

FEDERAL AND STATE LEGISLATION ADDRESSING THE
BURDEN OF REGULATIONS AFFECTING SMALL BUSINESS

JOINT SUBCOMMITTEE STUDYING MANUFACTURING NEEDS AND THE FUTURE
OF MANUFACTURING IN VIRGINIA

PURSUANT TO SJR 64

Wednesday, November 17, 2004

I. FEDERAL LAWS

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

The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) amended and expanded the RFA by giving small businesses:

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

The SBREFA amends the RFA to allow judicial review of agencies' compliance with RFA, which lacked any enforcement mechanism. The following issues are subject to judicial review under the SBREFA:

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

Other provisions of the RFA, as amended by the SBREFA:

- Update the requirements of a final regulatory flexibility analysis, including a description of the steps an agency has taken to minimize the significant economic impact on small businesses.
- Require that the EPA and OSHA receive input from affected small business through the SBA's Office of Advocacy before proposed rules are published. When an EPA or OSHA proposal is expected to have a significant impact on a substantial number of small

entities, the agency must convene a panel of employees from the agency, the Office of Advocacy, and the Office of Management and Budget to review a copy of the draft proposed rule and related agency analyses under the Regulatory Flexibility Act. The panel also will collect advice from small business representatives and submit a report to the agency within 60 days of convening of the panel. The agency will then review the report, make any appropriate revisions to the rule, and publish the proposed rule with the panel report as part of the record.

- Provide for congressional review of Federal agencies' regulations. Before any rule goes into effect, agencies are required to forward the rule to Congress for review. Major rules--those with a \$100 million impact on the economy or a major impact on an industry, government or consumers, or those affecting competition, productivity or international trade--cannot go into effect until congressional review is complete. Congressional review is subject to a presidential veto. Congress may take up to 60 session days for review and use a variety of mechanisms to delay implementation.
- Require agencies to publish compliance guides for all rules with a significant small business impact. These guides must explain in plain language how the firms can comply with the regulations. If a small business is cited for a violation of a regulation, the court review may include the content of the small business compliance guide in assessing the reasonableness of the proposed penalty.
- Require agencies to establish a system for addressing compliance inquiries from small business. Any guidance provided by an agency will be considered as evidence of the reasonableness of proposed penalties, fines or damages assessed against a small entity.
- Require the Small Business Development Centers (SBDC) be used as a point of distribution for compliance assistance.
- Establish a complaint process whereby small businesses may register complaints about enforcement actions with the newly-appointed Small Business and Agriculture Regulatory Enforcement Ombudsman or a Small Business Regulatory Fairness Board. Regional Small Business Regulatory Fairness Boards were established in each of SBA's ten regions to advise the Ombudsman on matters of concern to small business relating to the enforcement activities of agencies.
- Require each agency to establish a policy to provide for the reduction, and under appropriate circumstances, for the waiver of civil penalties for violations of statutory or regulatory requirements by a small business.
- Expand the ability of small businesses in litigation with the government to recover attorney fees under the 1980 Equal Access to Justice Act. In administrative and judicial proceedings, if the government's demand is unreasonable when compared to the judgment or decision, then the small business is awarded attorney fees and other expenses related to defending against the action. Allowable attorney fees were increased from \$75 under the current law to \$125 per hour.

II. STATE LAWS

In December 2002, the Small Business Administration's Office of Advocacy released model "regulatory flexibility" for adoption by states. The legislation is intended to strengthen regulatory flexibility for small business in the states. Colorado, North Dakota, South Dakota, Kentucky, Wisconsin, and Rhode Island have enacted the model legislation. In the 2004 legislative session, small business regulatory flexibility legislation was introduced in 13 states. In addition, the Governors of Massachusetts, Missouri, and West Virginia have signed Executive Orders that are intended to give small businesses a voice in their state's regulatory process.

The model state legislation contains five major elements:

- (1) a small business definition that includes most small businesses (less than 500 employees or gross annual sales of less than \$6 million),
- (2) a requirement that state agencies perform an economic impact analysis before they regulate,
- (3) a requirement that state agencies consider less burdensome alternatives that still meet regulatory goals,
- (4) judicial review may be sought by any small business, and
- (5) a provision for state government to periodically review all its regulations.

The intent of the model legislation is to compel regulatory agencies to consider small businesses when regulations are developed and particularly consider the disproportionate impact those regulations might have. The SBA's Office of Advocacy acknowledges that many states have some form of regulatory flexibility laws, but many do not contain "all of the five critical elements."

III. ATTACHMENTS

- Model state regulatory flexibility legislation
- Map -- Status of State Regulatory Flexibility Provisions
- West Virginia's Executive Order 20-03
- Chart of Current State Laws (as of June 2003)