware of these new requirements. You should also note that there are two requirements for future reports to Congress on our implementation of these requirements (a summary of the required reports is contained in Appendix 1 to the Guidance Manual). Based

SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT OF 1996 Subtitles A-D

Compliance Guides

Agencies must prepare and publish one or more guides explaining the actions a small entity is required to take to comply with "each rule or group of related rules for which an agency is required to prepare a final regulatory flexibility analysis" (FRFA) under 5 U.S.C. §604. (§212(a))

Although the substance of the guide is not subject to judicial review, its contents "may be considered as evidence of the reasonableness or appropriateness of any proposed fines, penalties or damages" in any civil or administrative action against a small entity. (§212(c))

Informal Guidance

Agencies are required to answer small entity inquiries "concerning information on, and advice about, compliance with" statutes and regulations within the agency's jurisdiction, "interpreting and applying the law to specific sets of facts supplied by the small entity." This guidance "may be considered as evidence of the reasonableness or appropriateness of any proposed fines, penalties or damages sought against" a small entity in any civil or administrative action. (§213(a))

By March 29, 1997, each agency must establish a program for responding to these inquiries. (§213(b))

By March 29, 1998, each agency must report to the Congress on the scope of the program, the number of small entities using it, and its achievements. (§213(c))

SBA Enforcement Ombudsman

The Administrator of the Small Business Administration (SBA) is required to designate a Small Business and Agriculture Regulatory Enforcement Ombudsman (Ombudsman).

The Ombudsman is required to report annually to Congress and the affected agencies on the enforcement activities of agency personnel, including a rating of the agency's responsiveness to small businesses, "based on substantiated comments received from small business concerns and the" Regional Small Business Regulatory Fairness Boards (the Boards). The Ombudsman must provide agencies an opportunity to comment on draft reports and must include in the report a section with agency comments that are not addressed in revisions to the draft. (§222)

Regional Small Business Regulatory Fairness Boards

The SBA Administrator is required to establish Boards in each SBA regional office to provide the Ombudsman with advice on small business concerns about agency enforcement activity; reports "on substantiated instances" of excessive agency enforcement actions against small business concerns, including their findings or recommendations on agency enforcement policy or practice; and comments on the Ombudsman's annual report. The Boards consist of five members from small business concerns and may hold hearings and collect information, as appropriate. (§222)

Rights of Small Entities in Enforcement Actions

By March 29, 1997, each agency that regulates small entities is required to establish a policy or program "to provide for the reduction, and under appropriate circumstances for the waiver, of civil penalties for violations of a statutory or regulatory requirement by a small entity. Under appropriate circumstances, an agency may consider ability to pay in determining penalty assessments on small entities." (§223(a)) Subject to other statutes, the agency policy or program must have conditions or exclusions. (§223(b))

Agencies are required to report to Congress by March 29, 1998, "on the scope of their program or policy, the number of enforcement actions against small entities that qualified or failed to qualify for the program or policy, and the total amount of penalty reductions and waivers." (§223 (c))

Equal Access to Justice Act Amendments

If a demand by an agency/U.S. "is substantially in excess" of the decision of the adjudicative officer/judgment "and is unreasonable when compared with" the decision/judgment, "under the facts and circumstances of the case," then the adjudicative officer/court must award the fees and other expenses "related to defending against the excessive demand, unless the party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust."

This subtitle also increases the maximum hourly rate for determining the fees from \$75 to \$125. (§231)

Regulatory Flexibility Act (RFA) Amendments

These amendments add some new requirements for FRFAs that are already required for the initial analysis. They also now require that the agency explain what it has done to minimize the burdens for small entities and explain why it chose the alternative it did, as well as explaining why it rejected other alternatives that would have minimized the burdens for small entities; previously, the agency only had to

explain why it had rejected those alternatives. The statute does not require an agency to choose an alternative that is not allowed by the agency's authorizing statute. (§241(b))

The agency must provide the factual basis for any certification that a rule will not have a significant economic impact on a substantial number of small entities rather than just "the reasons" for the certification. (§243)

This subtitle also now permits judicial review of agency compliance with most of the RFA. (§242)

Department of Transportation

Guidance Manual

on the

Small Business Regulatory Enforcement Fairness Act of 1996

Subtitles A-D

Office of the General Counsel
December 1996

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Department of Transportation
Guidance Manual
on the
SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT OF 1996
Subtitles A-D

Introduction

On March 29, 1996, President Clinton signed legislation that included the Small Business Regulatory Enforcement Fairness Act (SBREFA). Appendix 2 to this Guidance Manual contains a copy of SBREFA. Subtitles A-D of SBREFA contain provisions that address a variety of matters affecting small entities. Among other things, Congress intended SBREFA to:

- "encourage the effective participation of small businesses in the Federal regulatory process;"
- "simplify the language of Federal regulations affecting small businesses;"
- "develop more accessible sources of information on regulatory and reporting requirements for small businesses;"
- "create a more cooperative regulatory environment among agencies and small businesses that is less punitive and more solution-oriented; and"
- "make Federal regulators more accountable for their enforcement actions by providing small entities with a meaningful opportunity for redress of excessive enforcement activities." (§203)

This manual is intended to provide guidance on the implementation of these important provisions. The manual is set up to provide a summary of each section of SBREFA and then to provide guidance on the implementation of that section. The last part of the manual provides some general guidance aimed at achieving the objectives of SBREFA and the Regulatory Flexibility Act (RFA). There are also a number of appendices that contain documents that provide additional, detailed information that should be helpful in the implementation of SBREFA and the RFA.

Subtitle A -- Regulatory Compliance Simplification

Compliance Guides

Requirements

This subtitle of SBREFA requires that agencies prepare and publish one or more guides explaining the actions a small entity is required to take to comply with "each rule or group of related rules for which an agency is required to prepare a final regulatory flexibility analysis" (FRFA) under 5 U.S.C. §604. (§212(a)) (5 U.S.C. §§601 et seq. is the RFA; see Appendix 3 for the text of the RFA as amended by SBREFA.)

A FRFA is required unless "the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." (5 U.S.C. §605(b))

A "small entity" is a "small business" (or "small business concern"), "small organization," or "small governmental jurisdiction." (5 U.S.C. § 601 (6)) Each of these terms is further defined in 5 U.S.C. §601(3)-(5). The RFA permits an agency to establish its own definitions; agency definitions can only be established after the statutorily required consultation, an opportunity for public comment, and publication in the *Federal Register*.

The Small Business Administration has issued "Small Business Size Regulations," which can be found at 13 CFR Part 121. See Appendix 5. That agency has also issued a "Table of Size Standards," which is at Appendix 6.

Agencies must write the guides in "sufficiently plain language likely to be understood by affected small entities," and designate them as "small entity compliance guides." (§212(a))

They "may prepare separate guides covering groups or classes of similarly affected small entities." (§212(a))

Agencies also may cooperate with states to develop guides that integrate the requirements of Federal and state regulations. (§215)

Although the substance of the guide is not subject to judicial review, its contents "may be considered as evidence of the reasonableness or appropriateness of any proposed fines, penalties or damages" in any civil or administrative action against a small entity. (§212(c))

Guidance

The Department generally prepares such guidance now, especially for rules that would require a FRFA. For example, for the Department's drug testing rules a tremendous amount of guidance material was prepared and distributed, much of it aimed at small entities. We must remember not only that such guidance documents are now required but also that:

We must designate the guidance documents as "small entity compliance guides."

We must use language that can be easily understood by small entities.

There are no specific format requirements; the manner of presentation would vary with the particular rule and should essentially respond to the need to present the information in a way that will make it easily understood by the small entities that will be using it.

If different groups of small entities may be affected in different ways, we need to consider whether separate guides would be appropriate for each group that is affected differently.

If the guides can not be issued with the final rule, they must be made available sufficiently in advance of the implementation date to help the small entity meet its obligations.

Since we already generally prepare and distribute substantial amounts of guidance material, there are existing avenues for their distribution; we should, however, also check with offices such as our Intergovernmental Affairs office and the Small Business Administration to expand our distribution list as appropriate for a particular rule.

The Department's Intergovernmental Affairs office maintains a database of over 1800 key individuals and constituency groups with their areas of interest specified. That office can provide lists -- or labels, if the requester provides the blank labels -- tailored to specific needs for such things as mailing copies of the Small Entity Compliance Guides. A list of categories that can be used in obtaining names/organizations from the database is at Appendix 8.

There are other sources that can help in the distribution of regulatory compliance information, such as the Small Business Administration's U.S. Business Advisor. See the information contained under "Section 212" in the "Extensions of Remarks" at Appendix 4.

There are enforcement/litigation implications for the statements that we make in the guides.

Note that some of the requirements of SBREFA apply to all small entities and others only to small businesses or small business concerns.

Informal Guidance

Requirements

Agencies are required to answer small entity inquiries "concerning information on, and advice about, compliance with" statutes and regulations within the agency's jurisdiction, "interpreting and applying the law to specific sets of facts supplied by the small entity." This guidance "may be considered as evidence of the reasonableness or appropriateness of any proposed fines, penalties or damages sought against" a small entity in any civil or administrative action. (§213(a))

By March 29, 1997, each agency must establish a program for responding to these inquiries. (§213(b))

By March 29, 1998, each agency must report to the Congress on the scope of the program, the number of small entities using it, and its achievements. (§213(c))

Guidance

The Department generally already provides such guidance. However, to ensure that we comply with the statute:

We must have a formal program to provide information, advice, and interpretations. This may simply involve formalizing an existing informal program. We recommend adding sections or a subpart to your existing procedural rules (e.g., how to file a petition) explaining how people can obtain information, advice, or interpretations. We also recommend publishing the elements of the program in a clear, simple guide that can be provided to small entities.

We also recommend that, to the extent the various regulatory elements of the Department have not done so, they should establish an Internet "home page" or other device to ease the process for those with computers to access our information, advice, and interpretations. We should also allow questions or requests to be made electronically.

To the extent that resources permit, we also encourage greater use of toll-free (800-number), long-distance telephone numbers for use by those needing information or help.

To the extent that guidance is provided orally (or to the extent that a written record is not retained), we should consider the need to make a record of the communication in the event that there is a disagreement about what was said. What needs to be recorded and retained is a judgment call; providing information that is clear on the face of the rule need not be recorded (e.g., a compliance date), but an application of the rule to a specific set of facts that is not clearly set forth in the rule may warrant recording. Circulating the written record to others who provide guidance on the same provision may also be valuable in ensuring a consistent approach.

We must have a process for gathering information on (1) how many small entities are using the program and (2) the program's achievements. This means that individuals providing informal guidance under this program will have to keep records for use in compiling the information for the report to Congress. The General Counsel's Office will work with the various regulatory offices to develop a standard form for a Department-wide response to this reporting requirement. This form can provide the basis for any form needed by the individuals dealing with the public.

Subtitle B -- Regulatory Enforcement Reforms

SBA Enforcement Ombudsman

Requirements

The Administrator of the Small Business Administration (SBA) is required to designate a Small Business and Agriculture Regulatory Enforcement Ombudsman (Ombudsman). Agencies are required to "assist the Ombudsman and take actions as necessary to ensure compliance with the requirements of this section." (This subtitle adds a new section 30 to the Small Business Act. (15 U.S.C. §631 et seq.))

The Ombudsman is required to work with agencies to ensure that small business concerns that are subject to enforcement related communication or contact by agency personnel are provided with a means to comment on that activity.

A "small business concern" is an enterprise that is independently owned and operated and which is not dominant in its field of operation. (15 U.S.C. § 632)

The Ombudsman receives comments from small business concerns "regarding actions by agency employees conducting compliance or enforcement activities"; where appropriate, the Ombudsman refers these comments to the agency's Inspector General.

The identity of the agency employee and the small business concern are kept confidential.

The Ombudsman is required to report annually to Congress and the affected agencies on the enforcement activities of agency personnel, including a rating of the agency's responsiveness to small businesses, "based on substantiated comments received from small business concerns and the" Regional Small Business Regulatory Fairness Boards (discussed below). The Ombudsman must provide agencies an opportunity to comment on draft reports and must include in the report a section with agency comments that are not addressed in revisions to the draft. (§222)

Guidance

Our responsibilities under this subtitle are essentially to assist the Ombudsman as needed. However:

We must continue and increase our efforts to work effectively with small business concerns to ensure that we are dealing with them fairly and appropriately.

We must ensure that our enforcement and compliance personnel are aware of the problems and concerns of small businesses and take them into account in dealing with such entities.

We must remember that our primary responsibility is to achieve compliance with our regulations, not to ensure a certain number of inspections or penalties.

As long as we make special efforts to help our regulated entities comply with, rather than find violations of, our regulations, we should not have difficulties under this subtitle. In this regard, special note should be made of section 223 of SBREFA, which adds requirements concerning the rights of small entities in enforcement actions (discussed below).

Regional Small Business Regulatory Fairness Boards

Requirements

The SBA Administrator is required to establish Regional Small Business Regulatory Fairness Boards (Boards) in each SBA regional office to provide the Ombudsman with advice on small business concerns about agency enforcement activity; reports "on substantiated instances" of excessive agency enforcement actions against small business concerns, including their findings or recommendations on agency enforcement policy or practice; and comments on the Ombudsman's annual report.

The Boards consist of five members from small business concerns and may hold hearings and collect information, as appropriate. (§222)

Guidance

No special action is required of DOT agencies. Note that there is nothing in the statute that exempts the Boards from the Federal Advisory Committee Act.

Rights of Small Entities in Enforcement Actions

Requirements

By March 29, 1997, each agency that regulates small entities is required to establish a policy or program "to provide for the reduction, and under appropriate circumstances for the waiver, of civil penalties for violations of a statutory or regulatory requirement by a small entity. Under appropriate circumstances, an agency may consider ability to pay in determining penalty assessments on small entities." (§223(a))

Subject to other statutes, the agency policy or program must have conditions or exclusions; they may include, but are not limited to:

- (1) requiring the small entity to correct the violation within a reasonable correction period;
- (2) limiting the applicability to violations discovered through participation by the small entity in a compliance assistance or audit program operated or supported by the agency or a state;
- (3) excluding small entities that have been subject to multiple enforcement actions by the agency;
- (4) excluding violations involving willful or criminal conduct;
- (5) excluding violations that pose serious health, safety or environmental threats; and
- (6) requiring a good faith effort to comply with the law. (§223(b))

Agencies are required to report to Congress by March 29, 1998, "on the scope of their program or policy, the number of enforcement actions against small entities that qualified or failed to qualify for the program or policy, and the total amount of penalty reductions and waivers." (§223 (c))

Guidance

Based on existing practice and particularly in response to President Clinton's Regulatory Reinvention Initiative, the Department should generally be in compliance with this mandate.

To the extent it has not already done so, we recommend that each agency ensure that its program or policy is "established" through a written document setting forth the details of the program and how the agency will ensure that the statutory mandate is met, including providing for conditions or exclusions.

The statute provides us with the flexibility to conform the program to our specific statutory missions, allowing us to respond to special problems or circumstances in establishing the conditions or exclusions.

We also recommend that each agency ensure that it has or creates a recordkeeping system to gather the data that will be necessary for the report to Congress. The General Counsel's Office will work with the various elements of the Department with civil penalty enforcement authority to develop a standard format for the Departmental response to this reporting requirement.

Subtitle C -- Equal Access to Justice Act Amendments

Requirements

This subtitle amends the Equal Access to Justice Act with respect to civil actions and adversary adjudications commenced on or after March 29, 1996.

If a demand by an agency/U.S. "is substantially in excess" of the decision of the adjudicative officer/judgment "and is unreasonable when compared with" the decision/judgment, "under the facts and circumstances of the case," then the adjudicative officer/court must award the fees and other expenses "related to defending against the excessive demand, unless the party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust." A "party," for the purposes of this requirement, is a "small entity" as defined in 5 U.S.C. §601.

This subtitle also increases the maximum hourly rate for determining the fees from \$75 to \$125. (§231)

Guidance

Although we are not required to take any specific implementing action under these provisions, we must ensure that enforcement and litigation personnel are aware of these changes, so that they may take the necessary care to ensure that penalties assessed are reasonable.

Subtitle D -- Regulatory Flexibility Act Amendments

Requirements

The Regulatory Flexibility Act (RFA) (5 U.S.C. §§ 601-612), enacted in 1980, requires that agencies consider the impact of their rulemakings on small entities.

Regulatory flexibility analyses are required for notices of proposed rulemaking (NPRMs) (§603) and for final rules for which an NPRM was required (§604), unless the head of the agency certifies that the rule will not "have a significant economic impact on a substantial number of small entities" (§605(b)). The analysis must consider alternatives that would minimize the impact on small entities.

The RFA also requires agencies to prepare a semiannual agenda of rulemakings that would require an analysis (which is combined with DOT's semiannual Regulatory Agenda). (§602)

Finally, it required agencies to review their existing regulations by 1991 and requires any rules issued after January 1, 1981, to be reviewed within 10 years of their publication, if those rules have or will have a significant economic impact on a substantial number of small entities; the reviews are to determine whether the rules should be retained, amended, or rescinded to minimize that impact. (§610)

The provisions of the 1980 RFA were not subject to judicial review, although the analyses were to "constitute part of the whole record of agency action" in connection with any judicial review. (§611)

This subtitle amends the final regulatory flexibility analysis (FRFA) and judicial review provisions of the RFA. (See Appendix 3 for a "cut-and-paste" showing the RFA as amended by SBREFA.)

The 1980 RFA listed three things that a FRFA must contain; two of those have been modified and two new ones have been added. The revised requirements for a FRFA follow, with the changes noted by underlining:

- (1) a succinct statement of the need for, and objectives of, the rule;
- (2) a summary of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;
- (3) a description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available;
- (4) a description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and
- (5) a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected. (§241(b))

This subtitle also requires that the agency publish the FRFA or a summary of it in the Federal Register rather than just a statement of how the public could obtain copies, as was permitted under the 1980 RFA. In addition, the agency must provide "the factual basis for such certification," rather than just "the reasons" for the certification. (§243)

This subtitle also now permits judicial review of agency compliance with most of the RFA.

Specifically, the amendments provide that "a small entity that is adversely affected or aggrieved by final agency action is entitled to judicial review of agency compliance with the requirements of sections 601 [Definitions], 604 [Final regulatory flexibility analysis], 605(b) [Certification of no significant impact], 608(b) [Waiver or delay of §604 requirements] and 610 [Periodic review of rules]." Agency compliance with sections 607 [Preparation of analyses] and 609(a) [Procedures for gathering comments] is also "judicially reviewable in connection with judicial review of section 604."

Unless required by statute to initiate litigation sooner, small entities are permitted to seek review up to one year after final agency action. In granting relief, the court's corrective action can include remanding the rule or deferring enforcement against small entities. (§242)

Other wording changes were made to the 1980 RFA. The statute should be reviewed for the details.

Guidance

Items (3) and (4) are new requirements for FRFAs but are essentially the same as existing requirements for the initial analysis that is required for NPRMs; they should, therefore, be relatively easy to comply with.

Item (5) makes a number of modifications to the third element in the 1980 RFA; the difference is that, under the 1980 RFA, we had to explain why we rejected alternatives that might have minimized burdens for small entities; now we have to explain what we have done to minimize the burdens and explain why we chose the alternative we did, as well as continuing to explain why we rejected the others.

The statute does not require an agency to choose an alternative that is not allowed by the agency's authorizing statute.

Generally, the Department's analyses do contain these types of discussions; we must now remember that they are **required**.

Similarly, the Department's rulemaking documents generally contain a summary of the analysis (and sometimes the analysis itself), but we must now remember that this is **required**.

Although the new judicial review provisions do not require any specific implementation on our part, we need to ensure that the personnel working on these matters are aware of this change.

Also, it appears that the review provisions apply to final rules even if the NPRM was issued before the effective date of the statute.

It is especially important that those making decisions not to do a regulatory flexibility analysis because there is no significant impact on a substantial number of small entities note that that determination can be challenged; if the court disagrees with the determination, it can take appropriate action, including remanding the rule or deferring enforcement against small entities. As a result of the change, we must now ensure that our determination can withstand judicial scrutiny.

We do not necessarily believe that Departmental staff will make different decisions because of judicial review, but it may ensure more precise compliance with the details of the statute.

We must also note the new requirement that a certification that a rulemaking has no significant impact on a substantial number of small entities must be accompanied in the *Federal Register* by the factual basis for the certification rather than just the reasons. This would appear to require sufficient detail to permit a reviewing court to determine that the certification was not arbitrary and capricious.

When we are doing a review of an existing rule and that review will include action that meets the objectives of section 610, we must clearly state in the rulemaking documents and in the semiannual Regulatory Agenda that we are conducting the review pursuant to the RFA. This will not only clearly respond to the section 610 requirement that each agency publish an annual list of rules to be reviewed; it will also better enable us to advise the small entity community of our actions and to respond to requests concerning required reviews.

General Guidance

Although SBREFA imposes some specific new requirements, the general thrust of that statute and the RFA is to do more to ensure that agencies consider the impact of their actions on small entities. In that regard, we must be especially careful not only before we issue a rule but also in the implementation and the review of our existing rules. In that regard, some general guidance -- either a reiteration or an expansion of past DOT guidance in this area -- is appropriate.

As a result of a Small Business Administration and Office of Management and Budget Small Business Forum on Regulatory Reform, in which the Department of Transportation was an active participant, the Department found that it was doing a very good job in responding to the concerns of small business. We did note, however, that we had to continue our efforts in this regard and find areas where we can do even more. The following are some suggestions that we identified then on how we can make our rules (and their enforcement) even more responsive to the concerns of small businesses. Many of these approaches were then and are now already being used in some parts of the Department.

1. Make more use of advance notices of proposed rulemaking, requests for information, public meetings, advisory committees, and routine meetings with industry to gather information before making specific rulemaking proposals.
2. Hold more evening and weekend hearings or meetings.

3. Use teleconferencing more frequently to make public hearings and meetings more accessible.

4. Use question formats more frequently to obtain needed information; use question and answer formats more frequently to provide information.

5. Make Departmental employees more readily available to answer questions about rulemaking matters; e.g. have employees available an hour before the start of a hearing to answer questions.

6. Make more use of electronic communications and toll-free hotlines to make information available to the public or provide responses to inquiries.

7. Increase efforts to ensure that staff is fully aware of the special problems faced by small businesses.

8. Reexamine our communications strategies for advising small businesses of important action or information, including our list of organizations and individuals to be contacted.

9. Consider additional use of briefings, seminars, and workshops for stakeholders, trade associations, etc. after issuing significant final rules.

10. Continue to ensure that all important notices and information directives affecting small businesses are published in the *Federal Register*.

11. Increase efforts to make the public aware of the information that we make available to them (e.g., guidance material and training courses).

12. Improve inspectors' understanding about the small businesses they are inspecting and the particular problems small businesses face.

13. When appropriate, consider use of grace periods and phase-ins, or the use of tiered regulations, to ease the burden imposed on small businesses.

14. Increase our efforts to lessen paperwork burdens by considering such options as short forms, surveys rather than reports from an entire industry, and the use of electronic filing.

15. When appropriate, increase efforts to develop non-punitive methods of ensuring regulatory compliance.

16. Provide the regulated community with a list of the kinds of violations and common errors encountered by the agency; e.g., DOT publishes an annual report on hazardous materials civil penalty cases, which provides information on the types of

violations found and the civil penalties assessed; we also issue letters to industries advising of typical violations that are observed during hazardous materials inspections and publish penalty schedules and guidelines.

17. Recognize that, despite our best efforts, our actions in response to small business concerns are not always fully appreciated; increase your efforts to change this perception.

The Department also has a very effective program for reviewing existing regulations, but some reminders are worth noting.

1. The RFA requires us to consider "the continued need for the rule." Changing circumstances, new rules, changes to or elimination of statutory authority, may make existing rules unnecessary or obsolete.

2. The RFA also requires that we consider "the nature of complaints or comments received concerning the rule from the public." We have inspectors working with our regulated entities on a daily basis, we have investigators examining accidents or statistics about them, and we have attorneys handling enforcement cases or litigation involving violations of our regulations. They may find that rules that we thought were clear are confusing to many. A rule we thought may solve a problem may not be achieving its objective. A rule that we thought would be easy to implement may be causing problems in the real world. Or a court may decide that a rule means something other than we intended. We need to ensure that our day-to-day experience will result in necessary changes to existing rules. We also receive complaints, suggestions, and petitions concerning our rules. In addition to the legitimacy of the points that they make, we need to consider whether the sheer number we may receive concerning a particular rule warrants a change. The same is true for requests for interpretation. If too many people are asking what a rule means, the rule may need to be revised. If large numbers of people request an exemption -- or if one exemption petition provides a legitimate basis for an exemption but that basis would apply to a large number of people -- the agency needs to consider whether the rule needs revision.

3. The RFA's third requirement is that we consider "the complexity of the rule." We must remember the people who are covered by the rule and ensure that they we write rules that they can understand.

4. The RFA also requires us to consider "the extent to which the rule overlaps, duplicates or conflicts with other Federal rules, and, to the extent feasible, with State and local government rules." Despite our best efforts to avoid this, we may not always be aware of the problem. For example, we may not know that another agency has issued an interpretation that causes their rule to now be in conflict with ours. We need to ensure that we keep all avenues of communication open and encourage people to let us know of overlaps, duplication, or conflicts so that, to the extent possible, we can fix them. If it can not be fixed, we must explain why. We must also make every effort to

explain why a perceived overlap, duplication, of conflict does not exist, if that is the case.

5. Finally, the RFA requires that we consider "the length of time since the rule has been evaluated to the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule." After some period of time, we may learn that the expected costs or benefits have not materialized. We may not have imposed certain requirements or selected certain alternatives because the technology to implement them did not exist. If we used a design standard, industry may be blocked from using new technology. Economic conditions that may have precluded a certain approach or favored another may have changed. Or new information may become available that, if available earlier, would have resulted in a different decision; for example, a substance thought to cause cancer may no longer be thought to do so. Finally, we may simply want to try new or different approaches to solving a problem. It is not only important that we review our rules in light of these various possibilities, but some of them also stress the importance of striving for well-crafted performance standards.

TABLE OF APPENDICES

1. Summary of Congressional Reports under SBREFA
2. SBREFA.
3. A "cut-and-paste" prepared by the Small Business Administration's Office of the Chief Counsel for Advocacy (SBA) showing the Regulatory Flexibility Act as amended by SBREFA.
4. "Extensions of Remarks" from the April 19, 1996, *Congressional Record* that provide background on SBREFA.
5. SBA's January 31, 1996, rule on small business size standards.
6. SBA's ~~March 1, 1996~~, "Table of Size Standards." to 09/30/2000
7. An SBA document on "Data for Regulatory Flexibility Analysis."
8. A list of categories that can be used in obtaining names/organizations from the Department's Intergovernmental Affairs database.