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Australian Government Regulation Taskforce Issues Paper
VACC Submission November 2005

Small Business Compliance
'Small Business Voices Rationalise Public Policy' Anon.

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VACC Submission

Small Business Compliance

Introduction

21st century economies depend on regulation for effective governance, covering areas of social, economic, environmental, as well as health and safety compliance. However, over-regulation has become an issue, with businesses in many economies becoming overwhelmed with too much regulation. Regulatory growth is partly created by economic prosperity and by its nature, regulation tends to flourish rather than be rationalised.¹

For most Western economies, it is acknowledged that small firms bear a higher burden of regulatory costs than large businesses while having limited resources to cope with these costs.² CPA Australia estimate compliance costs facing small business are at least 35% higher than for larger businesses.³ Many small businesses report a lack of understating of regulatory requirements that is compounded by the frequency of regulatory changes and high cost of compliance. Overseas, the US Office of Management and Budget conceded in a 2005 accounting statement that the cost of federal regulations could 'easily be a factor of ten or larger than the sum of the costs and benefits'⁴.

In Australia, regulation costs are estimated to be around \$86.0 billion per year or 10.2 per cent of GDP.⁵ The benefits of Australia's current economic growth are undermined by regulation costs. The consequences of badly managed regulatory compliance from a small business perspective means reduced capacity for new employment growth, decreasing competitiveness, and increasing costs for products and services.

With around 60 Australian Government regulators, National standard setting bodies, and a further 40 Ministerial Councils making regulations, the volume of regulation is reaching indefensible levels. In Victoria during 2004, 69 State based regulators managed around 26,000 pages of regulation.⁶

Concerns about the adverse effects of regulatory compliance are reflected in VACC's September Quarter Automotive Industry Economic Survey. 50% of respondents are concerned about the impact of taxes and charges on business performance while 34% believe Government regulation has a negative effect on business growth.⁷

¹ Banks, G 2005 'Regulation –Making in Australia: Is It Broke? How do We Fix It? Public Lecture Series the Australian Centre of Regulatory Economics and the Faculty of Economics and Commerce Canberra

² Chittenden, F. Kauser, S. Poutziouris, P. 2003 ' Tax Regulation and Small Business in the USA, UK, Australia and New Zealand' International Small Business Journal V2 Issue 1 p 93

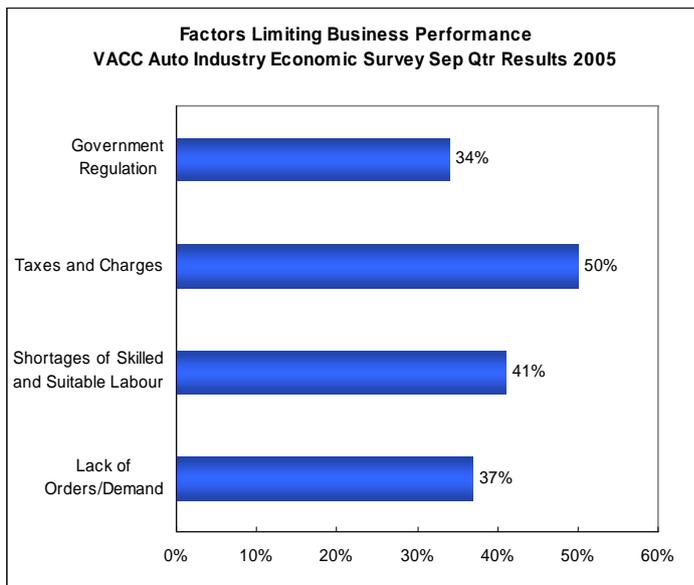
³ Priestley, M. Nicholson, J. 2004 'Indirect Tax Legislation Amendment (Small Business Measures) Bill 2004' Parliamentary Library Information and Research Services.

⁴ Crain, W.M. 2005 'The Impact of Regulatory Costs on Small Firms' SBA Office of Advocacy

⁵ ACCI 2005 'Regulation costs Australia \$86 Billion Annually' Media release.

⁶ Productivity Commission 2005 'Regulation and Its review 2004-05' Annual Report Series

⁷ VACC 2005 AIES Survey September Quarter 2005



Regulatory costs for small business affects⁸:

- Overheads and net margin. Excessive compliance reduces profit and retained earnings
- As compliance costs tend to be fixed e.g. administrative compliance costs, these costs can affect profit when sales drop
- Entrepreneurial attention. Business managers can focus too much on regulatory paperwork instead of managing a business

In the following submission, VACC outlines key recommendations that allow the cost & benefits of regulatory compliance to be made transparent to both small business and regulatory bodies administering regulatory policy.

⁸ OECD Observer 2001 'Business Views on Red Tape: Administrative and Regulatory Burdens on Small and Medium –sized Enterprises'

VACC

Since 1918, the Victorian Automobile Chamber of Commerce (VACC) has represented the interests of small business in the automotive industry. Currently, its 5,000 members employ around 50,000 Victorians and provide key services in the repair, services and retail sectors of the motor industry. **VACC** representation includes the following industry sectors:

- Automotive Dismantlers & Recyclers
- Crash & Mechanical Repairers
- New Car Dealers
- Engine Reconditioners
- Radiator / Air conditioning Specialists
- Auto Electricians
- Motorcycle Dealers and Repairers
- Used Car/Rental vehicle/ Commercial Vehicle /Tyre/ Farm Machinery Dealers
- Service Station & Convenience Store Operators
- Automatic Transmission Specialists
- Brake and Vehicle Under body Repairers
- Parts Retailers
- LPG installers
- Car Detailers
- Tow Truck Operators
- Commercial Vehicle Body Builders
- Car Washes
- Steering and Suspension Specialists

VACC General Recommendations

Regulation is necessary as it sets standards for corporate governance and upholds social, economic and environmental values.

But despite the Australian Government's competitive international ranking for its regulatory systems, and mechanisms such as Regulatory Impact Statements (RIS) which attempt to apply regulation effectively, small business continues to endure regulations associated with poor decision making.

Effective regulation is transparent, accessible and able to be understood by a range of stakeholders from diverse socio economic backgrounds. It is consistent and conforms to reliable, coherent standards in its application. VACC considers good regulation as a balance of self regulation and government regulation.

In achieving that balance, VACC recommends the following:

- **Further Consultation**

One of the prime causes of poor regulation is *inadequate consultation with relevant stakeholders* during the regulatory making process. Often regulators conceive regulation by focusing on the needs of 'the problem' without consideration of the flow on effects to small business.

'To be 'good', regulation must not only bring net benefits to society, it must also be the most effective way of addressing identified problems and impose the least possible burden on those regulated and on the broader community' - Maxwell Report⁹.

⁹ Maxwell,C. 2004'Occupational Health and Safety Act Review' State of Victoria
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- **Sufficient Consultation Times**

Time frames for consultation require review as current time frames do not leave stake holders sufficient time to consider issues adequately.

- **Independent Small Business Advocate**

While various government agencies support the needs of small business, their respective efficiencies are hindered by inadequate resources. And though some have suggested the creation of a Business Regulation Advisory Council may improve the consultation process, it does not replace direct contact between regulators and stakeholders and may remove resources that are better dedicated to other regulatory areas¹⁰. Appointing an *independent representative* within Government by applying a Small Business Advocate model (based on the US model) would ensure greater scrutiny and accountability. Such an advocate advances the interests of small business before Government and is able to offer impartial evidence to Government committees. This also allows small business to challenge the efficacy of existing regulations directly. Other organisations such as CPA Australia, Fair Trading Coalition and the Australian Industry Group also support the appointment of a Small Business Advocate. VACC recommends the appointment of a National Small Business Advocate.

- **Improved Communication Strategies**

In gathering and facilitating the views of small business, more *effective communications strategies* need to be introduced (*refer to attached SBA document ' The Impact of the Regulatory Flexibility Act'*) to engage small business stakeholders and regulators throughout the regulatory process. Communicating strategies and information about compliance issues must also be accessible to all stakeholders as some small business do not have ready access to IT technologies or the level of internet connectivity to facilitate easy downloading of information i.e. dial up connected businesses. So while measures such as the Business Entry Point (a website that advises small business on compliance) offers information on compliance issues, ease of access to such information needs further consideration and review.

- **Compliance Clarity**

The process of compliance in regulation is not clear and is exacerbated by the frequency of regulatory change and *lack of stakeholder knowledge in compliance conformance* procedures. While the Victorian Government has released the Victorian Guide to Regulation which establishes a consistent framework across Government regarding regulation development, communicating a guide for stakeholders that outlines small business obligations would improve existing compliance levels from small business. Also, regulators need to be aware that legalistic language can inhibit stakeholder ability to comprehend regulatory compliance issues.

¹⁰ Banks, G 2005 'Regulation –Making in Australia: Is It Broke? How do We Fix It? Public Lecture Series the Australian Centre of Regulatory Economics and the Faculty of Economics and Commerce Canberra

- **Stakeholder Guidance**

While it is recognised that in Victoria, the Victorian Competition and Efficiency Commission (VCEC) has developed training workshops for regulatory officers to develop best practice regulation, training needs to increase *stakeholder focus* to provide appropriate guidance. ASIC in particular, has been identified by small business as offering unclear or little guidance in applying regulatory law. As penalties for non compliance can be high, stakeholder comprehension of regulatory obligations is crucial.

- **Sunset Clause Listings**

The VCEC's new *sunset clause listings* are commendable as they identify regulations with sunset clauses for stakeholders, thereby allowing legislation to be reviewed automatically and its progress monitored. Such reviews can justify regulations or call for its removal based on stakeholder feedback. The sunset clause listings also increase Government accountability and stakeholder understanding of regulation.

- **Regulation Review**

The Office of Regulation Review (ORR) could engage in *ongoing reviews of all regulations* in partnership with a Small Business Advocate using the cost benefit model (The model is identified as a fundamental component in the RIS process). Furthermore, the need for continuing regulation review is advocated in the OECD's 2005 Guiding Principles for Regulatory Quality and Performance

- **Reducing Regulatory Inconsistencies**

Employ regulation that has a flow on effect to other laws to reduce regulation levels. For example, effective planning laws can have a direct impact on environmental laws without creating additional ones. Also, problems can occur when compliance law conflicts or has unintended consequences with another area of law. For instance, a service station attendant may violate a safety product handling policy by offering service to a disabled customer by complying with a disability regulation that advocates the right for service for all members of the general community.

- **Risk Balance In Regulatory Policy**

The level of regulatory law needs to be proportional to the level of risk that is being regulated. i.e. If the issue being regulated is a minor one, it does not require a level of regulatory activity that interrupts business activities. The benefit of regulation must outweigh the cost of compliance. A self regulatory mechanism may be sufficient using current models such as the Standard Cost model being developed from Dutch, UK and European Union initiatives and may set a suitable bench mark for self regulation by small business¹¹ .

¹¹ Banks, G 2005 'Regulation –Making in Australia: Is It Broke? How do We Fix It? Public Lecture Series the Australian Centre of Regulatory Economics and the Faculty of Economics and Commerce Canberra
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- **Consistency In local Government Regulations.**

At times regulations can vary widely from council to council, causing duplication of effort and frustration for business owners. A central regulatory register that outlines all levels of regulatory compliance may assist in reducing duplication for regulators and small business

- **Provide Greater Harmonisation between State and Territory regulations**

Reducing overlapping or conflicting regulation will ensure compliance obligations are met without undue cost to small business and Government. For example, some states recognise prior learning for apprenticeships while other jurisdictions do not. Stakeholder consultation is the key to greater harmonisation between State and Territory regulations. The OECD, amongst others, acknowledges the contribution of harmonisation within regulatory policy.¹²

- **Small Business Compliance Options.**

This can include exemptions/voluntary registrations, compensation for compliance when public sector administrative responsibilities are transferred to small business. Compliance mechanisms and incentives to comply can also be introduced

- **Regulatory Budgets**

Introduce regulatory and legislative budgets for all government departments. For example, in the UK, a small business Compliance Penalty Scheme effectively induces Government that imposes regulatory costs on small business to bear the cost of imposing those regulations¹³

VACC Specific Recommendations

In addition, VACC recommends the following strategies and suggestions for review:

For Government Agencies

- Establishment of a National Small Business Advocate
While the Small Business Commissioner in Victoria enhances small business representation, the commissioner's duties focus mostly on dispute resolution. An advocate who is a direct and central contact for small business can improve standards of public consultation, offer advice/models to reduce regulatory impact on small business and develop threshold standards that respond to small business needs whilst meeting regulatory obligations.
- Creation of a consumer division within the ACCC dedicated to small business owners with powers to review Regulatory impact on small business

¹² OECD2005 'Guiding Principles for Regulatory Quality and Performance' www.oecd.org

¹³ Chittenden, F. Kauser, S. Poutziouris, P. 2003 'Tax Regulation and Small Business in the USA, UK, Australia and New Zealand' International Small Business Journal V2 Issue 1 p 93

Employment Regulation

- **OHS training and New Work Choice proposals.** Confusion persists over relevant requirements and the burden of record keeping in this area is stressful for many small business owners.
- **Employee contracts.** These contracts need to clarify employer/employee definitions

Financial Regulation

- While some FBT exemptions have been extended, there should be no FBT for micro businesses (i.e. businesses that employ less than 5 employees)
- Higher thresholds for FTB compliance needs to be set e.g. gifts for employees under \$100 should not be charged as a FBT expense
- Apply a consistent approach in FSR (Financial Services Regulation)

TAX Regulation

- Taxation thresholds require review. Higher thresholds can help discourage unnecessary lodgement.
- BAS statements require extended lodgement times and simplification. Some businesses believe the original version of the BAS is easier to understand. Furthermore, the terminology of the BAS statement needs to be easily understood and provisions for self-correction require investigation.
- Regulations regarding hold back payments on new vehicles are not clear for many operators in the automotive industry.

In VACC's view, the consideration and implementation of the above recommendations will help to reduce the ongoing uncertainty regarding the compliance process and associated costs for both Government and small business owners. These recommendations offer strategic and flexible regulatory resources that consolidate existing regulatory frameworks to preserve Victoria's prosperity and future economic growth.

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THE IMPACT OF THE REGULATORY FLEXIBILITY ACT(30)

"Information Rationalizes Public Policy" – Anon.

Introduction

In 1980, Congress enacted the Regulatory Flexibility Act (RFA) with a mandate that federal regulatory agencies analyze the impact of their regulations on small entities and consider alternatives that would be equally effective in achieving public policy goals without unduly burdening small entities. In passing the law, Congress made several findings that are consistent with other congressional mandates regarding the preservation of competition. They are:

1. when adopting regulations to protect the health, safety and economic welfare of the nation, Federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public
2. laws and regulations designed for application to large scale entities have been applied uniformly to small businesses... even though the problems... may not have been caused by those smaller entities
3. uniform Federal regulatory and reporting requirements have in numerous instances imposed unnecessary and disproportionately burdensome demands... upon small businesses...
4. the failure to recognize differences in the scale and resources of regulated entities has in numerous instances adversely affected competition in the marketplace, discouraged innovation and restricted improvements in productivity
5. unnecessary regulations create entry barriers... and discourage... entrepreneurs from introducing beneficial products and processes
6. the practice of treating all regulated businesses... as equivalent may lead to inefficient use of regulatory agency resources, enforcement problems, and... actions inconsistent with the legislative intent of... legislation
7. alternative regulatory approaches which do not conflict with the stated objectives of applicable statutes may be available which minimize the significant economic impact of rules on small businesses...
- 8 the process by which Federal regulations are developed and adopted should be reformed to require agencies to solicit the ideas and comments of small businesses... to examine the impact of proposed and existing rules on such entities and to review the continued need for existing rules [\(31\)](#)

And to ensure that the intent of Congress was clear, it stated:

It is the purpose of this act to establish as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives... of applicable statutes, to fit regulatory and informational requirements to the scale of businesses... To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration. [\(32\)](#)

In 1996, Congress enacted the Small Business Regulatory Enforcement Fairness Act (SBREFA) [\(33\)](#) which amended the RFA in several significant ways. First, it gave the courts jurisdiction to review agency compliance with the RFA, thus providing for the first time an enforcement venue to ensure agency compliance with the law. Second, it mandated that the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA) convene *Small Business Advocacy Review Panels* [\(34\)](#) to elicit information from small entities on regulations expected to have a significant impact on them and to do so *before* the

regulations are published for public comment. This formalized for these two agencies a process for involving small entities early in the agencies' deliberations on the small business impacts of regulations and to force consideration of equally effective alternatives. Third, SBREFA reaffirmed the authority for the Chief Counsel for Advocacy to file *amicus curiae* (friend of the court) briefs in appeals brought by small entities from agency final actions.(35)

The Role of the Office of Advocacy

Regulatory Development. When Congress created the Office of Advocacy in 1976 within the U.S. Small Business Administration, Congress mandated that the Office measure the "direct costs and other effects of government regulation on small business..."(36)

The RFA, enacted four years later, requires the Chief Counsel to report annually to the President and the Congress on agency compliance with the law,(37) and the SBREFA, enacted in 1996, made the Chief Counsel a statutory member of the EPA and OSHA Small Business Advocacy Review Panels.(38)

Essential to these mandates are:

- research on small business trends in the economy
- independent analyses of the impact of proposed regulations on small business
- two-way communications with small business trade associations and leaders throughout the country on regulatory impacts and emerging issues
- *ad hoc* industry-specific roundtables to discuss small business sector concerns, and
- meaningful small business participation in the development of public policy

Regulatory Issues – More Diverse and More Complex. In recent years, the economy has been extremely dynamic – constantly churning – with technology changing industry structure at an extremely rapid pace, creating new challenges for analyses of regulatory impacts on small business. Small business is a major force in the changing economic landscape, contributing major technological innovations that are spurring growth in the economy and creating most of the new jobs. As such, the continued viability of small business must be ensured.

As the economy becomes more technology based, not surprisingly, regulations are dealing with more and more complex and technical societal issues on which there may be little or conflicting data.

Staff Expertise. This requires more sophisticated impact analyses than before and a level of expertise in the staff that can only be developed over time or, in the alternative, by changing the professional mix of the staff at the discretion of the Chief Counsel.(39) Currently Advocacy's regulatory staff is organized around issues on which they are very well versed and on which they continue to expand their expertise. On some issues, teams have been developed to ensure continuity and back-up. (See Appendix I)

Data Sources – Statistical as well as Anecdotal. If regulations are unduly burdensome, they could dampen the economic growth experienced in recent years. Therefore, regulatory impact analyses are taking on an ever more important role in public policy deliberations. Policy makers are increasingly aware that the key to rational decision making is *data*.

To provide some of the answers as to the impact of proposed regulations on small business, the Office of Advocacy makes available its unique database – *Statistics of U.S. Businesses (SUSB)* – on its web site at www.sba.gov.advo/stats. Agencies can refer to this database to estimate the number of firms that could be affected by a proposed regulation.

However, this data only address one part of the impact equation. To supplement it, Advocacy has issued task order contracts,(40) under which assignments are given to the contractor to estimate the compliance costs of a proposed regulation on the regulated industry, as well as to develop estimates on the amount of the problem that is solved by applying the regulation to small entities. The information provided by contractors has been extremely helpful in evaluating EPA and OSHA regulations. Information made available to these agencies early in the process has significantly

influenced agency deliberations and the design of regulatory proposals. More often than not, the contractor's data has been corroborated by small entities participating in the Small Business Regulatory Review Panels.

Finally, current (anecdotal) data have been compiled through discussions with small businesses, their representatives and economic experts. Advocacy has convened *ad hoc* industry-specific roundtable meetings and conference calls with small entities. These activities have generated additional information on small business impacts.

SBREFA and Judicial Review

RFA Litigation. By the end of FY 2000, SBREFA will have been in effect for a little over four years. It is clear that the 1996 amendments are having a major impact on the work of federal agencies. Much of this impact is due to the fact that small entities are increasingly seeking judicial review of agency compliance with the RFA and having some success. Several court decisions have remanded rules to agencies for failure to comply with the RFA. All of the known RFA court decisions are summarized in Appendix J. The decisions have been Shepardized and the tabulation is posted on Advocacy's web site at www.sba.gov/advo/laws/rfa_shep.pdf.

Advocacy as Amicus Curiae. When the RFA was enacted, agency compliance with the law was not reviewable by the courts in regulatory appeals. Nevertheless, Congress authorized the Chief Counsel to file as *amicus curiae* in such appeals.

In 1986, the Chief Counsel for Advocacy filed its first *amicus curiae* brief, but later withdrew it after it was challenged by the DOJ. The DOJ maintained that the Chief Counsel's *amicus curiae* authority was unconstitutional on the grounds that it would impair the ability of the Executive Branch to fulfill its constitutional functions. The Department cited Executive Order 12146, Section 1-402, which states that legal disputes between two agencies are to be resolved by the Attorney General. The then Chief Counsel argued that an executive order could not override a statute, namely the RFA, but nevertheless withdrew the brief.

Then in September 1994, the current Chief Counsel decided to file as *amicus curiae* in a Federal Communications Commission (FCC) proceeding. The brief was prepared but the issue was resolved with the Commission before the filing deadline. During discussions with the FCC, DOJ attempted to object to the filing arguing that the Chief Counsel's authority was narrow and could not address the merits of the rule. The issue was mooted by the out-of-court resolution of the dispute.

Subsequently, in 1995 when Congress was debating possible changes to the RFA (not enacted at the time), Congress addressed the Chief Counsel's *amicus curiae* authority as follows:

The ability to appear as *amicus curiae* is important to the ability of the SBA Chief Counsel for Advocacy to represent the interests of small businesses in the rulemaking process. Furthermore, if this bill should become law, with its provisions to permit judicial review of agency compliance with the Regulatory Flexibility Act, the importance of the Chief Counsel's ability to file *amicus* briefs will be magnified.⁽⁴¹⁾

The Chief Counsel had suggested that the exact scope of the authority needed clarification. When Congress enacted SBREFA in 1996, it in fact clarified the Chief Counsel's authority to authorize comments on: (1) agency compliance with the RFA; (2) the adequacy of an agency's rulemaking record with respect to small entities; and (3) the effect of a rule on small entities.

Advocacy's first brief was filed in *Northwest Mining Assoc. v. Babbitt*.⁽⁴²⁾ The court agreed with the issues raised by Advocacy and remanded the rule to the Department of Interior for further analysis. The DOJ did not file formal objections to the filing with the court.

Other Impacts of SBREFA. Agencies are watching court decisions closely and are increasingly seeking assistance from the Office of Advocacy in the earliest stages of regulatory development, presumably not just to avoid appeals, but also to avoid having Advocacy appear as *amicus curiae*. This is evidenced by the marked increase in requests for Advocacy's assistance prior to publication

of a rule for public comment. This is a change from Advocacy's *pre*-SBREFA experience or experience prior to Advocacy's successful filing of its first *amicus curiae* brief. There is also increased willingness on the part of regulatory agencies to participate in Advocacy's *ad hoc* industry roundtables where discussions focus on current problems. These roundtables play an important role in opening up dialogue between small entities and government regulators.

All of this indicates that a cultural change is underway in regulatory agencies. The potential for judicial review provides a significant incentive for agencies to do more in-depth small business impact analyses and to take other steps to strengthen in-house regulatory development processes. For example, the National Marine Fisheries Service (NMFS) has instituted some internal changes that could lead to improved impact analyses. Other noticeable improvements have occurred at the Health Care Financing Administration (HCFA) and at the Agricultural Marketing Service (AMS). Industries regulated by these agencies are part of the basic structure of the economy and are dominated by small entities. While regulations affecting these industries are not front-page news, regulatory impacts can often mean the difference between survival and extinction of small entities.

Having said this, it is important to note, however, that this cultural change is by no means uniform within or among regulatory agencies. The largest hurdle to overcome remains agency resistance to the concept that regulatory alternatives that are less burdensome on small business may, in fact, be equally effective in achieving public policy objectives. (*See supra* "Barrier No. 2" p. 7.) Economic data thus become the *force majeure* in overcoming this resistance.

Small Business Advocacy Review Panels. The value of economic data and good regulatory flexibility analyses has been demonstrated time and again in the work of the OSHA and EPA Small Business Advocacy Review Panels mandated by SBREFA.

Since enactment of SBREFA, work has been completed on 24 Small Business Advocacy Review Panels – 21 EPA panels and 3 OSHA panels. (Appendix K) Approximately 300-400 small entities have been consulted on a very diverse array of rules. Independent data on the impact of regulatory proposals have played an important role in the deliberations of the panels. The additional input from small entity representatives has spotlighted real-life consequences of proposals under consideration. Regulations that have emerged from this process have been changed in response to the information provided and are, for the most part, less burdensome than the regulations originally considered. In one instance, a regulation was withdrawn entirely because the data clearly demonstrated that there was no need for national regulation, saving small business approximately \$103 million annually.⁽⁴³⁾

It is important to emphasize that, although the regulations that emerge from panel deliberations are likely to be less burdensome on small entities, *public policy objectives have not been compromised.*

The panel process has confirmed that: (1) credible economic and scientific data, as well as sound analytical methods, are crucial to rational decision-making in solving societal problems, *and*, (2) information provided by small businesses themselves on real-world impacts is truly invaluable in identifying *equally effective regulatory alternatives.*

Although work on the panels has been productive, it has also been labor-intensive. We estimate that Advocacy alone has spent an average of 500-600 hours per panel – for a total of between 3500 and 4000 hours on the panels completed in FY 1999. Work on one OSHA panel completed in 1999 – given the scope of the regulation's application to almost all industries – probably consumed more than the average. Work on the seven panels completed in FY 2000 consumed 4000 hours or a little under 700 hours per panel.

None of the OSHA rules reviewed by SBREFA panels have been finalized. EPA has finalized seven rules that have been the subject of SBREFA panels, and all seven contained significant modifications to mitigate burdensome small business impacts.

A question emerges from this data. Why have only seven rules have been finalized out of the 24 that were the subject of SBREFA panels, particularly those reviewed in 1997 or 1998? Some agencies have attempted to argue that the 60-day panel process delays rules. This is one of the

objections some agencies have raised to avoid having the panel process applied to them. But this rebuttal begs the question that the analyses required by the RFA, which is what SBREFA panels do, is what agencies should be doing and are required to do by the Administrative Procedure Act (APA). These agencies simply have not institutionalized the process.

So the question remains: Does the 60-day panel process actually result in additional delay or is it more likely that the data and impact analyses generated through panel deliberations and the balance of the regulatory process force agencies to re-evaluate their proposals? If the latter, then the panel process contributes constructively to regulatory deliberations. This question ultimately may only be answered when the rules are finalized and their provisions compared with panel recommendations and data generated by the process.

Regulatory Review Processes

Advocacy's regulatory review processes primarily involve analysis of regulatory proposals published in the Federal Register and crafting public record communications on the impact of the proposals on small business. These public record documents also address the issue whether regulatory justifications and analyses of alternatives comply with the RFA. This review is significant and is in addition to Advocacy's work on EPA and OSHA panels. It encompasses the regulatory initiatives of approximately 18 additional regulatory agencies. The issues reviewed range from *procurement* to *taxes* to *resource quotas* to *telecommunications* to *food and product safety* to *transportation safety* to *antitrust to mergers* to *Internet policies* to *securities and banking regulations*, etc. The FY 1999 RFA report and the FY 2000 RFA report (currently under development) highlight some of those public record communications and illustrate the range of issues Advocacy has addressed.

In selecting issues for analysis and public comment, Advocacy targets its resources to those regulations where Advocacy could reasonably be expected to make a difference or where the small business interest is significant but underrepresented in the regulatory process. To this end, Advocacy reviewed approximately 2600 proposed and final rules in the past two fiscal years and submitted approximately 160 comments for the public record.[\(44\)](#)

Since enactment of the SBREFA judicial review amendment, Advocacy has been experiencing an increased workload involving pre-proposal consultations with regulatory agencies. These consultations and any written materials generated by this work are not a matter of public record. They are, however, as important as Advocacy's public record comments in effecting changes to regulatory proposals. In addition, Advocacy has increasingly been requested by OMB to participate in its review of regulations pursuant to OMB's responsibility under Executive Order 12866.

It should be noted that Advocacy does not restrict its activities exclusively to RFA issues. It has in fact intervened in other matters where the impact on small business is significant. Reports for the last two years, although they are technically reports on compliance with the RFA, nevertheless have contained descriptions of Advocacy's activities involving two entities not subject to the APA or the RFA. These entities are the Internet Corporation of Assigned Names and Numbers (ICANN)[\(45\)](#) and the U.S. Postal Service.[\(46\)](#) Advocacy became involved with these two entities because of their market dominance and because their activities are having a major impact on small businesses. Advocacy is of the view that small business needs a spokesperson to represent them in the proceedings of all government or quasi-government bodies.

Regulatory Savings[\(47\)](#)

The impact of SBREFA goes beyond modifications just to EPA and OSHA regulatory processes. The impact is affecting the work of all regulatory agencies. As stated earlier, agencies logically wish to avoid judicial challenges to their rules and are

taking greater care to comply with the RFA. Rules have been changed to minimize burdens on small entities. We estimate that changes made to rules in 1998 resulted in **\$3.2 billion** in savings to small business as a whole.[\(48\)](#) (Appendix L) Changes made to rules in FY 1999 reduced the

potential cost of regulations by **\$5.3 billion**. [\(Table I\)](#) In FY 2000, the estimated cost savings to small business are **\$3.4 billion** [\(Table II\)](#).

Conclusion

The RFA report for FY 2000, to be submitted by the current Chief Counsel, will be the nineteenth report since enactment of the RFA in 1980. It will mark the 20th anniversary of enactment of the RFA and it will be the fifth report since enactment of the 1996 SBREFA amendments. A cursory review of these and earlier reports will reveal different levels of compliance by regulatory agencies, even by different agencies within a department. The main improvements to be noted, however, are the changing role of data in regulatory development and the impact judicial review has had on agency compliance. Cost savings that result from modifications to regulatory proposals can now be documented using the data generated by the regulatory agencies themselves and/or by other third-party sources. These savings are the true measure of SBREFA's impact.

While the savings are, on the one hand, *good news*, they are at the same time *bad news* because agencies are still not doing enough in-depth small business impact analyses before proposing regulations. For this reason, Advocacy maintains that the biggest hurdles to overcome are agency resistance to understanding the importance of small business to the economy (*see supra* "Barrier No. 1" p. 7), and to accepting the notion that less burdensome alternatives can be equally effective in accomplishing public policy objectives (*see supra* "Barrier No. 2" p. 7). These concepts need to be inculcated into regulatory agency deliberations in order for the RFA to have a meaningful impact on reducing the regulatory burden for small business. Very likely this will remain the challenge for Advocacy in the coming years.

THE PUBLIC POLICY ROLE OF SMALL BUSINESS STAKEHOLDERS

"Small Business Voices Rationalize Public Policy" – Anon.

Introduction

Small businesses in the U.S. – 24.8 million strong – are diverse, fragmented, and located in every city in the United States. Entrepreneurs are busy running their businesses with little time for monitoring or devoting time to federal or state legislative or regulatory processes, despite the impact governmental decisions could have on their livelihood. Congress recognized this dichotomy and it is one of the reasons the Office of Advocacy was created, namely, to ensure that there would be an informed small business voice participating early enough in federal deliberations that small business impacts would be adequately addressed and barriers to competition avoided.

Research and statistical data are vital to sound public policy. But research data are historical. They reflect what has already occurred. While the data admittedly can provide some insights on what the economic trends are likely to be – insights that are important to public policy – they do not mirror what is happening *now* in the marketplace. *Only small businesses can provide this information.*

The challenge then, is how to make small businesses visible in the process; how to establish two-way communications with them; how to maintain a network throughout the U.S. to identify emerging problems and new small business leaders; and how to create a continuum of contacts at the local level on an ongoing basis.

The following describes techniques that have had demonstrable success in accomplishing these objectives.

White House Conference on Small Business

Congress enacted a law establishing a Commission, with funding, to organize a White House Conference on Small Business (WHCSB) to be held in 1995.

The Process. Beginning in 1994, conferences were held in each state of the union (two in the larger states) attended by qualified small business owners who wished to attend. The attendees were provided an *Issues Handbook* prepared by the Office of Advocacy that was intended to help the

delegates identify issues they wanted included on the agenda of the national conference. Advocacy's regional staff played a pivotal role in coordinating these 50-plus state meetings, promoting attendance, discussing issues with potential attendees and ensuring that a full range of small businesses was represented.

Attendees at the state conferences elected delegates to six regional conferences who would in turn be delegates to the national conference. The White House, each Member of Congress and Governors also nominated an additional number of delegates. In June 1995, over 2000 small business people convened in Washington, D.C. They heard presentations by the President, the Vice President, Congressional leaders and Cabinet officials. The delegates debated issues in 10 broad topic categories, eventually consolidating their deliberations into 60 recommendations.

Before the national conference, the Office of Advocacy held a series of 15 focus groups to tap the insights, experiences and perspectives of a diverse group of experts who were knowledgeable about small business issues. The discussions were summarized in a publication, *The Third Millennium*, distributed at the conference to all the delegates.[\(49\)](#)

Implementation. The Office of Advocacy had the responsibility for monitoring implementation of the recommendations – whether the recommendations required legislative or administrative action. The active support of the Executive Branch and the Congress was essential to the successful implementation of the recommendations.

Advocacy created a network of Regional Implementation Chairs, elected by the WHCSB delegates; a committee of State Chairs; and ten committees of Issue Chairs, each focussing on one of the 10 broad topics debated by the WHCSB delegates. This network worked closely with the Office of Advocacy over a period of three years on implementation efforts. During this time, cabinet sponsored meetings were held with agencies to discuss the recommendations and how to address them, distinguishing those that could be implemented administratively from those that required congressional action. Periodic reports were made to the President at his request on the progress being made.

A directory was compiled by Advocacy and distributed to Congress of "issue" experts (WHCSB delegates) who expressed an interest in working with the Congress on small business issues. The directory was designed to help Congress identify potential witnesses expert on small business issues for upcoming hearings.

The Office of Advocacy also had the responsibility for filing annual reports to the President and the Congress on the status of the recommendations. The final report was submitted in July 2000[\(50\)](#) in which the Office was able to report an unprecedented record of policy actions, surpassing that of both the 1986 and 1980 Conferences. A list of legislative actions taken to implement some of the recommendations is included in Appendix M.

Outgrowth. Two committees of Issue Chairs have remained active to this date: Tax Chairs and Technology Chairs. Their dedication is further evidence of how effective small entities can be in influencing public policy when a working partnership is established between them and government officials.

(1) Tax Chairs. This group of Issue Chairs has remained extremely active, in part because of tax legislation introduced by Congress to implement recommendations of the WHCSB. The Chairs have also been very active keeping members of Congress informed on small business tax concerns and have played a major role in the adoption of administrative initiatives by the IRS. Their expertise has been invaluable in several meetings with senior policymakers at the Treasury Department convened to discuss major tax issues, meetings in which the Tax Chairs have been extremely persuasive in arguing the small business agenda. Issues discussed included independent contractor definitions and pending legislation, IRS reform, cash versus accrual accounting; electronic tax reporting and paying; pension plan expansion. Treasury officials have been very responsive and receptive to problems identified by the Tax Chairs. The IRS has also appointed 4 different Tax Issue Chairs to several advisory councils including the Internal Revenue Service Advisory Council; the Electronic Tax Administration Advisory Council and the Commission on Restructuring. Most recently, the Employee Benefits Division of the U.S. Department of the

Treasury sought Advocacy's opinion on regulatory proposals related to "new comparability cross testing."⁽⁵¹⁾ By consulting with Advocacy first and then with others recommended by Advocacy, Treasury was able to produce a stronger, more defensible proposal that protected small businesses while protecting pension participants and taxpayers.

(2) *Technology Chairs*. Reflecting the growing importance of the technology sector in the U.S. economy, technology based small businesses were represented at the 1995 WHCSB in greater numbers than in earlier conferences. In addition to remaining involved with technology issues, such as R&D tax credits, universal access to the Internet, the Small Business Innovation Research Program, patent and intellectual property reform, etc., these chairs organized the Small Business Technology Coalition. The Coalition has as its mission ensuring the evolution of sound public policy to promote technology and is the first such organization dedicated to monitoring and participating in governmental deliberations on the role of technology in the economy. Coalition members have testified before Congress on a wide variety of technology issues.

Industry Roundtables

As noted earlier in this document, information on *current* trends and regulatory impacts can be most effective when it comes from small businesses themselves. Historical data on specific industries does not always exist from which inferences can be taken as to the impact of specific regulations. In order to develop some knowledge about current industry structure, etc., *ad hoc* industry-specific roundtable meetings have been convened by Advocacy to discuss pending issues informally with small business representatives. Representatives from relevant regulatory agencies and congressional committee staff have also been invited to participate. The meetings have uniformly been viewed as helpful in identifying and raising awareness of small business issues.

Industry-specific roundtables have been convened on:

- environmental issues (sulfur emissions, toxic release inventories, etc.)
- fisheries (quotas, Fishery Council decisions, etc.)
- transportation (hours of work, accommodations for the disabled under the Americans with Disabilities Act, etc.)
- telecommunications (universal service, ICANN, etc.)
- worker safety (health and safety programs and ergonomics)
- mineral resource allocation and land management (site reclamation, mill site descriptions, bonding)
- tax (pensions, independent contractor, employee benefits, etc.), and
- procurement (procurement reforms, small business' experiences with contract bundling, etc.)

Participation by entities outside the Washington, D.C. area has been actively encouraged through the simultaneous use of conference calls.

Finally, a roundtable of legal practitioners who represent small businesses has been convened on a number of occasions to discuss and share information on pending litigation in which they are personally involved. New precedents (court decisions) under the RFA have been discussed. The stated purpose of this group is to understand the issues being raised by litigants before the courts and the patterns that may be emerging in the legal precedents – both good and bad.

Small Entities and SBREFA Panels⁽⁵²⁾

Both EPA and OSHA must convene Small Business Advocacy Review Panels whenever these agencies are considering a regulation that is likely to have a significant impact on a substantial number of small entities. The review panel must consult with small entities that could be affected by the rule and submit a report to the head of the agency within 60 days summarizing the input from the small entities. In nearly every instance to date, information provided by small entities, in combination with other data, has proved invaluable in establishing a reality check for these regulatory agencies, namely, what the real impact of the regulation is likely to be and the actual compliance costs small entities will have to bear.

Technology is making it easier for small entities to participate in the panels. Conference calls, e-mails and faxes – all facilitate information sharing and fast communications. Small entities do not have to come to Washington to be effective participants in panel deliberations. They can influence public policy working out of their own offices or production facilities, wherever they are situated in the United States. What this means is that policy makers can reach out to a more diverse and more geographically dispersed group of small entities. Agencies are no longer limited to having discussions only with Washington-based small business representatives. They can have round robin conference call discussions with small refiners in Oklahoma on sulfur emission standards, or animal feed operators in Missouri or Kansas or Iowa on water polluting run-offs, or home health care providers in Ohio on limiting employee exposure to tuberculosis. Technology is making it easier to reach more small entities *if* they can be identified. That is the challenge.

State Conferences

Delegates to the 1995 White House Conference on Small Business voiced strong concern about the impact of *state* regulations and policies, which, they argued, could be equally as onerous as federal regulations. The statutory mandate of the Office of Advocacy, however, extends only to federal policies, legislation and regulation. Nevertheless, to draw attention to the impact of state actions on small business and the role state and local policymakers play, the Office of Advocacy has sponsored three conferences within the past seven years (a total of 15 such conferences since establishment of the Office). At these conferences innovative and successful local small business initiatives have been showcased in the expectation that unique initiatives might be replicated elsewhere. Through presentations and workshops, state and local issues have been discussed and awards made to truly innovative programs that help small business. Descriptions of the award-winning initiatives have been published by Advocacy in a booklet that characterizes the programs as *Models of Excellence*. The most recent publication is available on Advocacy's Internet web site at www.sba.gov/advo/vision.html.

One of the important messages of these conferences is that creative solutions to small business problems are not always crafted in Washington. Information gleaned from these conferences about state and local initiatives confirms the adage that the states are often major incubators, not only for identifying societal problems, but for solving them as well.

A significant by-product of these conferences is the expansion of Advocacy's outreach to an ever-increasing number of small entities and emerging local leaders in both the public and private sectors, who can in turn be effective spokespersons in public policy deliberations at the national level. Small businesses, wherever situated in the U.S., can be effective partners in the deliberations of their government. All it takes is a commitment to reach out to them.

Small Business Week

The question – *Are small firms important* – is answered to a large extent by research. Even more impressive than numbers on a chart are real life examples of successful start-up businesses or innovative small businesses. Each year, during Small Business Week, Advocacy honors the:

- Accountant Advocate of the Year
- Entrepreneurial Success of the Year
- Financial Services Advocate of the Year
- Home-Based Business of the Year
- Minority Small Business Advocate of the Year
- Small Business Exporter of the Year
- Small Business Journalist of the Year
- Women in Business Advocate of the Year;
- Veteran Small Business Advocate of the Year, and
- SBA Young Entrepreneur of the Year

Regional publicity solicits nominations from every state in the union for these awards. Applications are culled and recommendations developed by a local network of small business leaders convened for this purpose in each of the 10 federal regions.

Each year these awards spotlight the work of innovative companies and small business leaders who would otherwise be largely invisible to the press, to policy makers and even to members of their own business communities. Small Business Week provides a platform and a showcase for all to see the role small business plays in the economy and how small business continues to stimulate competition.

Communications Services

The Small Business Advocate. This is a monthly publication distributed to a mailing list of approximately 10,000 individuals and businesses. It is designed to provide highlights of pending small business issues, specific updates on pending regulations, data on new research and a list of upcoming events of interest to small business.

OpEd Page Articles. This past year, Advocacy's regional staff drafted several articles to appear in weekly newspapers, often the most read periodicals in the country. The OpEd pieces addressed small business' role in the economy and were independently edited to enhance their appeal to regional readership.

Web Site (www.sba.gov/advo). Within the past year, Advocacy has remodeled its web site so that it can be used by anyone seeking information on Advocacy's research and economic reports, small business statistics, public record comments filed by Advocacy on regulations, testimony of the Chief Counsel, SBREFA panel reports, press releases and Advocacy's newsletter, *The Small Business Advocate*. Information provided by SBA's Office of the Chief Information Officer indicates that Advocacy's web site receives a significant number of hits, ranking in the top ten on SBA's web site.

Most recently, a Shepardized compilation of RFA court decisions has been posted for use by lawyers representing small entities. This information should help reduce the time they would otherwise have to spend researching current legal precedents. Finally, a new E-Commerce Regulations and Policy web page was developed to provide small businesses with up-to-date information on Internet policies, conferences, etc.

On July 12, 2000, Advocacy's small business state profiles page received a Links2Go "Key Resource" award. This award is based on an analysis of millions of web pages to determine which pages are most heavily used.

Conclusion

There are approximately 600,000 employer and thousands more non-employer small business start-ups in the United States each year. There is no centralized directory of these firms. These firms are known, however, to local Chambers of Commerce, to state and local economic development offices, to local bank officials, and to venture capitalists, among others. Identifying and making contact with these firms cannot be done effectively or efficiently from Washington, D.C. – at least that has been the experience of the Office of Advocacy to date.

To illustrate, one of the major objectives of the WHCSB was ensuring that the delegates truly represented a cross-section of small businesses. This meant generating sufficient publicity to all industries and all groups of entrepreneurs, including women and minorities, to guarantee representative attendance at the conferences. Advocacy's regional staff worked with local leaders and organizations that had networks through which small businesses could be encouraged to participate. Regional staff also worked with local media to garner stories about the state and national conferences and the importance of the deliberations to take place.

In addition, increased credibility can be established for Small Business Advocacy Review Panels when there is a diverse geographic representation of an industry participating in the discussion. These entities can only be readily identified by regional staff working closely with Advocacy's headquarters staff working on regulations on which small entity input is needed. This was Advocacy's experience when it needed to identify small petroleum refiners which could discuss sulfur content limitations in gasoline and to find articulate feedlot operators to work on anti-water polluting runoff standards (both EPA regulations) or to find home health care providers or

homeless shelter managers to discuss the impact of OSHA's tuberculosis rule to limit employee exposure to the disease.

There have also been occasions when Advocacy's regional staff received data from their contacts that was pertinent to national deliberations. For instance, regional staff drew Advocacy's attention to the U.S. Postal Service's proposal on commercial mail receiving agencies well in advance of national trade organizations hearing about the issue from members. In another instance, information obtained through Advocacy's regional staff provided data showing that the number of injuries and illnesses among workers had not decreased as the result of instituting health and safety programs, contradicting an important OSHA assertion.

Opportunities have also developed at the local level where someone on site and in tune with the local economy could be helpful to small businesses. For example, an Air Force General was persuaded by Advocacy's regional staff to work with the small business community to find new business opportunities to offset potential losses from the phased-in closure of an Air Force base. Regional staff has also been working with universities to establish small business entrepreneurship programs as part of the college curriculum.

Having the capability to expand the involvement of small businesses in national policy deliberations has leveraged the work of the Office of Advocacy. Technology is making involvement in national policy deliberations a low-cost activity for small business and public policy has been the direct beneficiary. The capacity to expand the involvement of geographically dispersed small entities can only be developed over time by maintaining day-to-day and one-on-one contacts with local leaders and with the ever-changing landscape of state and local officials. It has always been and will continue to be a work in process and clearly not a task that can be performed effectively or efficiently out of Washington, D.C.