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Introduction

The National Ombudsman's 1999 Report to Congress on Regulatory Fairness provides Congress and the Administration with the status of the Regulatory Fairness Program (RegFair) and efforts by the National Ombudsman and Regulatory Fairness Boards to implement small businesses' new rights to regulatory fairness.

Created under the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), the National Ombudsman and Fairness Boards are one key element of the law under which small businesses have gained new rights in the regulatory arena. The efforts of Congress in this area have been significant and have enhanced efforts by President Clinton and his Administration, as exemplified by Vice President Gore's efforts in implementing the National Performance Review.

SBA Administrator Aida Alvarez has also made regulatory fairness an important priority for the SBA. With her support, the Fairness Boards and National Ombudsman have worked aggressively to secure significant rights and benefits for small businesses, which are addressed in this 1999 Report to Congress.

The SBA is in a key position to address regulatory issues. The new Regulatory Fairness Boards and the National Ombudsman's efforts are bringing concerns with the implementation of regulatory enforcement and compliance to the forefront of the debate. These efforts, in conjunction with the Office of Advocacy as the primary vehicle for reviewing proposed regulations and determining their expected impact on small business, provide small businesses with a comprehensive voice in regulatory affairs. The Small Business Committees of the Senate and the House are significantly advancing the process, especially the efforts of Senator Bond as lead author of SBREFA.

The first half of 1998 marked the end of RegFair's first full year of operation. It has been an excellent year for the program. RegFair has progressed in establishing the structures necessary for a successful new national entity. After only 18 months of full operation, RegFair is well on its way to fulfilling its purpose of reporting on the national regulatory enforcement climate faced by the Nation's 23 million small businesses.

Much of the time and energy of the National Ombudsman and Regulatory Fairness Boards have been focused in four areas: 1) informing small businesses across the country about their new rights to regulatory fairness; 2) building new and stronger roles for utilizing the Fairness Boards as RegFair's direct link to small businesses; 3) developing more detailed inquiries of small business needs; and 4) enhancing methods of evaluating the enforcement activities of federal agencies, including rating their responsiveness to small businesses.

As the program has evolved, RegFair has established concrete goals and policy initiatives, and internal and external processes and procedures. The program has identified the needs and responsibilities of the regional Fairness Boards, helping to develop methods to best use their experience and expertise. As RegFair develops, the program continues to advance new ways to take advantage of the support and assistance of its resource partners, such as trade associations, Small Business Development Centers (SBDCs), the Service Corp of Retired Executives (SCORE), the National Advisory Council (NAC) and other key leaders in the business community.

The National Ombudsman and Regulatory Fairness Boards have gathered the "best practices" of agency regulatory enforcement and compliance activities and present them in the 1999 Report.

Best practices detail how agencies incorporated small business-friendly policies and procedures into their regulatory enforcement and compliance efforts through their implementation of recommendations from the first annual report. The Fairness Boards and National Ombudsman hope that these practices will spread new ideas and methods through the federal regulatory enforcement arena, and that other agencies will consider incorporating them in their own enforcement and compliance processes.

Also included in the National Ombudsman's 1999 Report to Congress is an extensive evaluation of agencies. Based on the criteria presented in the first annual report, with suggested revisions and ideas from Fairness Board members, this report evaluates and rates agencies in the following areas:

- Agencies complying with the applicability of the Regulatory Fairness Program;
- Agency action taken to inform small businesses about RegFair at the time of agency enforcement or compliance action;
- Agency responsiveness to small businesses' comments and issues;
- Agency participation at RegFair hearings, held annually in each of ten regions; and
- Agency response to and implementation of the recommendations put forward in the National Ombudsman's first annual Report to Congress on Regulatory Fairness.

The National Ombudsman's 1999 Report to Congress evaluates 36 federal agencies. However, there are several agencies that assert that Section 222 of SBREFA does not apply to them. This information is detailed in *Agencies Complying with the Applicability of the Regulatory Fairness Program*, below.

As in the National Ombudsman's first annual Report to Congress, the 1999 Report contains recommendations for consideration by agencies that do business with small businesses. All have been crafted to encourage a better working partnership between the Federal Government and small businesses.

As RegFair addresses the future of the regulatory climate for small business, it is noteworthy to look back on its growth during the past year. Since the first annual Report to Congress was published, the number of small businesses submitting written comments to RegFair has tripled to more than 200 and the number of individuals testifying at hearings increased to over 250. Although, this is a modest number of comments, the experience of the past 18 months, and the steps taken by RegFair and federal agencies, indicate that these numbers will continue to increase. Increasing the number and breadth of comments received would be significant in drawing more detailed conclusions.

In 1998 alone, over 650 people attended the ten hearings held, and nearly 150 small businesses testified before the Regulatory Fairness Boards and the National Ombudsman on issues as varied as tax reporting, import-export procedures, immigration, and health care. While publicizing RegFair to the small business community still proves to be the biggest challenge, media coverage is growing.

To expand and intensify RegFair's outreach to the national small business community, the program has developed a number of new strategies. Among recent innovations are RegFair's Business Leader Roundtables, the Association of the Month program, and the RegFair Report, a monthly newsletter. These vehicles, detailed in the outreach section of this report, serve to open and maintain lines of communication with trade and professional associations, Members of Congress,

and RegFair's other resource partners, such as the SBA's National Advisory Council (NAC), the SBDCs, and SCORE.

The Fairness Boards and National Ombudsman have learned much about providing a forum for the small business community on agency enforcement and compliance activities. They have accomplished a great deal in their quest to implement a national program, and are very optimistic about the coming year, and the next five years of the RegFair program.

Significant Rights and Benefits for Small Businesses

Small businesses have gained the following concrete benefits and rights that the National Ombudsman and the Regulatory Fairness Boards have secured through their efforts to gauge and help improve the regulatory enforcement and compliance climate.

The underlying principle behind all of RegFair's efforts is that the program fosters a government that knows how to listen. The RegFair Program does not presume to tell small businesses what their concerns or priorities should be.

The National Ombudsman and Fairness Boards listened to small businesses when they said they do not want the Regulatory Fairness Program to be a mere sounding board where they vent their frustrations; nor do they want the program to be a platform for unsubstantiated allegations. Small businesses have limited resources, particularly time. They have stated that when contacting RegFair, their aim is to address specific regulatory enforcement and compliance concerns with an agency—concerns they want answers to, and ideas they want considered.

The National Ombudsman and Fairness Boards have listened to small businesses when they expressed frustration at not finding someone at an agency who can make a difference, someone who can look at their concerns with independence, and answer them. RegFair has responded to small businesses when they said they wanted agencies to change the regulatory culture, and for their problems to be resolved as soon as possible. The National Ombudsman and Fairness Boards listened when small businesses said they do not want their comments merely to await inclusion in an annual report. Small businesses have said their concerns are pressing and need immediate attention. In many instances, agencies have made changes to address small business concerns as a result of the comments they have received through RegFair.

(A) Notifying Small Business of Their Rights under the Regulatory Fairness Program, at the time of Regulatory Enforcement and Compliance Activities

The National Ombudsman has worked to ensure that agencies provide small businesses with clear notification of their right to file comments addressing agency regulatory enforcement and compliance activities directly with the National Ombudsman, or their regional Regulatory Fairness Board. Most significantly, the notification language also informs small businesses that the National Ombudsman, with advice from the Regulatory Fairness Boards, evaluates and rates the enforcement activities of these federal agencies. The National Ombudsman has insisted that the notification not be buried in agency materials, nor may it be perfunctory or obscure. In short, effective notification language is to be provided at the time of the regulatory enforcement and compliance activity.

In addition to receiving clear and timely notification, the value of this right to small business is also to create a significant deterrent effect: the agency official who undertakes the enforcement or compliance activity must also notify the small business about RegFair at the time of the enforcement or compliance activity.

(B) Direct Dialogue and Feedback

Based on the feedback from small businesses, and in keeping with the statute, RegFair provided small businesses with three options for self-identification. Small businesses may keep their

identity fully confidential; disclose their identity only to the agency; National Ombudsman and Fairness Board; or they may fully disclose their identity. Fully two-thirds of small businesses that have completed written comments and appraisal forms to date have chosen full or partial disclosure of their identities. RegFair fully protected the identity of the one-third of the small businesses that chose to keep their identity confidential.

(C) High Level, Independent Agency Review

Based on feedback from small businesses, RegFair has become a facilitator between small businesses wanting to raise issues with their government, and government officials able to independently address and answer small business concerns.

At the request of the National Ombudsman, most agencies have designated high level officials who are independent from the regulatory enforcement or compliance activities that small businesses are commenting on. For example, the U.S. Small Business Administration designated the Assistant Administrator, Office of Hearings and Appeals—an independent office which reports directly to the Administrator.

High level independent review, not only guards against retaliation, but also makes agency review meaningful and credible by providing for review by an official who was not directly involved in the enforcement or compliance activity. This ensures that the reviewing official does not have a direct conflict of interest. Significantly, small businesses are provided with review at a high level where the agency can gauge and ensure effective implementation of the principles of SBREFA, as well as whether its own internal policies to protect small business are effectively being utilized.

(D) Bringing the Statute to Life: Government Accountability

Based on feedback from small businesses, the National Ombudsman and the Regulatory Fairness Boards have established a program that ensures that agencies, at a high level, are aware of small business concerns; and that agencies examine enforcement or compliance actions while also considering the requirements of SBREFA. Thus, the Regulatory Fairness Program provides small businesses with government accountability.

As illustrated by these rights and benefits, the Regulatory Fairness Program is not simply a conduit to forward small business comments to an agency. The National Ombudsman writes the highest level independent official, crystallizing the small business' comment, and requesting a review and response to the comment on the agency's regulatory enforcement or compliance activity, as well as specific answers to questions such as the following:

- (i) Why and how the enforcement action was taken;
- (ii) How the enforcement or compliance action was determined;
- (iii) Whether and how any other regulatory violations were factored into current enforcement or compliance action;
- (iv) Whether the small business had sufficient notice of the enforcement or compliance action and an adequate opportunity to correct the cause of the violation;
- (v) Whether and how the agency considered the economic impact of the enforcement or compliance action on this small business and on small businesses generally;
- (vi) Whether the agency considered the small business' mitigating circumstances;

- (vii) Whether the agency considered a lesser enforcement or compliance action;
- (viii) The range and parameters of enforcement or compliance actions that are available to the agency with respect to similar activities;
- (ix) Whether the agency's policies and procedures were followed;
- (x) Whether and how the agency's regional and program offices were responsive to the small business; and
- (xi) Whether and why the agency believes the specific enforcement or compliance action it took reflects the requirements of SBREFA, or whether the agency should reconsider its enforcement or compliance action, in this and in future matters, in light of the small business' comments and the requirements of SBREFA.

These factors will be used by the National Ombudsman in fulfilling the statutory responsibilities of (1) evaluating enforcement activities; (2) rating agency responsiveness to small businesses; (3) examining if enforcement or compliance actions were excessive, and; (4) determining if the spirit of SBREFA was followed—developing a small business-friendly environment.

Thus, through the National Ombudsman and Fairness Boards, small businesses hold agencies accountable to the principles of SBREFA, before Congress. The inquiry made by the National Ombudsman provides a deterrent effect. No longer will actions of individual agency employees not surface for high level internal independent scrutiny, and review by an outside source. The approach adopted by the National Ombudsman and the Regulatory Fairness Boards requires high level independent agency officials to critically gauge their agency's enforcement and compliance activities using the standards of SBREFA. There is direct feedback as the agency at the highest level listens and responds to each small business concern.

As can readily be seen, RegFair has given life to the following laudable statutory language:

- “[E]valuating the enforcement activities of agency personnel including a rating of the responsiveness to small business;”
- Reporting “substantiated instances of excessive enforcement actions;”
- Making findings and recommendations “as to agency enforcement policy or practice;”
- Raising “matters of concern to small businesses relating to the enforcement activities of agencies;” and
- Ensuring that agencies “assist the Ombudsman and take actions as necessary to ensure compliance with the requirements of this section,” Section 222 of SBREFA.

(E) Perception As Reality: Sharing Small Businesses' Perceptions with the Agencies

Based on feedback from small businesses, the National Ombudsman and Fairness Board members have met with agencies individually and collectively, and have shared the perceptions of small businesses with high level agency officials. In last year's Report to Congress and in meetings with agencies, the National Ombudsman and board members emphasized the need for agencies to consider the economic consequences of their enforcement and compliance activity; to avoid excessive enforcement activity; and to prohibit even the appearance of retaliation against small businesses.

(F) Addressing Retaliation

Based on feedback from small businesses and Congress, RegFair is addressing the retaliation concern, recognizing that this concern is not limited to comments addressed to the National Ombudsman, but also includes small business testimony at public hearings. Most importantly, it includes the perceptions small businesses have developed through their daily contact with the government.

The principle guiding the program is that a democratic society demands that citizens not be denied their constitutional right to openly communicate with their government (that is one reason small businesses are provided with disclosure options on the Appraisal Form).

The Regulatory Fairness Program has focused on deterring retaliation, and asked agencies to call into question employees that appear to retaliate against small businesses. As discussed above, agencies are required to provide small businesses with notification of their right to directly communicate their enforcement concerns to the National Ombudsman and the Regulatory Fairness Boards, at the time of regulatory enforcement and compliance activities. RegFair has also emphasized, in meetings with agencies, public hearings, and through recommendations, the need for agencies to stress to their employees the prohibition of even the appearance of retaliation against small businesses, and the need for agencies to have zero tolerance with respect to employees who retaliate against small businesses.

The RegFair procedure has guaranteed small businesses that high level independent agency officials will be made aware of any retaliation concerns. It is important that agency officials who can take effective remedial and deterrent actions are notified of the retaliation concerns. The National Ombudsman immediately communicates with the high level, independent officials to ensure that the agency has effectively addressed the retaliation concern. Over time, this approach helps Congress and the Administration identify whether retaliation concerns are the by-products of isolated actions by an individual employees, whether they are pervasive and systemic within an agency, or whether they are misperceptions created by misunderstandings.

RegFair has also helped to ensure that small businesses' identities are not revealed to the individual who took the enforcement or compliance action. As discussed above, small business comments are sent to high level independent officials. Significantly, RegFair reached an understanding with agency Inspectors General that they will maintain the identity of the people and small business concerns making comments on a confidential basis, to the same extent as employee identities are protected under the Inspector General Act.

(G) Scope of the Statute: Insuring the Intended Impact for the Regulatory Fairness Program

In Section 222 of SBREFA, Congress addressed “actions by agency employees conducting compliance or enforcement activities with respect to the small business concern.” In keeping with Congressional intent, as manifested by the statutory language, RegFair has not limited small business concerns to fines and penalties. The National Ombudsman believes that Congress did not intend such a narrow scope, or it would have used the words “fines” and “penalties.” The Regulatory Fairness Boards and the National Ombudsman believe this is significant because, as seen in the feedback received by RegFair through written comments, testimony, and Fairness Board contact, small businesses have significant regulatory enforcement and compliance concerns which are not restricted to fines and penalties (see *Agencies Complying with the Applicability of the Regulatory Fairness Program and Regulatory Rights Notification at the Time of Enforcement Action*).

In determining which agencies are covered under the Regulatory Fairness Program, the National Ombudsman is strictly guided by the statute. In Section 221 of SBREFA, Congress adopted the Freedom of Information Act's (FOIA) broad definition of "agency," to define the agencies covered under Section 222 of SBREFA. Moreover, Section 222 addresses "each agency with regulatory authority over small businesses." Accordingly, the Regulatory Fairness Program has rejected the position of some agencies that they are not covered by SBREFA because they are not a regulatory agency. In other words, as required under Sections 221 and 222 of SBREFA, an agency can exercise "regulatory authority over small businesses," without being a regulatory agency.

The National Ombudsman and the Regulatory Fairness Boards have determined that enforcement activities taken against an owner of a small business are covered under the Regulatory Fairness Program, as a "matter[] of concern to small businesses," and in carrying out the statutory responsibility of "evaluating the enforcement actions of agency personnel including a rating of the responsiveness to small business of the various regional and program offices of each agency."

While enforcement actions taken against persons solely in their individual capacity are outside the Regulatory Fairness Program, SBREFA may not be circumvented by an agency taking a formal enforcement action against a person acting in his or her capacity as owner of the small business, rather than taking the action against the small business. The small business is directly implicated because it will either be prohibited from paying for, or called upon to pay, any potential fine or penalty. Moreover, the small business is directly involved, because its reputation and the actions of its board of directors are at issue in the enforcement and compliance proceedings.

Thus, the impact of Section 222 of SBREFA has become meaningful and pervasive, and this ensures that positive changes will be taken to improve the regulatory enforcement and compliance environment for small businesses throughout the Federal Government. Members of the Fairness Boards and the National Ombudsman have also assisted state efforts to enact state legislation modeled after SBREFA.

(H) Following up on the Recommendations: Best Practices

The National Ombudsman and Fairness Boards have listened to small businesses when they have said they want less talk and more solutions, and that RegFair should be a constructive force for change. Recommendations received from small businesses that were articulated in last year's annual Report to Congress are being advanced. The National Ombudsman followed-up with all agencies, and has used their performance in implementing the recommendations as part of this year's evaluation process.

Of significance, the Fairness Boards and the National Ombudsman share, in this report, what they believe are the best agency practices. The National Ombudsman continues to highly encourage other agencies to emulate these practices.

(I) Comprehensive Outreach

While the statute provides for the regional Regulatory Fairness Boards to “hold such hearings and collect such information as appropriate,” RegFair has annually held at least ten public hearings, one in each region.

The public hearings are held throughout the country; in large cities and in small towns, in urban and rural areas. The purpose of changing locations is to rotate geographic regions and economic sectors within each region. The public attends in relatively significant numbers, and a number of agencies, usually two, are asked to attend and address specific small business concerns. The Regulatory Fairness Boards and the National Ombudsman question the agencies, and the public has an opportunity to share their perspective and perceptions with the agencies.

These agencies are carefully chosen by the Regulatory Fairness Board and the National Ombudsman, who consider the concerns and priorities of small businesses in areas where the hearings take place. Members of Congress are also invited, and transcripts of the public hearings are available on the Internet. The benefit of posting these transcripts on the Internet is that unfiltered information from small businesses becomes readily available to the public, media, federal agencies, and to Congress.

The Regulatory Fairness Program has also held Business Leader Roundtable meetings with business leaders throughout the country to share ideas and strengthen communications with them. Significantly, RegFair has also contacted most major small business trade associations. These are not one-time efforts; but a continuous dialogue consisting of regularly sending materials, holding meetings and making presentations.

Members of the Regulatory Fairness Boards and the National Ombudsman regularly communicate with small businesses to ensure that the Regulatory Fairness Program has satisfactorily addressed their comments, and to ascertain whether the small business has experienced any retaliation.

The National Ombudsman has provided the Regulatory Fairness Boards with ethics briefings, and has challenged them to practice the highest standard of ethical conduct. RegFair has also ensured that the activities of the Regulatory Fairness Boards fully comply with the Federal Advisory Committee Act (FACA)(5 U.S.C. App.2).

The National Ombudsman has taken full advantage of the acumen of the members of the Fairness Boards. The National Ombudsman holds a conference call nearly every month with each regional Regulatory Fairness Board, in addition to regular meetings and on going dialogue.

While there is much more work to be done, small businesses have gained significant benefits and rights because of the Regulatory Fairness Program.

Small Business Participation

Through extensive outreach efforts, the Fairness Boards and the National Ombudsman have succeeded in raising awareness of RegFair in the small business community. The number of written comments filed with RegFair has tripled since the first annual report. In all, 213 small business representatives had filed a comment through RegFair by December 31, 1998, and over 250 individuals have testified at RegFair hearings. It is anticipated that this number will increase as agencies fulfill their commitment to provide small businesses with effective notification of their right to comment directly to the National Ombudsman and Regulatory Fairness Boards, at the time of enforcement or compliance action.

The table below illustrates the total number of written small business comments that have been received by RegFair from the program's inception until December 31, 1998. These comments do not necessarily fall under the mandate of SBREFA, which is applicable when a small business comment concerns a federal regulatory enforcement or compliance activity.

Table A

<i>Total Small Business Comments Received</i>		
<i>1997 - 1998</i>		
<i>Agency</i>	<i>Written Comments</i>	<i>Testimony</i>
Health Care Financing Administration (HHS)	49	60
Internal Revenue Service (Treasury)	26	20
Environmental Protection Agency	21	28
Small Business Administration	18	16
Department of Labor	12	7
Department of Transportation	9	7
Department of Agriculture	7	6
Federal Energy Regulatory Commission (Energy)	6	6
Occupational Safety & Health Administration	6	14
Department of Defense	4	0
Food & Drug Administration (HHS)	5	0
Department of Housing and Urban Development	5	9
Department of Justice	4	3
Department of Commerce	3	5
Securities and Exchange Commission	2	2
Commodity Futures Trading Commission	2	1
Equal Employment Opportunity Commission	2	2
Federal Communications Commission	2	3
Federal Trade Commission	2	3
Department of Interior	2	1
Customs (Treasury)	1	0
Department of Energy	1	0
Drug Enforcement Agency (Justice)	1	0
Federal Deposit Insurance Corporation	1	4
Immigration and Naturalization Service (Justice)	1	3
National Labor Relations Board	1	1
Social Security Administration	1	0
Department of State	1	0
Unspecified	18	51
Total	213	252

It must be noted that the sheer number of comments received is not an especially effective criteria in evaluating how agencies interact with their small business customers. In fact, to the degree which agencies are aggressive in notifying small businesses of their rights, comments will increase naturally.

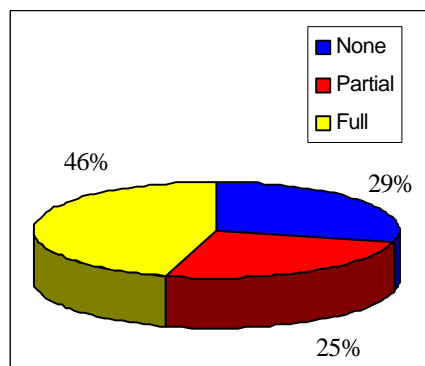
It is worth noting that comments received, such as testimony at the RegFair Hearing in Richmond, Virginia have not always been negative. Over time, hopefully more positive comments will be received, reflecting an improving regulatory environment.

Agencies that have not yet been named in a written comment filed by a small business are the Consumer Product Safety Commission, the Department of Education, the Farm Credit Administration, the General Services Administration and the National Aeronautics and Space Administration.

Of the 213 small business comments filed with RegFair, 158 were received since November 19, 1997, the cut-off date for the National Ombudsman's first annual Report to Congress on Regulatory Fairness. Of the 158 comments received this year, SBREFA was applicable to 84. SBREFA is applicable when a small business was subject to a regulatory enforcement or compliance activity undertaken by a federal agency.

The Evaluative Table below, shows the level of disclosure as well as the agency distribution of the 158 small business comments received by the RegFair program from November 19, 1997 through December 31, 1998.

This information is graphically illustrated by the adjacent chart, also showing the levels of disclosure chosen by small businesses filing a written comment with RegFair. While 29 percent of the small businesses are concerned about protecting their identities, fully 71 percent of the small businesses that filed a written comment with RegFair were comfortable disclosing the identity of their small businesses to the agency involved, and 46 percent were comfortable disclosing this information to the agency as well as the public.



None = No disclosure of business identity;
Partial = Disclosure to Agency and RegFair only;
Full = Disclosure to all.

In the chart, as in the Evaluative Table below, full disclosure means the small business is willing to release its identity to the agency involved and the general public. Partial disclosure means the small business is willing to release its identity only to the National Ombudsman and Regulatory Fairness Boards, and the agency involved. None means that the small business chose not to disclose its identity to any entity except the National Ombudsman and Regulatory Fairness Boards.

Table B

<i>Disclosure Level Chosen by Small Businesses November, 1997 through December, 1998</i>				
<i>Agency</i>	<i>None</i>	<i>Partial</i>	<i>Full</i>	<i>Total</i>
Health Care Financing Administration (HHS)	15	19	14	48
Small Business Administration	1	4	10	15
Internal Revenue Service (Treasury)	6	4	5	15
Environmental Protection Agency	3	2	8	13
Unspecified	3	3	3	9
Department of Labor	4	2	3	9
Department of Transportation	1		5	6
Occupational Safety & Health Administration	2	1	2	5
Department of Housing and Urban Development	3		2	5
Department of Agriculture		1	3	4
Food & Drug Administration (HHS)	2		2	4
Federal Energy Regulatory Commission (Energy)		1	2	3
Commodity Futures Trading Commission			2	2
Department of Defense	1		1	2
Securities and Exchange Commission		1	1	2
Department of Commerce	1		1	2
Department of Justice	1		1	2
Federal Trade Commission			2	2
Department of Interior	1		1	2
Equal Employment Opportunity Commission			2	2
Department of Energy	1			1
Federal Communications Commission	1			1
Customs (Treasury)		1		1
Drug Enforcement Agency (Justice)		1		1
Federal Deposit Insurance Corp.			1	1
Social Security Administration			1	1
Total:	46	40	72	158

Recommendations

The following recommendations are intended to guide federal agencies as they undertake enforcement and compliance actions with respect to small businesses, and to help improve the regulatory enforcement climate by providing a more small business-friendly environment. The first five recommendations shown below will be incorporated into the National Ombudsman and the Regulatory Fairness Boards' evaluation of agencies for the National Ombudsman's Report to Congress next year. Criteria for the evaluations will be shared with agencies at mid-year, and agency feedback and suggestions will be considered by the National Ombudsman and Fairness Boards. The additional recommendations are intended as guidance for the agencies.

Five major recommendations

1. Develop a regulatory fairness protocol for federal agency staff who undertake enforcement or compliance activities involving a small business. This protocol may include a form containing information such as a check list for the following:
 - Consideration of the size of the business when determining the enforcement or compliance action;
 - Consideration of the economic impact of the enforcement or compliance action on this small business and on small businesses generally;
 - Whether the small business' mitigating circumstances was considered;
 - Whether a lesser action was considered; and
 - Whether the small business had sufficient notice and appropriate opportunity to correct the cause of the violation.
2. Agencies should establish avenues through which small businesses can expeditiously raise the concern that the enforcement or compliance action threatens the economic viability of the business. The reviewing entity should have the authority to provide for alternative payment arrangements, enforcement or compliance actions, or other arrangements on a timely basis (such as within 30 days). The availability of this avenue should be made clear to small businesses.
3. Federal agencies should publicize data on agency enforcement and compliance activities, annually. Information gathered should improve agency self-assessment of agency fairness to small businesses at all stages of enforcement and compliance activities, and improve small business understanding of those activities. Agency heads could select data they believe would be most relevant to their agency's statutory authority, requirements or mission. Examples of appropriate data include the following:
 - Number and type of enforcement and compliance activities, with regional and program offices breakdowns;
 - Inspections, on-site visits, audits, or similar field activities;
 - Activities involving licensed versus unlicensed facilities;
 - Small business feedback, compliments and complaints with agency responses;
 - Number of fines, penalties, restrictions, license suspensions, or other debarments and similar actions;
 - Administrative, final agency, and judicial appeals and the cost of such activities; and
 - Use and success of informal and formal appeal channels for small versus large businesses.

4. Agencies heads should certify to the National Ombudsman that their designated RegFair Program representatives are independent of enforcement or compliance activities.
5. Federal agencies should provide formal training on a periodic basis for all enforcement and compliance staff on the regulatory fairness rights of small businesses, including the Regulatory Fairness Program. The training should sensitize employees to the unique needs of small business.

Five additional recommendations

6. Federal agencies should be encouraged to give awards annually to personnel that improved the regulatory enforcement and compliance environment for small business. Federal agencies are also encouraged to nominate the top individual or team within each agency that did the most to improve the small business regulatory enforcement and compliance environment for an award to be given by the National Ombudsman.
7. In an effort to promote improved customer service concerning regulatory enforcement issues, agencies are encouraged to develop a formal customer referral system, within and among agencies, to help ensure that customers are directed to the appropriate office or agency. This will dovetail with the Administration's National Performance Review efforts to ensure greater customer service and satisfaction.
8. Federal agencies should make a greater effort to monitor the tone and clarity of letters and notices sent to small businesses. The National Ombudsman has learned of instances in which small businesses have received what appear to be threatening letters and notices in situations that do not warrant such an approach.
9. The Public Affairs Coordinator or other appropriate personnel within each regional office of the U.S. Small Business Administration should be designated as a contact person for the Regulatory Fairness Program.
10. In order to reduce small business confusion about the role of the National Ombudsman, the name should be changed by Congress to clarify the role of the office. Customers often confuse the role of this office with that of the traditional ombudsman for individual agencies, especially that of the SBA. Currently, the Ombudsman's official title, by statute is the Small Business and Agriculture Regulatory Enforcement Ombudsman.

Agency Evaluation

One of the statutory missions of RegFair is to evaluate the enforcement activities of agencies with regard to small business, including rating their responsiveness to small businesses. Thirty-six agencies and programs have been identified which are evaluated using these factors.

As directed by the Act, the National Ombudsman, with advice from the Regulatory Fairness Boards, has focused on developing methods to evaluate federal agencies covered by the Act. For the 1999 Report, the National Ombudsman and Fairness Boards identified five areas of prominence. They are the following:

- Agencies complying with the applicability of the Regulatory Fairness Program;
- Agency action taken to inform small businesses about RegFair at the time of agency enforcement or compliance action;
- Agency responsiveness to small businesses comments and issues;
- Agency participation at RegFair hearings, held annually in each of 10 regions; and
- Agency response to and implementation of the recommendations put forward in the National Ombudsman's first annual Report to Congress on Regulatory Fairness.

Agencies Complying with the Applicability of the Regulatory Fairness Program

Most agencies identified as having “regulatory authority over small businesses” have acknowledged their responsibilities under SBREFA, and have agreed to notify small businesses about their right to comment through the RegFair process at the time an enforcement or compliance action is taken.

Section 222 of SBREFA is part of "Subtitle B--Regulatory Enforcement Reforms." Section 221 contains the "definitions" applicable to Subtitle B. Section 221 adopts the Freedom of Information Act (FOIA) definition of "agency." That definition states that agency means “each authority of the Government of the United States, whether or not it is within or subject to review by another agency....” (5 U.S.C. §551). Accordingly, the National Ombudsman, with advice from the regional Small Business Regulatory Fairness Boards, has concluded that Section 222 applies whenever a federal agency, as defined above, exercises regulatory enforcement or compliance authority with respect to a small business concern (15 U.S.C. Sec 657 (b)(2)(B)).

The following agencies, despite the broad statutory definition, correspondence and discussions with the National Ombudsman, and a letter from the Subcommittee on Regulatory Reform of the House Small Business Committee (see *Regulatory Rights Notification at the Time of Enforcement Action*) have taken the position that Section 222 of SBREFA does not apply to them:

Department of Defense
General Services Administration

Using the definition of agency supplied by FOIA through Section 221 of the Act to define the applicability of Section 222 of SBREFA, the Act is applicable to these Departments, as well as to the other federal agencies named in this report. (see *Significant Rights and Benefits for Small Business*).

For example, a comment illustrates the difficulty a small business would have if the Department of Defense was not covered by SBREFA. The comment concerns a small business in Kansas City owned by Mr. A. The business is a small to medium sized trucking company that has been

working as a freight-forwarder for federal agencies for 15 years. According to the business, it has done a considerable amount of work with the Department of Defense over the past five years and has never had any problems with shipments.

According to the business, the Department implemented a change to its procurement practices and began requiring a performance bond in order for a freight-forwarder to do business with them. The purpose of the bond is to insure fulfillment of the carrier's obligation to deliver the Department's freight to a given destination. Failure to obtain the bond precludes a firm from doing business with DOD.

In his agency appraisal, Mr. A comments that the requirement of a bond in order to continue as a carrier for the Department, ties up valuable assets and unfairly restricts participation by small or medium carriers in DOD contracts. Although the bond itself costs \$3,000, according to Mr. A, the bond is prohibitively expensive because the carrier must back the bond with \$100,000 of collateral based on equity, an amount which is difficult for a small business to achieve. Mr. A would like to see the requirement for a performance bond eliminated from the solicitation package. DOD eventually responded to the comment, indicating that it has since eliminated this bonding requirement.

Additionally, the Federal Insurance Deposit Corporation (FDIC) has taken the position that its examination and requests for information are part of risk assessment, and thus not enforcement or compliance actions. While acknowledging that Section 222 applies to the FDIC, that agency has construed all their actions as entailing no enforcement or compliance activity. Thus, in effect, making meaningless the applicability of RegFair to the activities of the FDIC.

The FDIC does more than risk assessment, and does indeed undertake substantial regulatory enforcement activities. See the following examples: "Authority of FDIC to take enforcement action against insured depository institutions and institution affiliated-parties" (12 U.S.C. § 1818(t)); and "Termination of status as insured depository institution" (12 U.S.C. § 1818(a)). The position taken by the FDIC is problematic, but discussions are continuing to resolve this issue.

Regulatory Rights Notification at the Time of Enforcement Action

Prior to issuing the National Ombudsman's first annual Report to Congress, the National Ombudsman requested federal agencies covered under Section 222 of SBREFA to fulfill their statutory obligation of notifying small businesses, at the time of regulatory enforcement and compliance activities, of the right to file confidential comments with the National Ombudsman and the regional Regulatory Enforcement Fairness Boards.

The National Ombudsman requested that agencies use the following notification language:

"Your Comments are Important"

"The Small Business and Agriculture Regulatory Enforcement Ombudsman and 10 Regional Fairness Boards were established to receive comments from small businesses about federal agency enforcement actions. The Ombudsman will annually evaluate the enforcement activities and rate each agency's responsiveness to small business. If you wish to comment on the enforcement actions of [Name of the Agency], call 1-888-REG-FAIR (1-888-734-3247)."

To dispel any confusion, the National Ombudsman worked with agencies to add language stating that small businesses' compliance obligation is not affected by the filing of comments with the National Ombudsman, and that filing comments with the National Ombudsman does not substitute for any legal options available to the small business.

As of December 31, 1997, when the first annual report was issued, 13 agencies had agreed to this request. The notification requirement is based on Section 222 (b)(2)(A), (B), and (b)(1)(15 U.S.C. § 657 (b)(2)(A)(B) and (b)(1)), as well as on express legislative history. At the time of the passage of SBREFA, the Senate and House filed a Joint Manager's Statement of Legislative History and Congressional Intent. 142 Congressional Record ES71-01 (March 28, 1996)(House); 142 Congressional Record S3242-02 (March 29, 1996)(Senate).

The Joint Statement was introduced "[i]n order to provide additional guidance for agencies to comply with the requirements of [SBREFA]. Since there will not be a conference report on the act, this statement and a companion statement in the House should serve as the best legislative history of the legislation as finally enacted." 142 Cong.Rec.S.3242-02, S3242 (March 29, 1996)(Statement of Senator Bond, Chairman of the Small Business Committee). Immediately after quoting 15 U.S.C. §657 (b)(2)(A), the Joint Statement expressly states:

"the SBA should publicize the existence of the Ombudsman generally to the small business community and also work cooperatively with the enforcement agencies to make small businesses aware of the program at the time of agency enforcement activity." 142 Cong. Rec. E571-01, E572(March 28, 1996)(House)(emphasis added); 142 Cong. Rec. S342-02, S3243(March 29, 1996)(Senate)(emphasis added).

On June 26, 1998 Chairwomen Sue Kelly and Ranking Minority Member Danny Davis, of the House Subcommittee on Regulatory Reform and Paperwork Reduction, Committee on Small Business, wrote a letter to agencies previously contacted by the National Ombudsman. That letter stated:

"Specifically, we ask that you honor the Ombudsman's request to insert the information about the Regulatory Fairness Program into materials distributed *at the time of any enforcement action*. This would fulfill much of the stated requirement of Section 222 of SBREFA, which specifically requires agencies to work with the Ombudsman to inform small business about the right to comment directly on enforcement activities."(emphasis in the original).

In August, 1998, after receiving the leadership's letter, additional agencies agreed to provide this notification at the time of enforcement action. The agencies that have agreed to provide notification are shown in the Evaluative Table, below.

As demonstrated in the National Ombudsman's first and second Reports to Congress, enforcement and compliance activities under Section 222 are not limited to fines and penalties. The statute covers both compliance and enforcement activities (15 U.S.C. §657(b)(2)(B)). Enforcement activities, as used in the statute, must mean something different from compliance. Enforcement activities include authoritatively obtaining or denying benefits, as well as to cause to take effect, and to put into execution based on regulatory authority. The concept of enforcement necessarily encompasses oversight activities. On the other hand, compliance activities mean to bring into

conformance, and this could entail the imposition of a fine or penalty (see *Black's Law Dictionary*; see also *State of Colorado v. United States*, 867 F. Supp. 948, 952 (D. Colo., 1994)).

As mandated by SBREFA, and supported by the legislative history, notifying small business of their rights at the time of the regulatory enforcement and compliance activities will enable small business to know of their rights when it is most effective and meaningful.

In fact, RegFair received written small business comments concerning the IRS, FDA, and the Department of Labor because those agencies gave effective notification about the Regulatory Fairness Program at the time of regulatory enforcement and compliance activities. However, one of the Fairness Board members was recently audited by OSHA, and was upset that he was not provided information regarding his right to comment through RegFair, as OSHA had indicated (see *Evaluative Table 1* below). This raises an issue regarding the degree to which all agencies, including OSHA, have uniform implementation by each of their field offices.

The FDIC still does not provide notification of the Regulatory Fairness Program to small businesses. The FDIC recently indicated it “is prepared to consider whether there may be circumstances in which the FDIC may wish to provide an appropriate notice to small businesses concerning their right to comment to the SBA Ombudsman under SBREFA.” The reason given by the FDIC is that it “provides a number of different avenues for small businesses to comment on or air complaints, including its regulatory appeals process, its ombudsman, and it [sic] alternative dispute resolution process.” However, as was pointed out to the FDIC, these avenues predate enactment of Section 222 of SBREFA and are not unique to the FDIC. Congress was aware of these avenues when it enacted Section 222 and mandated that small businesses be notified of their new rights to comment on regulatory enforcement action through the National Ombudsman and Fairness Boards.

Evaluative Criteria:

High Marks

The agencies shown below earned high marks for providing or putting in motion implementation of the notification language at the time of regulatory enforcement and compliance activities.

Satisfactory Marks

Agencies that earned satisfactory marks have given specific unambiguous commitment to provide the notification language to small businesses, but have not yet put in motion the implementation of that commitment by specifying the notification language to be used in all their enforcement and compliance regulatory activities.

Unsatisfactory Marks

The agencies given unsatisfactory marks have not committed to provide notification to small businesses, despite letters from the National Ombudsman, and the Subcommittee on Regulatory Reform of the Small Business Committee of the United States House of Representatives.

Evaluative Table 1

High Marks	Commodity Futures Trading Commission	Department of the Interior
	Consumer Product Safety Commission	Internal Revenue Service
	Drug Enforcement Agency	Department of Labor
	Department of Education	Occupational Safety & Health Admin.
	Environmental Protection Agency	National Aeronautics & Space Administration
	Farm Credit Administration	National Labor Relations Board
	Federal Energy Regulatory Commission	Securities and Exchange Commission
	Federal Trade Commission	Small Business Administration
	Food and Drug Administration	Social Security Administration
	General Services Administration	Department of State
	Department of Housing and Urban Development	Tennessee Valley Authority
	Immigration and Naturalization Service	Department of Transportation
		Department of Veteran Affairs
Satisfactory Marks	Department of Agriculture	Equal Employment Opportunity Commission
	Department of Commerce	Department of Health and Human Services
	Customs Service	
Unsatisfactory Marks	Department of Defense	Federal Deposit Insurance Corporation
	Federal Communications Commission	

Agency Participation at RegFair Hearings

RegFair hearings are held annually in each of SBA's 10 regions of the country. RegFair hearings were designed to give small businesses across the country a new voice to address matters that concern them and to express their views on the enforcement or compliance activities of the Federal Government agencies that regulate them. They also provide a means through which agencies may address and be questioned about specific issues identified in small business comments, or of general concern to small businesses.

The hearings provide a public forum in which small businesses can give direct feedback on their experiences to federal agencies, Congressional representatives, Fairness Board members and the National Ombudsman. They also allow small businesses to provide their views to Congress through the National Ombudsman's annual report on regulatory fairness. Additionally, the hearings provide an opportunity for trade and professional associations and other small business groups to present the experiences of their members, or industry and regional trends in federal regulatory enforcement and compliance action.

In 1998 alone, over 650 people attended the 10 hearings held, and nearly 150 small businesses testified before the Regulatory Fairness Boards on varied issues and concerns with federal agency enforcement action. Since proceedings of the hearings are available on the RegFair Internet web site, the testimony of small businesses and federal agencies, and the actions of the Fairness Boards and the National Ombudsman are available nationally.

With the advice of the region's Fairness Board members, two federal agencies are chosen and invited to testify before the Board at each regional hearing. During the first round of hearings held in 1997, agencies offering testimony were asked to give a general review of their activities in response to the requirements of SBREFA, and changes they were planning or had made to become more responsive to small businesses. Agencies were also requested to address specific regulatory enforcement issues affecting small businesses in the region, and how the agency planned to address those issues.

For the 1998 RegFair hearings, agencies offering testimony at the hearings were requested to provide a status report on their implementation of the 10 recommendations contained in the National Ombudsman's first annual Report to Congress, or their plans and timelines for implementing the recommendations.

Although a number of agencies sent representatives to many of the hearings throughout the country, the tables below show the agencies that were invited to testify at each hearing held in 1997 and in 1998, and the agencies that attended and offered testimony.

Rating Criteria for Evaluative Table 2, below:

<i>1997 RegFair Hearings Federal Agency Participation</i>					
<i>Date</i>	<i>Region</i>	<i>City</i>	<i>Invited Agencies</i>	<i>Presenting Agencies</i>	<i>Notes</i>
5/28/97	8	Denver	OSHA, EPA	OSHA, EPA	
6/20/97	9	San Francisco	IRS, USDA	IRS, USDA	
8/5/97	6	Albuquerque	INS, FCC	FCC, OSHA	1
8/21/97	10	Seattle	EPA, FDA	EPA, FDA	
9/25/97	2	New York	INS, SEC	INS, SEC	
10/27/97	1	Boston	IRS, FDA	IRS, FDA	
11/3/97	7	Kansas City	USDA, DOL	USDA, DOL	
11/17/97	4	Charlotte	FERC, FCC	FERC, SBA	2
12/1/97	3	Philadelphia	DOL, DOT	DOL, DOT	
12/4/97	5	Chicago	INS, SEC	OSHA	3

Rating Criteria, Cont'd.

<i>1998 RegFair Hearings Federal Agency Participation</i>					
<i>Date</i>	<i>Region</i>	<i>City</i>	<i>Invited Agencies</i>	<i>Presenting Agencies</i>	<i>Note</i>
4/6/98	9	San Jose	FCC, EPA	FCC, EPA	
4/20/98	8	Salt Lake	DOL, OSHA	DOL, OSHA	
5/1/98	6	Tulsa	IRS, INS	IRS, INS	
6/8/98	7	St. Louis	USDA, HCFA	SBA	4
6/22/98	1	Augusta	IRS, OSHA	IRS, OSHA	
6/25/98	10	Boise	HCFA, DOI	HCFA, DOI	
8/10/98	5	Cleveland	DOT, EEOC	DOT	5
8/21/98	4	Nashville	DOC, HUD	NONE	6
9/15/98	3	Richmond	HCFA, HUD	HCFA, HUD	
9/18/98	2	Long Island	IRS	IRS	

Notes:

1. The Immigration and Naturalization Service did not respond to the National Ombudsman's letter of invitation to speak at the hearing, but did present at a subsequent hearing. The Occupational Safety & Health Administration deserves recognition for agreeing to speak at the hearing on short notice.
2. The Federal Communications Commission responded to the National Ombudsman's letter of invitation and requested to participate in another hearing. The FCC did so at the hearing in San Jose, CA. The Small Business Administration deserves recognition for agreeing to speak at the Charlotte hearing on short notice.
3. The Securities and Exchange Commission (SEC) requested to be re-scheduled for a hearing in 1998. The Immigration and Naturalization Service (INS) did not respond to the National Ombudsman's letter of invitation. The Occupational Safety & Health Administration deserves recognition for agreeing to speak at this hearing on short notice.
4. The Department of Agriculture declined the invitation to participate in the hearing. The Health Care Financing Administration did not respond to the National Ombudsman's invitation. The Small Business Administration deserves recognition for agreeing to speak at the St. Louis hearing on short notice.
5. The Equal Employment Opportunity Commission did not respond to the National Ombudsman's letter of invitation, and have stated that it has no record of receiving the invitation.
6. The Department of Commerce responded to the National Ombudsman's letter of invitation by offering to participate in a future hearing, instead. The Department of Housing & Urban Development also responded to the invitation by requesting to present at the Richmond hearing, rather than in Nashville.

Agency Participation in RegFair Hearings

Each year, ten regional fairness board hearings have been convened across the country. These hearings are one of the major vehicles by which the National Ombudsman and Fairness Boards obtain feedback from the small business community on the regulatory enforcement environment. The public hearings are well publicized and attended.

In 1997, approximately 450 individuals attended the hearings, and more than 100 provided testimony on their experience with regulatory enforcement. In 1998, over 650 individuals attended the hearings, and nearly 150 small business representatives offered testimony. Transcripts of the proceedings are posted on the RegFair website, which is found on the Small Business Administration's home page (www.sba.gov/regfair).

In 1998, Members of Congress or key staff attended or actively participated in 8 of the 10 hearings, and this Congressional involvement resulted in heightened awareness of the RegFair Program by small businesses.

Over the last two years, the RegFair Program has convened 20 public hearings nationally, with 17 different agencies participating in varying degrees. In 1997, 12 agencies presented information on their implementation of SBREFA at the public hearings. In 1998, 11 agencies presented information on their efforts to implement the recommendations contained in the National Ombudsman's first annual Report to Congress. In 1998, most agency representatives came prepared to address the recommendations, and provided testimony that was relevant.

Of the agencies that have demonstrated full cooperation with RegFair by participating in RegFair hearings, the Occupational Safety & Health Administration deserves recognition for active participation in the two hearings to which they were invited, and for substituting, often at short notice, for "no show" agencies at three additional hearings.

High Marks

As illustrated in Evaluative Table 3 below, nine agencies earned high marks for their full participation and interaction with small businesses in all hearings to which they were invited, and for meaningfully addressing the 10 recommendations in their presentations.

Satisfactory Marks

The second category consists of agencies that had been invited to participate in a number of hearings and sent an agency representative to some of those hearings.

Unsatisfactory Marks

The final category includes agencies from which no representative attended a hearing to which the agency was invited, or the agency did not respond to the National Ombudsman's letter of invitation.

Evaluative Table 2

	<i>Agencies</i>	<i>Hearings Invited</i>	<i>Hearings Attended</i>
High Marks	Internal Revenue Service	5	5
	Occupational Safety & Health Administration	5	5
	Environmental Protection Agency	3	3
	Department of Labor	3	3
	Department of Transportation	2	2
	Food & Drug Administration	2	2
	Small Business Administration	2	2
	Federal Energy Regulatory Commission	1	1
	Department of Interior	1	1
Satisfactory Marks	Federal Communications Commission	3	2
	Health Care Financing Administration	3	2
	Department of Agriculture	2	1
	Securities and Exchange Commission	2	1
	Department of Housing and Urban Development	2	1
	Immigration and Naturalization Service	3	1
Unsatisfactory Marks	Department of Commerce	1	0
	Equal Employment Opportunity Commission	1	0

Agency Responsiveness to Small Business Comments and Issues

Under SBREFA, the National Ombudsman is responsible for receiving both positive and negative comments from small businesses, and evaluating the enforcement activities of agency personnel including rating the responsiveness of regional and program offices of each agency.

The National Ombudsman, with the explicit permission of the commenting small businesses, uses substantiated RegFair comments as sample case studies in federal agency enforcement or compliance activities. The case study approach focuses the National Ombudsman’s agency evaluations on particular agency procedures and practices that strike at the heart of fairness in regulatory enforcement and compliance activities. Agency leaders may have admirable policies and intentions, but most crucial are how these intentions and policies are carried out in the field.

RegFair first reviews small business comments to determine whether the program has jurisdiction. After jurisdiction is established, the National Ombudsman drafts questions about each comment to substantiate the comment and to focus the agency on the fairness of the regulatory enforcement issues raised by each comment. These questions increase the impact of small business comments on the federal regulatory enforcement environment and give meaning and credibility to the National Ombudsman’s evaluation and rating of agencies. For a given comment, the agency might be asked to address whether it considered factors such as economic consequences, past compliance, mitigating circumstances, and opportunities for the company to bring itself into compliance. RegFair also asks agencies whether, in light of the small business comment and the National Ombudsman’s questions, it would handle similar activities differently, with respect to the comment, and in the future.

The small business comments and the National Ombudsman's questions are sent to the agency involved for an independent review of the enforcement or compliance activity. The comments also provide agencies feedback from small businesses to help them gauge their compliance with the Regulatory Fairness Program. High-level officials are asked to respond to these comments and questions, and to determine whether their agency followed policy, acted professionally, and used sound judgment. This review process gives agencies an opportunity to consider whether their rules, policies, training or other factors create a small-business friendly environment or one that is hostile. As required by the statute, this process also helps agencies, the National Ombudsman and the Fairness Boards identify enforcement or compliance activity problems that are regional or local in scope.

The case study approach and agency review is a critical element in the ultimate success of SBREFA. The colloquial expression, the devil is in the details, could not be more accurate for improving the enforcement and compliance environment for small business. In fact, many agencies are eager to review small business comments, as they are very interested in customer feedback and reviewing their own performance.

In evaluating agency responsiveness to small business comments, the National Ombudsman considers both the timeliness as well as the adequacy and thoroughness of the agency response.

Timeliness of agency responses to small business comments is rated because of the special importance it has to small businesses. To small business, timeliness includes all phases of agency enforcement or compliance activities as well as their response to small business comments. Small businesses that comment through RegFair are very concerned that their comments be considered and responded to promptly. This concern has been consistently raised by small businesses across the country and in every program forum. In some circumstances, agency timeliness can be even more important than the ultimate agency positions or decisions. In other words, an earlier negative response from an agency can be less damaging for the business than a late positive response. With a response a small business can more accurately plan for the future.

Adequacy and thoroughness of the agency responses in addressing small business comments are an indication of the agency's customer service. The responses are also useful in RegFair's evaluation of agency enforcement and compliance activities. Moreover, the quality of the response is indicative of the level of agency review and agency commitment to improving the regulatory environment for small business.

The Regulatory Fairness Boards generally believe that if agencies are not timely and thorough in their responses to the RegFair Program, when the spotlight is on them, it is very unlikely they would be responsive under everyday circumstances.

The Evaluative Table below evaluates the average timeliness of initial agency responses to small business comments. The average represents the number of days that elapsed between the date RegFair sent an agency a small business comment, and the date RegFair received the agency's initial response.

Small businesses may submit comments to RegFair on enforcement or compliance activities at any point during or after those activities. In some instances, an agency currently engaged in enforcement or compliance activity, which is the subject of a comment may conclude that an early

response to portions of the comment may undermine the regulatory activity itself. In those instances, the agency is requested to respond only to those portions of the comment that are not at the heart of the enforcement or compliance activity, and to respond to the remaining portions when the activity concludes.

In the next annual Report to Congress, the evaluation of agency responsiveness to small business concerns will be enhanced in two ways. First, the National Ombudsman will report on the timeliness of agencies in providing full and final responses to small businesses' comments. This rating will account for instances in which the enforcement or compliance activity has not concluded. Second, agencies will be qualitatively rated on the adequacy and thoroughness of their responses to the full range of the National Ombudsman's regulatory fairness questions.

The Fairness Boards and National Ombudsman believe it is important that the timeliness of agency responses should be weighed together with their adequacy and thoroughness to more accurately assess the responsiveness of agencies to the concerns expressed by small businesses.

Evaluative Table 3

<i>Timeliness of Agency Small Business Comment Responses 1997 through 1998</i>		
<i>Agency</i>	<i>Average Grade</i>	<i>Number of Comments sent to Agencies</i>
Department of Agriculture	Excellent	3 Comments
Commodity Futures Trading Commission	Excellent	1 Comment
Customs (Treasury)	Excellent	1 Comment
Federal Deposit Insurance Corp.	Excellent	1 Comment
Immigration and Naturalization Service (Justice)	Excellent	1 Comment
Small Business Administration	Excellent	5 Comments
Housing and Urban Development	Excellent	5 Comments
Department of Labor	Good	4 Comments
Department of Defense	Good	2 Comments
Equal Employment Opportunity Commission	Good	2 Comments
Internal Revenue Service (Treasury)	Good	15 Comments
Occupational Safety & Health Administration (Labor)	Good	2 Comments
Securities and Exchange Commission	Good	1 Comment
Department of Transportation	Average	3 Comments
Environmental Protection Agency	Average	11 Comments
Federal Communications Commission	Average	2 Comments
Food and Drug Administration	Average	2 Comments
Federal Energy Regulatory Commission	Average	4 Comments
Department of Justice	Unsatisfactory	2 Comments
Health Care Financing Administration (HHS)	Unsatisfactory	38 Comments

Key: 1-45 days = Excellent; 46-60 days = Good; 61-90 days = Average; 91 + days = Unsatisfactory

Evaluative Table 4

<i>Adequacy and Thoroughness of Agency Small Business Comment Responses 1997 through 1998</i>	
<i>Agency Involved</i>	<i>Response to Small Business Comment</i>
Equal Employment Opportunity Commission	Excellent
Department of Labor	Excellent
Securities and Exchange Commission	Excellent
Housing and Urban Development	Excellent
Occupational Safety & Health Administration (Labor)	Excellent-
Small Business Administration	Excellent -
Department of Agriculture	Good
Environmental Protection Agency	Good
Federal Communications Commission	Good
Federal Energy Regulatory Commission	Good -
Department of Justice	Good -
Customs (Treasury)	Average
Food and Drug Administration (HHS)	Average
Health Care Financing Administration (HHS)	Average
Internal Revenue Service (Treasury)	Average

Rating Criteria for Evaluative Table 4, above:

Excellent	All of the small business' issues or National Ombudsman's questions were fully addressed. The response demonstrates a thorough and reflective review of the issues or questions. Courses of action are discussed for any agency-validated concerns.
Good	The Response addressed most of the small business' issues or National Ombudsman's questions. The response demonstrates the agency gave the issues or questions serious consideration during the agency review. Where applicable, agency reaction to agency-validated small business or RegFair concerns is not addressed in the response.
Average	The Response addressed most of the small business' issues or National Ombudsman's questions. The issues or questions that were addressed in the agency response were done in a moderately complete fashion.
Unsatisfactory	The Response did not address a significant number of the small business' issues or the National Ombudsman's questions. The issues or questions that were addressed in the agency response were done in a very minimal fashion.

Agency Response to the first Annual Report Recommendations

The National Ombudsman's first annual Report to Congress on Regulatory Fairness presented 10 recommendations which were derived from small business comments, RegFair hearing testimony, and the experiences of Fairness Board members as small business owners and as 1995 White House Conference Delegates.

The National Ombudsman requested federal agencies to provide a status report on efforts to implement the recommendations contained in the report. Initial agency responses were reviewed and in most cases, agencies were asked to provide further details or clarification on specific recommendations. Their complete responses were reviewed to evaluate the steps agencies have taken to implement the recommendations, thereby improving the regulatory enforcement environment for small business.

This section of the 1999 report evaluates and rates the agencies' responses to the recommendations deemed most significant to creating a friendlier environment for the Nation's 23 million small businesses. They are the first five recommendations appearing in the National Ombudsman's first annual Report to Congress. The results of this process are the rating which appears in Evaluative Table 5, below.

All agency responses, including agency responses to the draft of the 1999 Report to Congress were used to rate agencies. Four agencies achieved ratings of *Good* or *Excellent* in all five categories. Those agencies are the Department of Agriculture, the Federal Trade Commission, the Small Business Administration and the Department of Transportation. The National Aeronautics and Space Administration received an *Unsatisfactory* rating for all five recommendations because it did not supply the status of its implementation of the recommendations to the National Ombudsman, as requested.

Overall, according to federal agencies, they are particularly effective at providing notice of new regulations and appear to have or be developing employee evaluation methods that are not based the number of fines and penalties issued. Additional focus is needed on developing expedited review, implementing and enforcing anti-retaliation policies.

Evaluative Table 5

Rating of Agency Responses to RegFair Recommendations

<i>Agency</i>	<i>Rec. 1 Notice of New Regs.</i>	<i>Rec. 2 Expedited Review</i>	<i>Rec. 3 Employee Evaluation</i>	<i>Rec. 4 Anti- Retaliation Policy</i>	<i>Rec. 5 Executive Summary</i>
Department of Agriculture	●	◐	◐	◐	◐
Department of Commerce	●	◐	◐	○	⊙
Commodity Futures Trading Commission	◐	●	◐	●	NR
Consumer Product Safety Commission	●	◐	◐	⊙	◐
Customs Service (Treasury)	●	●	◐	◐	⊙
Department of Defense	○	NR	NR	○	○
Department of Education	⊙	NR	NR	◐	NR
Environmental Protection Agency	●	○	◐	●	⊙
Equal Employment Opportunity Commission	●	◐	NR	NR	◐
Farm Credit Administration	◐	⊙	◐	NR	NR
Federal Communications Commission	◐	⊙	◐	⊙	⊙
Federal Deposit Insurance Corp.	●	○	●	◐	●
Federal Energy Regulatory Commission (Energy)	●	○	●	⊙	●
Federal Trade Commission	●	●	◐	◐	●
Food & Drug Administration (HHS)	◐	⊙	◐	●	◐
General Services Administration	●	●	NR	○	◐
Health Care Financing Administration (HHS)	◐	○	⊙	○	○
Department of Housing and Urban Development	●	⊙	◐	NR	◐
Immigration and Naturalization Service (Justice)	◐	◐	⊙	○	◐
Internal Revenue Service (Treasury)	◐	◐	◐	◐	⊙
Department of Interior	●	⊙	◐	◐	○
Department of Justice					
FBI	●	NR	●	◐	◐
DEA	●	◐	◐	●	⊙
Exec. Office – Immigration Review	NR	●	NR	NR	NR
Civil Rights Division	◐	●	◐	⊙	NR
Department of Labor	●	⊙	◐	⊙	⊙
National Aeronautics and Space Administration	○	○	○	○	○
National Labor Relations Board	NR	●	◐	NR	NR
Occupational Safety & Health Administration (Labor)	●	○	⊙	⊙	●
Securities and Exchange Commission	●	◐	◐	●	⊙
Small Business Administration	●	●	◐	◐	◐
Social Security Administration	NR	NR	NR	NR	NR
Department of State	⊙	○	◐	○	○
Tennessee Valley Authority	NR	◐	NR	NR	NR
Department of Transportation	●	◐	●	◐	●
Department of Veterans Affairs	◐	○	NR	◐	◐

Key: ● = Excellent ◐ = Good ⊙ = Average ○ = Unsatisfactory NR = Not Rated

Rating Criteria for Evaluative Table 5:

Issue 1

Small businesses complain that there is often little or no notice given by the agency that its interpretation or methods have changed until a fine or penalty is handed down.

Recommendation 1

Agencies should be more aggressive in informing small businesses when they change or amend the rules, processes, or regulations that specifically affect small businesses.

While the *Federal Register* and web site information sources are helpful, many small businesses cannot review the *Federal Register* on a consistent basis, and many do not have access to the Internet. Therefore, it was suggested in correspondence from the National Ombudsman to agencies receiving a fair or poor rating for Recommendation 1, that they consider augmenting their current distribution avenues with additional sources of information on rules, regulations and major policy changes affecting small businesses.

<p>● Excellent</p>	<p>From the agency's response, it appears a concentrated effort is consistently made to inform the small business community of new rules and regulations, of rule changes, and of major program or policy revisions that will affect the industry's compliance efforts. Agencies receiving an excellent rating communicate these changes by publishing information on their Internet web sites and in the <i>Federal Register</i>, and using methods such as direct mail and face-to-face meetings with small businesses and trade associations of the industries affected.</p>
<p>◐ Good</p>	<p>The agency reports a reasonable attempt to inform the small businesses of rule changes by publishing information on their Internet web sites and in the <i>Federal Register</i>, and by using additional communication methods such as direct mail to small businesses, trade associations, and other interested parties.</p>
<p>◑ Average</p>	<p>The agency makes some attempt to inform the small business community of changes by publishing information on its website and in the <i>Federal Register</i>.</p>
<p>○ Unsatisfactory</p>	<p>An empty circle rating means one of two things. First, this rating may reflect an agency response that did not address the issue or recommendation at all. Second, this rating means that from the agency response it appears the agency makes little or no attempt to inform the small business community of major rules, program or policy other than publishing information in the <i>Federal Register</i>.</p>
<p>NR Not Rated</p>	<p>"NR" appears where an agency has not been rated with respect to that particular recommendation. In many of these cases, it appears from the agency's response that the recommendation does not apply to its enforcement or compliance activities or functions. In other instances the agency is not rated for the recommendation because the agency's response indicates the recommendation does not apply, however, the National Ombudsman and Fairness Boards are still studying whether they agree with this interpretation.</p>

Issue 2

Agency actions can have serious and/or negative impact on small business operations.

Recommendation 2

Agencies should develop an expedited review process in circumstances where agency actions may have a severely negative impact or threaten small businesses' survival. Additionally, time limits should be instituted to restrict the length of time agencies may take to review the circumstances of an action and issue some kind of a response.

● Excellent	According to the agency, it has a written policy in place to expedite the review process, which limits the amount of time taken to review an appeal and issue a response.
◐ Good	The agency reports it has a review policy that includes safeguards for small businesses that are severely threatened by enforcement action, but the agency's response to the National Ombudsman on this issue did not indicate that there were time limits on the review of an appeal. Conversely, this rating may also mean that the agency's response indicates established timelines when dealing with small businesses, but does not indicate that a review policy exists.
◑ Average	From the agency's response, it appears that there are some safeguards in place for small businesses that are severely threatened by enforcement actions, but there appears to be no formal policy.
○ Unsatisfactory	It appears from the agency's response that there is no policy, nor does there appear to be adequate safeguards in place for a speedy review when the survival of small businesses is threatened by agency enforcement action.

Issue 3

Small businesses are concerned that agency personnel may be evaluated and rated according to the number of penalties they issue or fines they collect.

Recommendation 3

Agencies should build on the Administration's policy that employees should be rated based on their efforts to ensure small businesses' compliance with federal regulations, rather than on the number of fines they collect. Also, evaluations should include factors which could lead to a negative rating for employees who take action without careful and objective review of the actual circumstances of each case.

● Excellent	The agency's response indicates that employees are evaluated on professionalism and efforts to encourage compliance rather than on the number of penalties issued or fines collected, and that the agency has criteria in place that could produce a negative rating factor for employees who take action against small businesses without a careful and objective review of the full range of the circumstances of each case.
◐ Good	The agency's response indicates it uses factors other than the number of penalties issued or fines collected when rating employees. However, the agency's response does not indicate whether it has or will develop criteria that could produce a negative rating factor for employees who take action against small businesses without reviewing the full range of the circumstances of each case.
◑ Average	The agency's response states that it does not rate employees on the number of penalties issued or fines collected, but does not provide information on how employees are rated, nor does it appear to include criteria that could produce a negative rating.
○ Unsatisfactory	The agency did not respond to the recommendation, and/or provided information which was not germane.

Issue 4

Small businesses fear agency retaliation for speaking out or criticizing them.

Recommendation 4

Agencies should develop internal policies that specifically condemn any and all forms of retaliation by agency personnel, and clearly communicate that policy to agency personnel dealing with small businesses.

Agencies must adopt and follow policies and procedures which make it clear to small businesses that they will not face retaliation for raising concerns regarding compliance and enforcement. While the National Ombudsman can assure small businesses that, absent their express consent, that their names will not be used when dealing with federal agencies, small businesses communicating directly with an agency should be equally assured that no retaliation will be taken for asserting their rights.

While many agencies have designated an ombudsman to handle small business complaints who, in most cases, can assure the confidentiality of the small businesses that contact them, fear of retaliation is likely to deter a small business from ever contacting the agency's ombudsman. For example, a small business owner who knows she or he must work with the same agent year after year, will be less likely to contact the agency's ombudsman, fearing that any disciplinary action short of dismissal taken against that employee may hurt the small business in the next inspection.

● Excellent	The agency reports it has policies or procedures in place that make it plain to small businesses that they will not be retaliated against for expressing their views or experiences with the agency, and that this policy has been clearly communicated to the agency's employees who deal directly with small businesses in enforcement or compliance activities.
◐ Good	According to the agency, it has a policy or procedures against retaliation by agency personnel, but it is unclear from the agency's response how it deters retaliation, what steps are taken to monitor enforcement actions and how agency employees are notified of the policy.
◎ Average	The agency's response indicates it does not retaliate against small business owners for expressing their views on agency actions and activities, but the response does not indicate whether this is a formal policy, how it deters retaliation, or whether this has been clearly communicated to all employees that have contact with small businesses.
○ Unsatisfactory	From the agency's response, it appears the agency does not have a policy against retaliation, or that the agency's response did not address this issue.

Issue 5

Small businesses can receive a myriad of materials and notices from federal agencies each week. It is burdensome for them to determine whether these notices apply to their businesses and whether they require action or are purely informational.

Recommendation 5

All agencies should place an executive summary on the cover of every major notice sent to small businesses to make them immediately aware of whether action is required or whether the notice is informational, the purpose of the publication, and to which businesses or industries it applies.

● Excellent	According to the agency's response, the cover of every notice sent to small businesses includes an executive summary.
◐ Good	The agency reports it includes a formal summary of some kind when mailing information to small businesses, or that in response to this recommendation, the agency plans to issue a summary with notices sent to small businesses.
◎ Average	The agency's response indicates that it has made a concerted effort to summarize information or notices sent to small businesses, but does not indicate plans to institute an executive summary for each notice.
○ Unsatisfactory	It appears from the agency response that there is no real attempt being made to summarize information or notices sent to small businesses, or that the agency did not respond to the issue stated in Recommendation 5.

Section Summary

While a helpful tool with which to measure agency inclinations toward small business customers, this process of evaluation also illuminates one of the constraints of the RegFair program. That is, under SBREFA, the National Ombudsman has no immediate way to determine the extent to which agencies are putting into practice the efforts and programs described in their written responses to the National Ombudsman on these issues.

The method by which the National Ombudsman currently evaluates whether agency personnel are carrying out these policies in the field is by matching agency responses against the comments of small businesses received through RegFair on regulatory enforcement or compliance action, and through the testimony received in RegFair hearings and by Fairness Board members.

One of the most important benefits of utilizing this extensive evaluation was to develop a model of best practices for each of the critical recommendations. In this way, other agencies could use these examples to develop ways of better communicating with their small business customers and also in achieving greater compliance. Therefore, this report shares how specific recommendations have been put into practice by a number of agencies and suggests that others consider similar measures, where appropriate.

Best Practices of Recommendation Implementation

In this section, the National Ombudsman and Regulatory Fairness Boards offer descriptions of "best practices" for the 10 recommendations contained in the in the National Ombudsman's first annual Report to Congress. The implementation of these best practices will foster a friendlier regulatory enforcement environment for the Nation's 23 million small businesses.

A major goal of the Fairness Boards and National Ombudsman in putting forward these best practices is to provide a means through which agencies can obtain new ideas to incorporate a small business friendly approach into their internal processes and procedures. Much as the concept of Total Quality Management transformed the manufacturing industry in the United States, the adoption of these "best practices" can help an agency continually improve the regulatory enforcement environment. It also should ease small businesses' perception of being micromanaged by federal agencies.

The following are examples of best practices:

Recommendation 1

Significant for Recommendation 1 were indications that agencies are making a consistent and concentrated effort to inform the small business community of new rules and regulations, of rule changes, and of major program or policy revisions affecting the regulatory enforcement and compliance environment.

While examples of distinction in this area were exhibited by many of the agencies, two agencies that stood out for their efforts were the Consumer Product Safety Commission (CPSC) and the Environmental Protection Agency (EPA).

According to its response to the 10 recommendations, the CPSC regularly and routinely issues industry-wide guidance letters whenever policies or procedures impacting small businesses change, and hosts training seminars in various locations around the country when regulations change significantly. For a major regulations change the CPSC provides "grace periods" ranging from 120 days to one year or more for businesses to come into compliance. (The Immigration and Naturalization Service (INS) reports a similar policy providing a "grace" period when regulations have changed, before fines are assessed.)

According to the Commission, the CPSC rarely focuses on small businesses that were not aware they were violating the law. Such small businesses, while they may need to take corrective action, are not automatically subject to penalties because the business is unaware that the agency has changed its interpretation.

The Fairness Boards and the National Ombudsman commend the CPSC for these efforts. They also suggested to other agencies that they consider augmenting their own avenues of communication with small businesses, with additional sources of information on rule changes.

In addition to its public notice and comment procedures, the Environmental Protection Agency (EPA) established a Small Business Ombudsman who serves as the one-stop source for compliance information. Through EPA's Small Business Ombudsman (SBO), EPA publishes the SBO Update Newsletter, a quarterly update which the agency uses as its primary vehicle for informing small

businesses of rule changes that impact them. The newsletter contains information and guidance for small businesses on upcoming regulation changes, and new and existing rules. It also includes state agency and EPA contacts and hotlines, information on SBREFA and EPA's penalty reduction policies. The SBO Update Newsletter is sent to small businesses, trade associations, states and other small business assistance providers around the country.

In a recent meeting with the National Ombudsman, EPA staff described agency efforts at partnering with trade associations, on an industry-by-industry basis, to develop information centers where small businesses can obtain industry-specific information on state and federal regulatory requirements .

Recommendation 2

Recommendation 2 requested agencies to develop an expedited review process in circumstances where their actions may have a severely negative impact or threaten the survival of a small business.

While many agencies have not previously considered implementing a formal, written policy before, recommendation 2 specifically calls their attention to this crucial issue that small business owners say can have serious consequences on the survival of their businesses. The institution of an expedited process for an enforcement or compliance matter under review by an agency would be of enormous help to small businesses which often have no legal staff and a limited amount of resources to devote to a formal appeal.

While the review and appeals processes for some agencies are governed by statute, such as the Executive Office of Immigration Review of the Department of Justice, many agencies are not bound or constricted by statute and thus could develop regulations that expedite the review or appeals process.

According to the U.S. Customs Service, its binding classifications rulings are usually issued to requesters within 30 days, unless a meeting with an attorney is also requested. According to the Service, in those cases, it tries to issue the binding ruling within 120 days after the meeting. In either instance, Customs regulations permit any of the parties to request an expedited decision if there is need, and all inquiries are screened and tracked to ensure timely responses.

To minimize adverse effects of delays in its proceedings, the National Labor Relations Board (NLRB) has always had time targets with respect to the length of time it should take to complete an investigation. The NLRB reports that recent budget cuts have necessitated cuts in case handling and a hiring freeze, have also resulted in the failure of some offices to meet their time targets.

According to the NLRB, through careful investigation, approximately two-thirds of all charges filed with the agency are dismissed. The NLRB also has an aggressive settlement program in which any business alleged to have violated the Act, is given the opportunity to resolve the charges promptly, without litigation. According to the agency, over 90 percent of the charges found to have merit are settled in this way.

The inverse of expedited review is illustrated by a valuable idea from the Federal Trade Commission (FTC). According to the FTC, while its actions generally do not have the potential to inflict severe injury on a business, those businesses subject to review are ordinarily not required to change their practices until the review of the action is completed.

Recommendation 3

Recommendation 3 requested agencies to base employee evaluations on compliance, rather than on penalties issued or fines collected. This recommendation also suggested that the evaluation process should include a measure which may produce a negative rating for employees who take action against a small business without a careful and objective review of the actual circumstances of each action.

For this recommendation, the National Ombudsman and Fairness Boards would like to commend the following agencies for developing and implementing employee evaluation processes that include possible negative rating factors:

Federal Deposit Insurance Corporation
Federal Energy Regulatory Commission
Federal Bureau of Investigation
Department of Transportation

Recommendation 4

Recommendation 4 requested that agencies adopt and follow policies and procedures that make it clear to small businesses that they will not face retaliation for speaking out or criticizing an agency. This is a crucial recommendation in the eyes of small businesses, many of who fear agency retaliation, even if they have never experienced it.

This perception and fear extend beyond the confidentiality issue of sending small business comments to the agencies involved. It has also arisen in RegFair hearings, where a small business owner requested to give testimony anonymously.

To further underscore the seriousness of this issue, at a Joint Congressional Field Hearing before the Small Business Committees of the U.S. House of Representatives and the U.S. Senate in Kansas City, Missouri, Congressman James Talent, Chair of the House Small Business Committee, discussed his intention to research the possibility of developing legislation on this issue.

In addressing agency retaliation through recommendation 4, RegFair is pushing the debate beyond merely keeping the identity of a small business secret, to develop solutions that address this common perception among small businesses. The National Ombudsman established four methods to do so:

1. The National Ombudsman has asked that agencies notify small businesses of their statutory rights under the Regulatory Fairness Program at the time of an enforcement or compliance action.
2. The National Ombudsman has asked agencies to assign a high ranking, independent official to review small business comments sent to them by RegFair. This addresses the issue in two ways: first, review at a high level within an agency ensures that the agency personnel reviewing the small business comment is independent of the personnel that took the enforcement or compliance activity against the business. Second, a high-level official who can represent the agency's position in responding to the small business comment, can also identify and implement changes in regulatory enforcement activities and policies, so that they better

serve the agency's small business customers without costing those businesses undue time and resources to clarify or appeal the action.

3. Fairness Board members have expressed serious concern and a desire to move forward on this issue. Therefore, when called upon to follow-up with small business owners who have testified at RegFair hearings and indicated the desire to file a written comment and an appraisal form, board members are also asking whether the owners believe they had experienced retaliation as a result of their testimony.
4. Pursuant to the statute, RegFair has established a clear link to each agency's Inspector General in order to refer enforcement or compliance activities that have the appearance of impropriety on the part of agency personnel. Agency Inspectors General were contacted by the National Ombudsman to guarantee that the identity of the small business will be treated with the same level of confidentiality provided employee complaints.

These steps have been taken by the National Ombudsman to address the issue of retaliation, not just for small businesses who traverse the RegFair process, but for all small businesses. Bringing these issues to the forefront makes agencies realize that to alleviate this fear, as well as any actual threat of retaliation within the agency, they should pursue policies against retaliation and clearly communicate these policies to their employees and to the public. These policies will benefit all businesses that deal with agencies and the government as a whole, as the public becomes aware of the policies against retaliation and efforts by agencies to enforce the prohibition. The next step in this process is to ensure that stated policies are being enforced.

For recommendation 4, which directly addresses the issue of retaliation, the National Ombudsman and Fairness Boards were interested in agency attempts to develop and institute policies and procedures that ensure that retaliation does not occur. Specifically deemed important was a clear and specific policy communicating to all agency employees that retaliation is not tolerated, along with clear steps designed to monitor enforcement action.

In this respect, the Food and Drug Administration (FDA) earns specific commendation. According to the FDA, the agency's leadership regularly warns FDA employees that retaliation against businesses in their regulated industries will not be tolerated. This policy was issued to all FDA employees in a memo in June, 1995, and is posted on the FDA Internet web site. The memo advises alleged victims of such retaliation to report it in strict confidence to the FDA Office of Chief Mediator and Ombudsman.

The Securities and Exchange Commission (SEC) also earns commendation for designing a structure and procedures for operation that limits the possibility of retaliation. Under the Commission's procedures, no individual staff member can bring formal investigative or enforcement action. Only the Commission, which consists of five members can decide to initiate a formal investigation or civil or administrative enforcement action, or to request sanctions. In cases where the SEC is considering enforcement action, potential defendants are offered an opportunity to submit arguments to the Commission on why it should not take the action against them.

The Drug Enforcement Administration is recognized for the three safeguards it reports that were designed to limit the possibility of retaliation. They are: mandatory review of proposed enforcement actions by management officials or legal counsel; strictly enforced standards of conduct for DEA personnel; and communication of concerns through industry associations to DEA

management rather than direct communication between the complainant and the investigative personnel believed to be at fault.

Under DEA's system, a small business desiring anonymity may contact its professional association to voice any comments, concerns or complaints regarding compliance or enforcement actions taken by DEA personnel. The association will provide general details of the reported incident to DEA, and seek a solution to the issue, which might entail a clarification of regulatory requirements, issuance of appropriate guidance to DEA investigative personnel, or in cases where inappropriate actions have occurred, referral of the matter for internal investigation.

This DEA process is very similar to that used by the RegFair Program for small business choosing confidentiality when submitting a comment, which is to summarize the issues contained in the comment for agency response and refer them to the agency for independent and high level review, without disclosing the small businesses' identities.

The Environmental Protection Agency is also recognized for stating that, although the agency has no current policy in place, a formal, unambiguous policy against retaliation will be drafted by March 1999.

Finally, the Small Business Administration earns recognition for designing a structure and procedures for operation that limit the possibility of retaliation by requiring supervisory and legal concurrence on decisions that could result in findings of regulatory violation.

Recommendation 5

Small businesses can receive a myriad of informational materials and notices from federal agencies each week. It is burdensome for them to determine whether these notices apply to their businesses and whether they require action or are purely informational. As a result, Recommendation 5 requested agencies to place an executive summary on the cover of all major notices sent to small companies to make them immediately aware of the purpose of the notice.

RegFair commends the following agencies for putting this recommendation into practice, and recognizes that some had done so prior to the National Ombudsman's report. The Federal Energy Regulatory Commission (FERC), the Occupational Safety & Health Administration (OSHA), and the Department of Transportation include an executive summary with notices sent to small businesses.

The Department of Housing and Urban Development (HUD) is also recognized for advising its program staff to adopt an "information" versus "action" protocol for materials sent to small businesses.

Recommendation 6

Recommendation 6 suggested that agencies use the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget to resolve regulatory and jurisdictional disputes. The Department of Commerce, DEA, FBI, HUD and OSHA are commended for recognizing the importance of resolving potential interagency conflicts when they affect the operations of small businesses, and for using OIRA to help resolve regulatory and jurisdictional disputes.

The U.S. Customs Service and the Department of the Interior are also recognized for their willingness to use OIRA to help resolve regulatory and jurisdictional disputes, should they occur.

The Department of Agriculture is also credited with developing and maintaining an on-going working relationship between its regulatory personnel and their OIRA counterparts.

Recommendation 7

Recommendation 7 requested that agencies provide more systematic and consistent education about SBREFA to their own personnel and to ensure that personnel who work with small businesses are familiar with the law and are sensitive to the unique needs of small business. For recommendation 7, many of the agencies reported good efforts to inform staff about SBREFA, such as the development of guidebooks and other materials distributed to affected personnel, and staff briefings. The National Ombudsman and Fairness Boards would like to commend the Internal Revenue Service (IRS) and the U.S. Customs Service for the following excellent efforts.

The IRS has taken an aggressive approach to educating its employees on SBREFA, including, among other items, the following:

- Appointment of a SBREFA Executive in each of the IRS's four regions to oversee overall SBREFA implementation in their respective regions;
- Appointment of SBREFA coordinators in each district service center to resolve local SBREFA-related questions and issues;
- Distribution of a comprehensive "SBREFA Implementation Plan" in November of 1996, outlining the various implementation responsibilities of each IRS area;
- Distribution of 2 communications explaining the Act and key provisions affecting the Service, recommended ways of educating IRS employees on the Act;
- Distribution of 40,000 desk aides entitled SBREFA at a Glance to customer service representatives; and
- Establishment of a SBREFA Hotline to answer taxpayer, practitioner and employee questions.

The U.S. Customs Service is also commended for taking the following steps to ensure that Customs personnel are familiar with SBREFA and the recommendations contained in the National Ombudsman's first annual Report to Congress:

- Briefing all managers on SBREFA in January, 1998, on the importance of making their staff aware of the agency's responsibility to comply with the Act;
- Developing methods to ensure that employees are made aware of SBREFA's requirements and of the agency's policy in support of the Act;
- Including SBREFA presentations as part of training seminars and courses provided for employees; and
- Distributing a memo to all assistant commissioners in December 1997, providing information on the Act and the agency's message to be placed in appropriate communications.

The EPA is also credited with organizing and conducting training sessions for national and regional personnel, for plans to conduct training for all personnel who are affected by SBREFA's requirements and for including SBREFA as a lesson topic in the agency's more general training programs.

The Department of Labor is recognized for its "User's Guide to SBREFA and Related Laws," for establishing national and regional office SBREFA contacts, and for plans to convene semi-annual strategy meetings with these staff to better respond to the needs of small businesses.

Recommendation 8

Recommendation 8 suggested that the IRS should develop a program that provides a reasonable opportunity to get absolute and final interpretation of tax issues and allows small businesses a reasonable opportunity to pursue compliance without fear of penalty.

In response to this recommendation, the IRS described a number of programs under which taxpayers could request "reduced user fees," and described a system of reduced penalties under a voluntary identification and correction system.

However, the agency also states the following:

“We understand small businesses' desire to be assured that one IRS agent's examination findings will not later be overruled by another IRS agent. Our Examination employees are trained to administer the law fairly and equitably to all taxpayers. However, each year stands on its own, so what was acceptable (or even required) in one year may not be in subsequent years. This could be because of changes in the law, regulations, court decisions, or changes in the way the taxpayer conducts business. Each decision must be based on the unique facts and circumstances before the examiner.”

Recommendation 9

Recommendation 9 suggested that SBDCs, SCORE, and other SBA resource partners should help aggressively disseminate information about SBREFA and the RegFair Program. RegFair and its resource partners have pursued this recommendation in four significant ways:

1. Aida Alvarez, Administrator of the Small Business Administration, created a regulatory committee of the SBA's National Advisory Committee (NAC), co-chaired by Vince Ruffalo of Wisconsin and Carolyn Bushnel of California. The committee has passed resolutions to ask NAC members to be more involved in helping to promote the RegFair Program and to encourage small businesses to attend and participate in RegFair hearings;
2. The National Ombudsman met with the 50 state SBDC Directors at their annual conference in Savannah, GA. The Directors indicated their strong interest in more active involvement, and one of their major committees has been assigned regulatory issues as a major part of its jurisdiction. The committee is headed by Sam Males, former national president of the National Association of SBDCs;
3. A liaison committee of Fairness Board members, headed by Tom Gutherie of Region IX, will hold periodic conference calls with the SBDCs' newly-formed committee to discuss progress on methods of improving coordination and involvement between RegFair and the SBDCs; and
4. Ken Yancey, Executive Director of SCORE, has agreed to make regulatory fairness an active issue with the SCORE chapters throughout the country. Ken Yancey included a RegFair brochure in his monthly mailing to approximately 400 SCORE chapters, and placed an article about RegFair in SCORE's monthly newsletter, which has a distribution of about 16,000 members. Ken Yancey also indicated he would include information on RegFair on the SCORE website, which averages roughly 900,000 hits a month.

Recommendation 10

Finally, recommendation 10 requested that agencies publicize information about their enforcement activities with regard to small businesses as compared to larger companies.

For recommendation 10, the Department of Transportation deserves commendation for its SBREFA Enforcement Report, which is published on the Internet and describes how the Department's agencies distinguish treatment of small entities, compared with larger businesses, in its enforcement activities. The Federal Bureau of Investigation is also commended for its stated intent to begin publicizing information about its enforcement activities with regard to small businesses.

Agency Changes

As agencies examine their relationships with small businesses, some of the relationships between agencies and small businesses are becoming less adversarial and closer to partnerships. Some agencies are beginning to realize that it is easier for all parties involved to work toward compliance, than to "catch" and fine small businesses that are not following regulations to the letter.

The new attitude of some agencies is illustrated by their requests for training from the National Ombudsman. To date, five agencies have discussed or requested possible assistance in training their regional and local personnel on SBREFA and RegFair.

Some of these agencies have also expressed an interest in suggestions and ideas on bringing small businesses closer to the regulatory process, so that voluntary compliance becomes the norm for the agency, rather than penalizing small businesses for violations. The agencies are the Department of Agriculture, the Environmental Protection Agency, the Federal Communications Commission, the Federal Energy Regulatory Commission, the Department of Housing and Urban Development, the National Labor Relations Board, and the Tennessee Valley Authority. These agencies are commended for their willingness to create a win-win situation for themselves and their small business customers by working to develop unambiguous regulations.

Agencies have also requested meetings with the National Ombudsman to discuss specific aspects of the RegFair Program. Formal and detailed meetings were held with the Departments of Defense and Interior, the Federal Deposit Insurance Corporation, the Environmental Protection Agency, and the Federal Energy Regulatory Commission. Additionally, the Commissioner of the Internal Revenue Service met with the National Ombudsman to discuss how IRS' restructuring efforts might incorporate the ten recommendations contained in the National Ombudsman's first annual Report to Congress.

Issues Faced by Small Businesses

In expanding the dialogue on federal regulatory fairness with the national small business community, recurring enforcement and compliance issues have emerged from small business written comments and appraisal forms submitted, in testimony taken at the Regulatory Fairness Board public hearings, and in feedback obtained through Fairness Board members' daily interactions with the small business community.

In the National Ombudsman's first annual Report to Congress on Regulatory Fairness, four issues were identified as major themes to show that small businesses face many of the same regulatory issues across the country and across industries. These issues were illustrated using case studies of actual small business comments.

For the National Ombudsman's 1999 Report to Congress, the small businesses in the case studies presented were contacted once again to determine the results and/or current status of their comments. They are presented below.

Four new themes were also identified for the 1999 report, and once again, are illustrated with the actual experiences of small businesses. As in the previous report, the comments are presented here with the consent of the individuals who testified or submitted written comments. The comments convey some of the perceptions and experiences small businesses have reported to the National Ombudsman and Fairness Boards.

1998 Case Studies

In examining the regulatory enforcement and compliance environment for small business, four issues were identified in 1998 that were prevalent in written comments, public hearings, and roundtable feedback. The issues are not isolated to any one area of the country or any one federal agency. These issues are:

- Agency enforcement practices too frequently have draconian effects;
- Too many compliance and enforcement officials utilize a broad brush approach;
- Agencies often fail to effectively communicate their own procedures and standards; and
- The tone conveyed in enforcement activities are frequently too adversarial and confrontational.

As in last year's annual Report to Congress, these new regulatory enforcement and compliance issues are illustrated through review of small business comments, testimony, and fairness board inquiries.

Many of the small business comments selected to illustrate these issues have been responded to by the relevant agencies. These responses, and subsequent agency or small business communications regarding the comments, were considered in the National Ombudsman's evaluation of agency enforcement or compliance activities.

These case studies are presented only for illustrative purposes. Some are awaiting agency review, and represent the small business owners' perception of events. Although specific agencies are identified in connection with the issues presented, their mention here is not intended to reflect overall agency performance.

Agency Enforcement Practices Too Frequently Have Draconian Effects

Apart from the merits of an enforcement or compliance activity, small businesses report a common perception that agencies sometimes take actions that appear to be harsh and unrelated to the severity of the alleged violation. These actions appear to reflect little regard for their impact on businesses and their owners.

A written comment filed on behalf of R & R Restaurants, Inc. illustrates this issue. R & R is a family-owned and operated small business in Mesa, Arizona. R & R's comment concerns a 1996 tax audit by the IRS against the owners, and their account of the circumstances is as follows:

As a result of the audit, the IRS determined, based on an amendment to their business tax return, that the owners owed approximately \$28,000 in additional taxes, penalties and interest for the 1992 tax year. The additional taxes reflect an adjustment based in part on business dividends the IRS claimed should have been taxed.

The small business owners received a computer generated IRS notice, which provided little information about the reasons why \$28,000 was owed and gave the owners 10 days to respond. R & R contacted its accountant and began what proved to be a two-year quest.

Although R & R's accountant promptly provided the response demanded by the IRS notice, the agency's written confirmation that it had received this response was not delivered for four months, and the agency indicated it required an additional four months to review the matter. The IRS substantive response came one month after its own self-imposed deadline, or over nine months after the owners first submitted their reply to the agency.

Despite their quick response to the first notice, and subsequent follow up during the IRS review period, the owners continued to receive what they perceived as threatening notices from the agency. The notices indicated a continued escalation in their tax bill, with ever-increasing fines and penalties, but did not reflect any of their communications with the IRS on the matter. Finally, R & R's owners received a notice from the IRS stating that the agency planned to seize their property for failure to pay the \$28,000. However, when the IRS finally reviewed the couples' response and the additional documentation requested, the agency confirmed that the couple had made the proper tax payments from the start. As a result, the owners' \$28,000 bill was reduced to approximately \$650. After review of R & R's comment filed through the RegFair Program, the fine was eliminated altogether by the IRS.

According to the IRS, such letters to taxpayers in these circumstances are automatically computer-generated. According to the agency, the letters, although inaccurate, are not meant to be threatening but must be issued as required legal notice. The IRS position appears to be that R & R should know these letters are computer generated and should have disregarded them. This is most troubling to the small business because the IRS seems to believe that it should not be held accountable if its letters are computer-generated.

For R & R, this ordeal was significantly magnified because they felt the IRS was inaccessible, untimely in its review and responses, and especially, because the agency appeared unaware and unconcerned that it continued sending threatening letters to a taxpayer that had responded adequately and promptly to its first notice.

In its response to the National Ombudsman and the small business, the agency apologized for the extended delay in responding to R & R. In reviewing the matter the IRS found that the representative handling the audit was not adequately familiar with the tax rules applicable to the business. The Fairness Boards and National Ombudsman urge the IRS to put a process in place to guard against this situation in the future.

The second comment concerns a Health Care Financing Administration (HCFA) audit and the unnecessarily harsh manner in which its action was completed. The small business, referred to as Company W, chose to retain the confidentiality of its identity.

Company W is a small home health care provider that was selected as one of less than 700 agencies nationally to be audited by HCFA for the purpose of developing HCFA's Prospective Payment System (PPS). Compared to the current Interim Payment System, the PPS is supposed to be a more advanced payment system that offers better cost and abuse control for government, while offering providers more equitable reimbursements for medical services provided.

The company tried to approach its audit as a fact gathering process, necessary for the proper development of PPS. However, according to the company, HCFA handled the audit in a harsh manner.

HCFA's first letter advised Company W about the audit. Its second letter requested general information to be collected and made available on the first day of the audit. Among other documents, the company was to have every invoice, canceled check, and payroll record for the year. According to the company, the second letter warned that providers failing to adhere to these requirements would be reported to the HCFA Regional Office, and that their interim payments would be suspended immediately. Company W, like many small home health care providers, provides practically all of its care to HCFA-insured patients. The implementation of HCFA's warning would financially imperil Company W. A third letter from HCFA included a four-page list ordering the company to assemble and provide 40 additional items for the audit.

Company W spent two to three weeks preparing for the audit and occupied three full-time staff members for the week of the audit. According to the company, HCFA approached it as an interrogation, and the audit was both punitive and grueling. Also according to Company W, the auditor was accusing and negative in tone and attitude, spending hours questioning the company on its personnel policies and days cross-examining staff on how the company accounts for medical supplies. According to the company, the auditor, who appeared to the small business to be untrained to do the audit, appeared to be trying to find something wrong with the way the company handled its supplies. HCFA has not yet responded to this small business comment.

A third small business comment, submitted confidentially to the National Ombudsman, further illustrates the harsh effect of agency practices. The small business, which is referred to here as Company V, submitted a comment that concerns two distinct and equally disturbing enforcement actions by the IRS.

The first enforcement action concerns the collection of a disproportionately large tax penalty on a tax bill of less than \$0.50. Company V relied on an IRS publication that states that no tax payment is necessary when total tax due is less than \$1.00. Company V followed these

directions but soon after received a notice for less than \$.50 tax due, but with a penalty of over \$200.00—a penalty of about 400 times the amount due.

Because this comment was filed confidentially, the IRS could not address the specific circumstances of the comment. The agency stated that it would not normally take action to recover such a small amount, and that the small business owner should contact their local IRS Problem Resolution Office to have its concern addressed. Regulatory Fairness Board members question whether agents have discretion to contradict official IRS publications. These are publications which offer official guidance for small businesses and the public.

The second enforcement action presented by Company V concerned bi-weekly IRS payroll tax payments, to which the company had recently become subject. According to Company V, it sought and received written guidance from the IRS and followed instructions on making its payroll tax deposits on the Wednesday following each Friday payday. However, after following these instructions for a fiscal quarter, the company received a notice from the IRS stating that its electronic payments were consistently 1-2 days late and assessing almost \$400 in penalties.

According to Company V, it is unfair practice for the IRS to penalize a company that had sought guidance and complied with instructions to the letter, in good faith. Moreover, instead of bringing the problem to the company's attention in a timely manner, so that correction and compliance would be achieved rather than a fine issued, the IRS waited until the end of the fiscal quarter to notify the business.

In its response to the small business comment, the IRS did not address this issue which left the small business without the satisfaction of being able to understand what the IRS policy really is and whether it can rely on written agency guidance in the future. The National Ombudsman is again asking the IRS to specifically address these issues.

Too Many Compliance and Enforcement Officials Utilize a Broad Brush Approach

Taking a broad-brush approach to compliance and enforcement action can result in inappropriate, unfounded, premature or improperly explained enforcement or compliance action taken by agencies against small businesses.

When agencies take what appear to small businesses to be inappropriate or excessive enforcement actions, the businesses often perceive two options. They either feel compelled to fight the action or to surrender to what they perceive as the unjust demands of the agency, because they do not have the time or financial resources available to challenge a federal agency. Two written comments illustrate the broad-brush approach that many small businesses report experiencing.

The first comment concerns Clifton Power Corporation, a small business in Spartanburg, South Carolina that produces hydroelectric energy from a small dam. The company sells the power it produces to the area electric utility.

Clifton operates the dam in compliance with multiple federal and state regulatory agencies. The company had voluntarily submitted to FERC jurisdiction, although because of its size and age, Clifton's dam can operate as an exempt facility under federal law.

According to the company, one of FERC's requirements for Clifton is monitoring and maintaining certain water levels above and below the dam, and the company has maintained full compliance. However, the FERC ordered Clifton to install a specific measuring device below the dam. There were several problems with this order, but the most troubling for Clifton was that it was impossible to install the specified device in the manner prescribed by the agency.

Clifton tried to bring its concerns with this order to the attention of FERC officials. Although the company firmly believed the measuring systems in place were adequate, it proposed to FERC alternative measurement systems that the company believed were more practical than those ordered by the agency. However, FERC did not consider Clifton's alternatives and eventually fined the company \$122,100 for failing to install a measuring device that Clifton was certain would not work at their site.

Upon appeal, an independent administrative law judge (ALJ) found that FERC had not properly considered the facts and reduced the penalty to approximately \$15,000. However, the Commission rejected the judge's decision and reinstated the original penalty.

Although the company had already spent considerable time and money fighting the agency, Clifton appealed FERC's decision to the U.S. Court of Appeals. The Court of Appeals found that the Commission's decision was arbitrary and capricious, and sent the action back to the Commission for compliance with its order.

While Clifton was trying to resolve the matter with FERC staff, the Commission was also considering the company's RegFair comment. As a result of that review, FERC acknowledged that SBREFA requires the Commission to consider additional regulatory fairness factors in its enforcement and compliance related activities.

In its final order on the matter, the Commission weighed environmental issues with factors such as the business' size, economic consequences of the enforcement action, the cooperation of the business with FERC, and the business' past compliance. The Commission decided to accept the small business's settlement offer, which called for the company to surrender its FERC license and begin operating as a FERC exempt dam.

To the agency's credit, FERC began to take the circumstances of the small business into account when considering an enforcement order that appeared impractical to carry out, rather than merely going "by the book."

A written comment submitted on behalf of Jack O'Connor's Quality Beef n Seafood illustrates how agencies may take a cursory review approach when determining compliance with agency regulations.

Jack O'Connor's is a restaurant in Bridgewater, New Jersey that has operated continuously for eighteen years. The small business has had cash flow problems in the past and has worked cooperatively with the IRS when special payment plans were needed. According to O'Connor's, the restaurant had met all previous obligations.

In 1995 and 1996 the restaurant experienced particularly severe cash shortages that were due primarily to new chain restaurant competition and intense winter storms. As a result of the cash

shortage, the business fell behind on payroll taxes, and the IRS assessed the business \$90,000 in taxes and interest, and \$30,000 in collection penalties.

According to Jack O'Connor's, the restaurant could not meet these payments while simultaneously keeping the business operating. According to the company, despite its efforts to communicate the reasons for the late payments, the IRS did not consider any extenuating circumstances until it reviewed the company's RegFair comment.

In reviewing the enforcement action to respond to the small business' RegFair comment, and the National Ombudsman's specific questions about the comment, the IRS applied the tax code to the specific facts presented by Jack O'Connor's and reduced the penalty by \$11,000. However, the IRS did not indicate in its response what changes, if any, it planned to improve the audit process in the future to achieve more individualized, detailed, and accurate reviews for similarly situated businesses.

Agencies Often Fail To Effectively Communicate Their Own Procedures And Standards

Often federal agency enforcement and compliance actions are taken in ways that are not clear to small businesses. Small businesses are usually expert in their fields, but not in ever-changing government regulations. When agencies fail to effectively educate small businesses on the rules and procedures the agencies follow in pursuing their actions, such failures increases the negative impact of their actions on business. A lack of effective agency communication results in the following:

- Worse outcomes for small businesses;
- Increased length of time for action resolution; and
- Increased business frustration and dissatisfaction.

Three agency actions illustrate the importance of effective communication with respect to agency regulatory enforcement activities. The first comment concerns the Environmental Protection Agency (EPA), which reports it has implemented its own regulatory fairness procedures. However, it appears the agency needs to communicate these procedures to small businesses.

Behrens, Inc. is a small manufacturer in Minnesota that does metal plating work. It has been under current ownership since 1990. The company uses hazardous chemicals in its manufacturing processes and has been working in cooperation with state environmental officials and the local fire department to comply with environmental regulations.

Over the course of nine years, Behrens has worked with relevant state environmental agencies and has requested visits from the local fire department to make sure it was in regulatory compliance in its use and storage of hazardous materials. Despite these efforts, the company was never made aware of the Emergency Planning and Community Right-to-Know Act (EPCRA).

In 1996, the company received a notice from the EPA alerting it that the EPA believed Behrens might not be in compliance with EPCRA and that the EPA was going to audit the company. After receiving this notice, the company scrambled to learn about EPCRA and what was required. The company brought itself into compliance before the EPA visited its facility. Although Behrens was in compliance for the EPA inspection, the company was still assessed a \$26,000 penalty for one of two violations that spanned multiple years.

Behrens strongly believes that this fine was excessive, and that the agency did not consider the company's good faith efforts with the fire department, state environmental agencies, and the EPA itself. The company believes that a portion of the reason for its non-compliance lies with the EPA for its lack of communication about the Act, especially since Behrens had made such a concerted effort to ensure compliance with all laws governing hazardous materials.

The company was also concerned that EPA enforcement officials did not have enough discretion to consider the company's specific circumstances and efforts, and that it was unfairly targeted for enforcement action.

According to EPA's response to this comment, the agency did consider regulatory fairness factors before its initial penalty assessment and during its negotiations with Behrens. According to the agency, it considered Behrens' size, fiscal condition, quick compliance, cooperation with the agency, and disclosure of hazardous material information to the fire department. According to EPA, the \$26,000 fine assessed for several years of non-compliance on two different disclosure requirements, is significantly less than the maximum allowable fine of \$25,000 per day, per violation.

According to the agency, it has developed a policy to completely waive fines for companies that voluntarily come into compliance before EPA contacts them. Although a complete waiver is unavailable to companies after EPA contact, significant penalty reductions are still an option. The agency has penalty matrices to make sure EPA agents appropriately weigh various factors in their penalty assessments and that the penalties do not inappropriately discriminate between companies or across regions.

EPA's voluntary compliance policy seeks to encourage and reward companies that comply with the law without EPA intervention. According to the EPA, although Behrens did not qualify for a complete waiver, it did receive the maximum penalty reductions for its good faith efforts.

As for Behrens' belief that it was unfairly targeted, the EPA states that its initial letter to Behrens was the result of the agency's effort to increase staff effectiveness by focusing audits on businesses that are more likely to be non-compliant. In the case of Behrens, the EPA targeted the business based on its Standard Industrial Classification (SIC) code and its failure to file EPCRA disclosure statements with the agency.

While Behrens' initial fine was \$26,000, the amount was reduced to \$11,000 in a settlement agreement. The company was also allowed to spend approximately two thirds of the fine on increasing safety at the plant and better prepare emergency crews to respond to a site emergency.

The second comment concerns the Federal Energy Regulatory Commission (FERC), which in response to RegFair, modified its internal processes to take regulatory fairness issues into consideration and communicated these efforts directly in the agency's enforcement order to the small business.

Bluestone Energy Design is a small hydroelectric operator in Converse, South Carolina. Bluestone was ordered by FERC to develop an emergency plan for the possibility of a dam failure. The company submitted multiple plans to the agency and after a significant time lag

was informed that none of the plans met agency requirements. Despite Bluestone's efforts to be responsive to FERC's order, according to the agency, Bluestone's non-compliance presented significant human safety concerns and the company was assessed a fine of \$206,000.

Bluestone believes the fine was excessive and that FERC had not properly considered SBREFA, the company's compliance history, and its financial resources. The company appealed the order and later filed a written comment with the National Ombudsman. After several stages of review, including a review by the U.S. Court of Appeals, FERC addressed the enforcement action for a second time.

On its second review, the Commission applied SBREFA to the facts presented by Bluestone, and in its written order, considered the threat to public safety, the company's past compliance, and its financial status. FERC eventually decided that Bluestone's violations were not serious enough to warrant the large proposed fine and reduced the amount to the \$16,000 already paid. This amount was the settlement amount originally offered by Bluestone.

FERC's direct consideration and discussion of SBREFA in its enforcement order is commendable. The discussion explicitly makes clear to Bluestone and to the small business community that FERC is cognizant of SBREFA and will apply its analysis during enforcement or compliance proceedings.

A third comment illustrates how agencies may fail to appreciate and respond to small business concerns raised during enforcement or compliance activities. Brost International Trading Co. (BITCO) is a small business located in Chicago, Illinois. The company trades internationally and for several years has sought a business loan guaranteed by the Small Business Administration (SBA).

The business owner was previously the principal of an international trade business that had defaulted on a direct SBA loan. According to BITCO's owner, the previous company primarily exported U.S. goods to Panama, and had fared badly in the 1980's when the U.S. began economic sanctions against Panama and ultimately invaded that nation. Because of these circumstances, it was impossible for that business to continue operating in Panama, and that company defaulted on the SBA loan and filed for bankruptcy.

BITCO applied for a SBA guaranteed loan several years ago, but the loan was denied under the SBA's "prior loss" rule. This rule denies new loans to applicants in cases where the SBA suffered a loss on a prior loan. However, due to the extenuating circumstances surrounding his previous loan, BITCO's owner believed that a "good cause" exception to the prior loss rule applied, and he should be able to obtain a new loan.

BITCO applied for a good cause exception and SBA reviewed the case. The agency determined that the company was ineligible for the new loan, but the SBA did not address why the "good cause" exception did not apply. After the SBA declined its loan application a second time, BITCO submitted a written comment to RegFair.

In responding to the RegFair comment and the National Ombudsman's specific questions, SBA reviewed the entire action and found that the result was proper. Also, after reviewing the comment, the agency did explain the "good cause" exception and cited examples of how it had previously applied the exception. According to the agency, the exception may be applied only

when the principal of the company currently applying for a SBA loan guarantee did not have control of the company which failed to make full payment on a prior loan, and so was not responsible for the previous loan's non-payment. According to the SBA, the good cause exception does not include external factors that impact on the business.

Had the SBA addressed these reasons why BITCO was not eligible for another SBA guaranteed loan at the time the company raised the issue, the company could have moved on to other options, or sought regulatory, legislative or other legal relief.

In its response to this small business comment, the SBA indicated a strong interest in clarifying the meaning of agency rules with appropriate field staff and improving the level of analysis provided in the responses small business concerns receive to direct inquiries.

The Tone Conveyed In Enforcement Activities Is Too Often Adversarial and Confrontational

Agencies have difficulty communicating with small businesses and end up needlessly causing conflict and creating small business adversaries. Sometimes, even when agencies take steps to make regulatory life easier for small businesses, communication can break down and businesses perceive agencies to be working against them.

Company Y is a small business that chose to retain its confidentiality when it filed a SBREFA comment about the IRS. The small business operates a restaurant and was recently contacted by an IRS agent to sign a Tip Reporting Alternative Commitment (TRAC) agreement.

The IRS agent called Company Y to suggest a meeting, so that the agent could explain the TRAC agreement. Company Y says the IRS gave a carefully worded warning that if Company Y's owner did not agree to sign the TRAC agreement, that its dealings with the IRS would certainly face more scrutiny in the future.

TRAC is supposed to be a voluntary alternative, not a replacement for restaurants' current tip reporting practices. There is no legal requirement for Company Y to replace its current system.

The IRS agent met with the small business and discussed TRAC and its impact on the business. The agent gave several interpretative assurances about the agreement, but Company Y and its accountant believed the agreement itself and a related brochure contradicted the agent's interpretations. Company Y explained what it saw as a contradiction and pressed the agent to put these interpretations in writing. The agent refused and became "agitated and abrupt," stating, "I will not put anything in writing, I can't and I won't." Without the written interpretation the company did not sign the TRAC, as it appeared the agreement would only increase the company's tax reporting burden.

The IRS response to the confidential comment confirmed the voluntary nature of TRAC but did not address the threats or refusal to put its interpretation in writing. Unfortunately, the IRS' response did not address what steps the agency has taken, or will take, to reduce the occurrence of such threats. According to the company, because of the adversarial and unprofessional behavior the agent exhibited, Company Y's owners now believe that the IRS is "out to get them."

The second example involves an EPA effort in which the agency offered businesses in Region VII a quasi-amnesty program for air emissions reporting violations. Regulatory Fairness Board Member Joanne Stockdale of Lake Park, Iowa learned about the problem from a small business in her region and obtained additional information.

The EPA had sent a letter to manufacturers in the region in an effort to resolve past violations and achieve future compliance. The letter sought a settlement agreement from manufacturers and payment for any past violations of air emissions reporting requirements.

The agency felt this effort was a reasonable, cost-effective way to resolve any past reporting violations. However, small businesses perceived the agreement as an admission of guilt, that their signature would be an admission that they had indeed violated air emission requirements in the past. The businesses also construed the letter to mean that if they did not admit to past violations by signing the agreement, they would be subject to more inspections in retaliation.

This is an example of an unfortunate situation in which the EPA's actual intent was to offer penalty reductions to businesses that voluntarily admitted and corrected errors. In the EPA's view, businesses that participate in the program are much more likely to be in compliance and would therefore be subject to less frequent audits. This was the first communications breakdown. The second breakdown, according to the EPA, was a lack of clarity in the emission reporting rules.

Many businesses did not understand that they were subject to the specific reporting requirements described in the EPA's letter, and therefore did not believe that the offer of a settlement for past violations, which the businesses did not believe were violations, was reasonable.

The EPA listened to and evaluated the businesses' concerns and concluded that they had a valid objection to the rule. The agency decided to clarify the reporting requirements. EPA agreed that once the rules are clearly stated, it will educate the industry while giving time to achieve compliance before taking enforcement actions.

In this situation, the EPA is commended for working with the affected businesses and industry associations to understand the manufacturer's problems and continuing to work toward resolution. Its responsiveness halted a well-intentioned effort that was otherwise destined to create a more adversarial regulatory environment with small businesses.

Follow-Up of 1997-98 Case Studies

The National Ombudsman's first Report to Congress on Regulatory Fairness identified four themes or perceptions common to small businesses across the country and across industries. These themes were derived from written small business comments and in testimony taken at RegFair public hearings.

The first report presented the individual experiences of specific small businesses as case studies to illustrate these common perceptions. The 1999 Report to Congress reviews these case studies and presents their current status. In concert with the other factors presented in this report, these follow-up studies provide a real flavor of the regulatory enforcement climate for small businesses.

The results are presented below. Significantly, one year after these case studies were first presented to Congress, five of the eight issues are not yet resolved.

The four themes identified in the National Ombudsman's first annual Report to Congress were:

- Agencies change their rules in the middle of the game;
- Agencies disregard economic or other consequences of their actions on small businesses;
- Small businesses often get ensnared in conflicting regulatory requirements when federal agencies' jurisdictions overlap; and
- Small businesses fear agency retaliation.

Changing the Rules In the Middle of the Game

In the first annual Report to Congress on Regulatory Fairness, small business owners reported that agencies enforce their rules and regulations inconsistently. Small businesses claimed that agencies change their interpretation, enforcement methods or personnel during enforcement activities, often with little or no notice given by the agency.

The small business comment by Mr. C. B. Metcalf, Jr., owner of Automation Technology, Inc. in Pensacola, Florida, illustrated the first issue. Mr. Metcalf's story is presented here with follow-up on the issue as of one year later. Mr. Metcalf again chose to fully disclose his identity and that of his small business.

Automation Technology purchases equipment and has it shipped directly to the buyer—Automation Technology never takes physical possession of the equipment. The company employs three workers.

According to Mr. Metcalf, Automation Technology has been using the cash accounting method for nineteen years, since the business began. Automation Technology has been audited at least twice in the past by the IRS. In those previous audits, it was never fined or penalized for its business accounting methods, and was actually complimented by IRS agents that its accounting was clean, simple and straightforward.

Automation Technology was notified on December 19, 1996, that it would be audited again. This time, the IRS objected to its use of the cash accounting method, citing that even though it never takes possession of the purchased items, it must show an inventory and must change to the accrual accounting method, retroactive for three years—to 1994. According to a study of both methods by Mr. Metcalf's CPA, Automation Technology

would actually have paid slightly less taxes using the accrual method than it did using the cash accounting method. Mr. Metcalf feels that the request to change his system from cash accounting to accrual would cause Automation Technology undue financial hardship.

This case has been on appeal for six months, and the IRS has requested an extension for further auditing—as late as December, 1998. As of December 1997, Automation Technology had expended approximately 250 hours and \$10,000 fighting what Mr. Metcalf sees as an unnecessary change.

Because he has spent over \$10,000, Mr. Metcalf guesses that the IRS has spent that much or more in pursuing this case. He feels this is a waste of tax dollars, especially since the total amount Automation Technology would have paid the IRS is \$5,000 for the three retroactive years if the company had changed to the accrual method as requested.

This comment was under review by the IRS at the time of the National Ombudsman's first Report to Congress on Regulatory Fairness. In following up with Mr. Metcalf for the 1999 Report, the issue has been resolved, but not to the satisfaction of Automation Technology.

According to Mr. Metcalf, the March 1998 settlement agreement required Automation Technology to change its method of accounting from cash accounting to accrual. In order to contest the issue further, Mr. Metcalf would have had to turn to the courts, but because he had already spent \$20,000 on the matter, he decided to acquiesce to the IRS, as he felt it was easier to adopt accrual accounting than to sue a government agency.

As Mr. Metcalf reiterated in his previous statement to RegFair staff, he believes Automation Technology will go bankrupt due to the settlement requirements of changing his system from cash accounting to the accrual method.

The only information provided to the National Ombudsman by the IRS regarding resolution in the Automation Technology matter was a letter stating that a settlement agreement had been reached.

Ms. Kathy Diaz, co-owner and founder of Monroe's Restaurants in Albuquerque, New Mexico, testified at the 1997 RegFair hearing in Region VIII, held in Albuquerque. In her testimony, Ms. Diaz told about Monroe's Restaurants experiences with the IRS after a change in personnel at that agency's district office.

Monroe's Restaurants employs approximately 80 workers, and has been established in its community for over 20 years. According to Ms. Diaz, her company had been working with the IRS to develop a payment plan which the restaurant could adhere to, and which would work well for both the IRS and her company. However, the agent Ms. Diaz was working with retired and a new agent took over her case.

The new agent informed Ms. Diaz he had decided the written agreement worked out previously was null and void, that it was canceled, and that additional penalties and interest were due. According to Ms. Diaz, the cancellation of her previous agreement and

the addition of penalties and interest were completely at the discretion of the new agent. This decision began a 5-year quest by Ms. Diaz's business for relief.

According to Ms. Diaz, the IRS agent stated on numerous occasions that he will "shut the business down" and has been verbally abusive to her, her employees and even some of her customers.

Recently, Ms. Diaz informed the National Ombudsman that the company has succeeded in having a new agent assigned to its case. However, she reports that the debts incurred over the past 5 years through this process have grown so large that her business may not survive.

In following up with Ms. Diaz for the 1999 report, she stated that after the hearing her case was assigned to a new office. However, when she and her attorney went to the new office to meet with the agent, she discovered that her case had been reassigned to the same agent who had been transferred to that office.

Ms. Diaz reports that at the meeting the agent was extremely upset and agitated about her testimony at the RegFair hearing. According to Ms. Diaz, the agent said he was sick and tired of them and just wanted to close them down, and when asked why he was so upset, had them physically removed from the building.

According to Ms. Diaz, another IRS agent saw this situation developing, and as a result, the agent was again removed from her case. The restaurant is in the process of filing a third compromise agreement request (this submission, according to Ms. Diaz, is exactly like the previous two that were submitted and rejected by the previous agent). This compromise agreement request includes the company's petition for a reduction in the amount of the penalties and interest originally given. The company is requesting these reductions under SBREFA, as Monroe's is a small business. Nevertheless, to protect the company, Monroe's Restaurants has filed Chapter 11 bankruptcy.

Throughout this situation, the company has continued making payments to the IRS and has almost paid off the principal debt. However, according to Ms. Diaz, the penalties and interest on the debt, and the \$50,000 the company has spent in legal and other fees has created such a financial hardship for Monroe's that she doubts the Restaurants will ever recover.

If Monroe's Restaurants does go out of business because of this situation, 80 employees will be out of work. According to Ms. Diaz, the agent that had been removed from her case has since been promoted.

Agencies Disregard the Economic or Other Consequences of their Actions on Small Businesses

The first annual Report to Congress on Regulatory Fairness presented the belief of some small businesses that agencies do not appreciate the sometimes severe effects of their regulations and actions on small businesses. This belief was illustrated by the comment from Mr. Nolan Woods, President of Red Woods Outfitters, in Pollock, Idaho. Mr. Woods chose to fully disclose his identity and that of his small business for these reports.

Red Woods Outfitters is a jet boat outfitter company that has worked out of Riggins, Idaho on the Snake River in Hells Canyon for over 19 years. The company has no

employees; Mr. Woods runs the business himself as his only means of supporting his family.

In July 1994, the U.S. Department of Agriculture (USDA) adopted final rules governing the Hells Canyon National Recreation Area Federal Lands. These new regulations, as adopted by the local Forest Supervisor, established Forest Plan Amendment #20, the Wild and Scenic Snake River Outfitter Environmental Assessment. The plan set guidelines for motorized and non-motorized rivercraft in that area.

Implementation of that environmental assessment changed the operation of Red Woods' special-use permit. The plan effectively reduced the number of days that Red Woods could operate its jet boats each summer from 70 to 9 and established destination limits—limits on the areas of the river they could access. These rulings were appealed by Mr. Woods and the two other power boat outfitters in the area.

The Deputy Regional Forester for the Pacific Northwest Region, who was the appeals officer, ruled that the environmental assessment did not support destination limits, and so struck down that decision, but upheld the decision to amend the special use permits. This decision will severely affect the financial stability of the company.

Red Woods Outfitters is still in business, but is still fighting the Forest Service. According to Sandra Mitchell, Executive Director of the Hells Canyon Alliance, a group that represents many outfitters in Hells Canyon including Red Woods, although the destination limits were struck down, the decision to amend the special use permits was upheld, effectively reducing the number of days that Red Woods Outfitters can operate.

Under the new decision, Red Woods' allocation amounts to only 21 percent of the season, or 15 days between May 1 and Labor Day. Although tours on the Scenic River from Mondays through Thursdays do not count against their allocation, Fridays through Sundays—the big days for tours on the river—do count against it. Additionally, the allocation order states that Red Woods may fish on the Wild River only on Monday, Tuesday, and Wednesday of every other week. This is a real problem according to Ms. Mitchell, because the Wild River is the biggest tourist attraction in Hells Canyon.

Red Woods estimates losses of \$6,000 this year, and about \$10,000 per year over the past 2 years in lawyer fees. Red Woods gross annual earnings are about \$38,000. At present Red Woods is still working with the Forest Service, which regulates the allocations, and they have initiated a lawsuit against the Forest Service which is due to be heard in the March, 1999.

According to the USDA's response to the National Ombudsman's draft 1999 Report to Congress, Forest Service personnel continues to work with the outfitters. According to the agency, an informal review indicated to it that "the outfitters are doing about the same amount of business as before. Annual revenue of outfitters on the Snake River has remained level. In fact, some outfitters have been investing in bigger and faster jet boats to service their clientele." This response did not address Red Woods Outfitters, specifically.

Business Z's experience with the EPA, illustrates the businesses' belief that, in this case, the EPA did not try to alleviate or even appreciate the severe effect a change in the interpretation of its regulations had on a small business. This comment was filed by a business that chose not to disclose its identity.

Business Z imports chemical products, and processes, packages and ships them to other countries for sale. It believes that EPA does not have to approve these chemicals as long as they are not sold in the United States, and all other regulations, such as labeling, are followed. Recently, however, an EPA Inspector refused to allow a chemical to be released from the warehouse of a Midwestern airport to Business Z's manufacturing facility.

Business Z was subsequently advised by the agency that it could not process the unregistered chemical even though it intended to process and repackage it solely for export. However, according to Business Z, the company has been operating under this arrangement with no problems for many years, and with the knowledge of the EPA Inspector.

At that point, Business Z tried to find out if and when the interpretation of the policy had changed, as this new interpretation was inconsistent with its understanding of Section 17 of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) and with EPA regulations. Business Z's attorney sent a letter to the Office of General Counsel of the EPA asking for clarification and requesting that EPA release the chemical which was still at the airport.

The chemical was held at the airport for several weeks, pending clarification by the EPA, during which time Business Z was being charged for storage. However, according to Business Z, six months later, at the time it filed a Federal Agency Appraisal Form, they still had not received a response to their inquiry. Business Z was finally forced to pay an offshore company for processing and shipping the chemical.

In following up with Business Z for this 1999 report, the company had received a response from the EPA. This result, Business Z's owner is firmly convinced, had occurred only after notice was drawn to its issue through the RegFair process.

The company received good news: after a year and seven months, in a conference call with the EPA, Business Z's owner and attorney were informed that the EPA agreed. They had decided that Business Z's original method of operation was valid, and that the methods they had used in importing and processing the chemical in question were proper and in compliance with EPA regulations.

The EPA is recognized for in this case for reversing a decision that resulted from an apparent change in policy, without notice to the small businesses under regulation. However, despite receiving this good news in mid-October of 1998, Business Z finally received EPA's promised confirmation of this decision in writing on February 9, 1999.

Although the final result is favorable in this case, the fact that Business Z, a small business with very limited resources, was forced to spend close to \$1 million and almost 2 years of valuable company time and resources fighting an erroneous decision must not be overlooked. As

recommended in the National Ombudsman's first annual Report to Congress, enforcement decisions need to be factored into personnel evaluations and ratings.

Small Businesses get Ensnared in Conflicting Regulatory Requirements when Federal Agencies' Jurisdictions Overlap.

At times, businesses are unaware that they need to conform to the regulations of multiple agencies regulating their activities or certain aspects of their operations. This situation was illustrated in the first annual Report to Congress on Regulatory Fairness through public testimony from Mr. Michael Morizio, attorney for Joyce Chen, Inc.

Joyce Chen Inc. is a small business in Massachusetts with approximately 16 employees. The company is a wholesaler of various kitchenware items—a highly competitive industry with very small profit margins, according to Mr. Morizio.

Joyce Chen, Inc. developed an antibacterial polyethylene cutting board for everyday kitchen use. Cutting boards and other household items have been regulated by the Food and Drug Administration (FDA) for over 40 years, so the company asked Mr. Morizio's firm to ensure that they were in compliance with FDA regulations for this cutting board. According to Mr. Morizio, he was assured through a number of telephone conversations with officials at the FDA that Joyce Chen was in compliance and that the product was indeed covered by the FDA under its Food Additive Regulations.

The unique thing about the cutting board, according to Mr. Morizio, is that the anti-bacterial additive in the cutting board is actually regulated by the FDA as a flavoring substance and a preservative—meaning, under FDA regulations, the substance could be added directly to food and be ingested safely.

Nevertheless, six months later, the Environmental Protection Agency (EPA) issued a Stop Sale Use and Removal Order (SSURO), which applies criminal sanctions if you fail to stop selling the product immediately. The reason for this order was that the EPA claimed that the cutting board contained a pesticide and must be regulated by the EPA under the Food Quality Protection Act, which became law in 1996. According to Mr. Morizio, that Act gave a new definition to anti-microbial pesticides which clearly excludes any item or product which is already subject to FDA regulation as a food additive. However, according to Mr. Morizio, the EPA fined the company \$82,000 dollars and issued a nationwide press release.

When Mr. Morizio tried to negotiate this fine with the EPA, he requested special consideration under SBREFA, since Joyce Chen is a small business. According to Mr. Morizio's testimony, however, the EPA refused, saying that because Joyce Chen had to be "caught" instead of coming forward voluntarily, there would be no such consideration offered.

Joyce Chen, Inc. also brought forward financial records showing that the amount of the fine would cause financial hardship to the company. However, according to Mr. Morizio, although the EPA officials were very polite, they "...were adamant that they would not give us any consideration as a small business, and that we had to be treated the same way as a large business would be treated..."

As a result, to continue selling the cutting board, Joyce Chen would have to register the antibacterial additive as a pesticide through the EPA's registration process, which can take years and cost hundreds of thousands of dollars. The other option was to substitute a pesticide that already had been registered with the EPA as a plastic additive, but that probably would not be edible. The latter is the path Joyce Chen chose, but substituting a new material caused the company an enormous financial hardship and put a product on the market that the company considers inferior.

Joyce Chen, Inc. had not filed a written comment at the time of the first annual report. After Mr. Morizio's testimony at the RegFair hearing was summarized for the first annual Report to Congress, and the report was being published, Joyce Chen received a letter from the FDA stating that the EPA clearly had jurisdiction over the cutting boards under the FQPA.

Joyce Chen, Inc. subsequently filed a comment in May 1998, and the comment was accepted as applicable under SBREFA.

The EPA's response indicated the agency's belief that Joyce Chen had circumvented EPA's review and registration process for consumer products, making claims to control infectious microorganisms, and that the unsubstantiated claims made by the company with regard to these products "posed a serious threat to human health."

According to EPA, it had been notified by outside sources that the company was selling unregistered pesticides, and they confirmed this through an inspection. As a result, Joyce Chen did not qualify for a complete penalty waiver under the agency's Small Business Policy because the company "did not voluntarily comply with the law." However, the EPA reduced the penalty from \$275,000 to \$82,500 due to the company's size, financial position and good faith efforts with the FDA to that point.

Nevertheless, following up with Joyce Chen, Inc. for this report, it was found that the company has ceased making cutting boards.

A small business comment on behalf of Russian and East European Partnerships, Inc. by Kenneth Fortune, President, and testimony at the Fairness Board hearing in Charlotte, North Carolina from Danny Cooper, Vice President of Operations also illustrates this theme. Mr. Fortune chose to fully disclose his identity and that of his small business .

Russian and East European Partnerships, Inc. (REEP) is a New Hampshire-based small business that specializes in training and training support programs. The company has completed a number of U.S. Government contracts.

In September 1995, the Department of Defense (DOD) Contracting Office issued a solicitation for a contract at Fort Bragg, North Carolina. According to REEP representatives, the solicitation information received by the company included an outdated Wage Determination sheet.

A Wage Determination, or minimum wage, for each contract is required when a U.S. Government contracting agency issues a service contract which is governed by the

requirements of the Service Contract Act. According to Mr. Fortune, this is where the problems between the Department of Defense and the Department of Labor (DOL) begin.

According to Mr. Fortune, the Department of Defense Contracting Office requires the process of establishing wage rates (called “conformance”) to begin within 30 days of the origination of a contract. However, the Department of Labor—the agency that actually does the “conforming”—requires the process to begin before work on the contract has started, and places responsibility for this on the Department of Defense, not on the contractor.

According to Mr. Fortune, since REEP did not know it had an outdated Wage Determination sheet, the company completed it and sent in the package. REEP was informed by the Department of Defense Contracting Office that all positions in the contract had previously been conformed by the Department of Labor as Clerk I and Clerk. The company assumed everything was fine and officially began work on the project in February, 1996.

According to the company, repeated inquiries over the next six months to the Department of Defense Contracting Office for a finalization of the DOL conformance went unanswered. In September, 1996, a new DOL wage determination was issued for Fort Bragg, and wage rates increased. According to Mr. Cooper, the minimum wage for an instructor increased from \$8.10 per hour to \$16.50—a 104 percent increase.

When the Department of Labor issues a new wage determination in such cases, it also issues a conformance notice to the Department of Defense Contracting Office. This authorizes the Department of Defense to amend the contract with REEP, and allows REEP to submit a claim for additional payment to cover the wage increases. However, in this case, DOD never received a conformance notice from the Department of Labor, and refused REEP’s claim for a contract increase to cover the wage increase. According to Mr. Cooper, DOD refused to pay the claim based on a lack of notification from DOL.

According to Mr. Cooper, in early August, 1997, the Department of Defense refused to meet with REEP and DOL to attempt to resolve the matter. In late August, DOL issued a form WH-56 that required REEP to pay over \$229,000 in back wages to its employees, implying that REEP was trying to avoid paying its workers legal wages. But, according to the company, they contacted the Department of Labor more than forty times over a year and a half in an attempt to resolve this situation. A negotiated settlement for the contract period up to September, 1997, fell apart when the Department of Defense refused to pay its obligation.

Finally, on November 4, 1997, REEP was informed by the Department of Labor of the conformed wage rates, but no explanation was given as to how they were derived. On November 12, 1997, REEP appealed the wage rates determined by the Department of Labor, based on their assessment of the prevailing wages.

According to both Mr. Cooper and Mr. Fortune, the Department of Labor and the Department of Defense were working against each other, rather than trying to develop a cooperative method of resolving the situation. To date, the issue has cost REEP more than \$10,000 in expenses and legal fees.

This comment is under review by the Department of Defense and the Department of Labor.

For the 1999 report to Congress on Regulatory Fairness, REEP was contacted once again. According to Mr. Kenneth Fortune, President of REEP, after he testified at the RegFair hearing in Charlotte, his Congressman became interested in his experience and was able to bring DOL and DOD together for a discuss of the matter.

On February 17, 1998, the two agencies met with REEP representatives and the Congressman. At the meeting, the issue of payment of the back wages was discussed and a working solution was reached whereby REEP would complete and re-file the forms for each of the employees that had been working with the contractor, essentially re-billing for hours that the employees had worked but for which they had not been paid.

REEP had 30 days to fill out the forms and return them to DOD. DOD also had 30 days to sign off on the back wages, and submit the forms to DOL which they did, on time, in April, 1998. The forms submitted to DOL confirmed that DOD was prepared to pay \$198,000 in back wages to REEP employees, upon notification by DOL to do so.

In late October, six months after DOL received the information, REEP received call from its Congressman informing the company that DOL had finally made its decision.

The next day, the company discovered that DOL had denied the new conformance request and would not release the funds for the back wages. According to DOL, it was because REEP had not submitted required materials and had not followed the guidelines for the materials that were submitted.

This means that REEP will be required by the Department to pay the back wages of over \$198,000, plus an additional amount that was accruing over the six months DOL took to issue a response in this case.

According to REEP, their paperwork was in order when submitted to DOD, but DOD apparently failed to submit all of the paperwork to DOL. Now, despite the fact that it took 6 months for DOL to respond on this matter, REEP states it has only 20 days to appeal this “final” ruling.

A more serious allegation is that, according to Mr. Fortune, REEP’s attorney was told by a DOL representative that there had been the possibility of a negotiated settlement, but because of the pressure put on by REEP’s Congressional representatives and the RegFair Program, DOL was no longer willing to negotiate a settlement in this case.

In addition to spending approximately \$44,000 to resolve this matter, REEP has experienced other detrimental economic effects as a result of DOL’s wage determination. Nevertheless, Mr. Fortune is thankful that DOL did not assess further fines on his company and he thinks this is largely due to his comment through RegFair and the Congressman’s active role in the resolution.

The sequence of events presented here by REEP corresponds with those described in the Department of Labor’s interim response to RegFair on this comment, which was received by the National Ombudsman in early December 1998, including the fact that although REEP requested a

meeting with the Department in December 1997, the meeting did not take place until February 17, 1998.

However, according to the Department, REEP did not follow the guidance of DOL either in the February meeting or in the conformance guidelines booklet they were sent to submit proposed conformed wage rates. Instead of comparing the classifications to be conformed to wage rates for comparable classifications that were already conformed, REEP simply proposed an 18 percent increase for all of the proposed conformed classifications.

As a result, DOL's denial of the second conformance of wages submitted by REEP through the DOD was based on three things: 1) the absence of information to support or justify the lower wage rates used; 2) the resulting incompatibility of classifications for comparison to arrive at wage determinations; and 3) the inability to use indexing which requires conformed classifications.

According to the Department, this left it "no choice but to use the materials submitted for conformance in December 17, 1997. This also left REEP in the preexisting situation of owing back wages." This comment is pending review by an Administrative Law Judge within the Department.

In following up for this 1999 report, the company's comment has shifted from conflict between two agencies, as initiated, to a comment about the way DOL wage rates are determined for army contracts, and the regulations governing them. REEP has indicated interest in filing an additional comment on this new issue.

Small Businesses Fear Agency Retaliation

As identified in the first annual Report to Congress, some small business owners who comment or testify at RegFair hearings do not want to publicly identify themselves because they think that their businesses will be the subject of some further enforcement action.

One small business owner, Jacqueline Baca, discussed these concerns at the RegFair hearing in Albuquerque, New Mexico.

Ms. Baca is President of Bueno Foods, a second generation family owned and operated business which has produced traditional Mexican foods in Albuquerque, New Mexico for almost 50 years, distributing them throughout the Southwest. Bueno Foods employs legal immigrants in its operations, and has received notices of full compliance from the Immigration and Naturalization Service (INS) on two previous inspections. In February 1996, the INS visited again for a routine survey of employee records. This time, Bueno Foods was informed that although its records were in full compliance, some of its current employees had provided it with forged documents.

According to Ms. Baca, INS officials suggested that Bueno Foods cooperate in apprehending the employees by staging a meeting in which the INS would arrest those with allegedly forged documents. The company felt that this was doing the agency's work for them, and that such a plan would put it in a compromising position with the rest of its employees. It contacted an attorney well-versed in INS regulations who advised it that it was not obligated to assist the INS in the plan, and that it would be in full compliance with the law by suspending and terminating the employees in question. This was done. That night, according to Ms. Baca, an INS official appeared on the

evening news and mischaracterized the actions of Bueno Foods in the situation. Ms. Baca's perception was that this was retaliatory, and the result was a loss of customers which severely hurt her business—on top of attorney fees and public relations expenses.

Following up with Ms. Baca for this report, nothing had changed for Bueno Foods since the first annual report. Ms. Baca estimated the amount she thought the company had lost due to the publicity, attorney's fees and other expenses at a "drop of 32 percent in profitability, which amounts to hundreds of thousands of dollars."

The INS responded that this is a misrepresentation of the facts. The agency maintains that there was a mutual agreement, that in exchange for the agency's delay of the enforcement action that Bueno would cooperate in apprehending the employees. Further, INS asserts that the news story was initiated by a third party and that the agency simply stated its side as articulated

Four restaurant owners from different parts of the country had also raised concerns about retaliation, concerns which are reinforced by the fact that all chose not to disclose their identities to the agency in question or the public. The following incorporates aspects of all four restaurant's stories.

An IRS agent called Restaurant X to suggest a meeting, so that the agent could explain the Tip Reporting Alternative Commitment (TRAC) agreement to Restaurant X's owner, Jane Doe. Jane Doe listened to the agent's explanation of TRAC and understood that it was designed to ensure that restaurant employees were reporting correctly on the tips they receive as part of their compensation for tax purposes.

The TRAC agreement called for Restaurant X to report 8 percent of their sales as the minimum amount that employees earned in tips. However, Jane Doe knew that 8 percent was probably too high for Restaurant X, since it was a local restaurant in a small blue-collar community. She also knew that reporting a base percentage using any of the alternative methods suggested by the IRS agent would be unfair to her lunch servers who made much less every day than her dinner servers. Additionally, Jane Doe discovered that using TRAC at her restaurant would involve more paperwork than her current system, which was legal according to the agent, and which she had used since opening her restaurant 22 years prior.

When Jane Doe asked the agent what would happen if she did not agree to use the new system, she was informed that if she did not sign the TRAC agreement, Restaurant X would be subject to further investigation by the IRS and perhaps an audit. When Jane Doe asked what would happen if she agreed to sign, the agent told her that Restaurant X's past violations would be overlooked and that Restaurant X would not be subject to any further investigation or audit by the IRS for past violations.

When Jane Doe questioned the agent as to whether her nearest competitor, the national fast food chain on the highway outside of town, had signed the TRAC agreement, the agent told her that it is more difficult to get the national chains to sign because they have attorneys and much more administration to go through. When asked to put the terms and conditions described to her in writing, the agent refused to do so. The comments used in this example are pending agency review.

In following up with the four restaurant owners, only one restaurant had signed the TRAC agreement. That restaurant's owner reported that she felt she had no choice, that she was forced to sign the agreement. The restaurant owner also reports that the restaurant is losing good employees because of the agreement.

None of the other three restaurant owners signed the TRAC agreement, and all three said they had not been audited by the IRS, nor had there been any further communications from the IRS on the matter.

Health Care Financing Administration

HCFA oversees the nation's home health care industry as it relates to Medicare and Medicaid. The home health care industry is largely dominated by small businesses, many of which are owned by women and minorities. Nearly 35 of these small businesses have commented on the enforcement and compliance activities of the Health Care Financing Administration (HCFA). HCFA was also the main subject at 8 of the 10 RegFair hearings.

Home health agencies (HHAs) and the industry's trade associations have turned to the National Ombudsman and Regulatory Fairness Boards because of recent HCFA regulations issued under the Balanced Budget Act of 1997 and the serious concerns with enforcement that followed.

As managed care has shortened hospital stays in recent years, the need for follow-up care has grown—stimulating growth in the home health care industry. Medicare payments for home health care have grown dramatically in the 1990s. Concerned about the rise in home health care outlays, Congress, in the Balanced Budget Act, directed HCFA to implement the Interim Payment System (IPS) later to be replaced by the Prospective Payment System (PPS). Both systems were designed to reduce fraud and abuse and to curb costs in home health care.

According to testimony from representatives of the Home Health Care Association and the National Association for Home Health Care, HCFA's regulations and enforcement efforts caused serious problems for many small businesses. At public hearings small businesses repeatedly pointed out that HCFA established a surety bond requirement greater than the minimum mandated by the Balanced Budget Act. Testimony pointed to the surety bond requirement as one key reason many small home health care providers were going out of business. Testifiers alleged that HCFA had not been responsive to efforts by small businesses and trade associations to reconsider the bond requirement.

The Fairness Boards and National Ombudsman focused their communications with HCFA on enforcement activities repeatedly raised in testimony at RegFair hearings. HCFA required small businesses to obtain a bond of either the greater of \$50,000 or 15% of the previous year's gross billings. According to testimony, small business providers had difficulty affording and in many cases, securing the bond, due to the asset requirements that surety companies demand. Small business owners stated that requiring large surety bonds of all companies, including those with many years of trouble-free experience, may guard against fraud but may also force many capable small companies out of business.

HCFA responds that Medicare trust funds were being jeopardized by increasing numbers of HHAs that were going out of business without reimbursing HCFA overpayments made to the HHAs. To

address this concern, HHS' Inspector General had recommended that HCFA require surety bonds equal to 100% of agencies' Medicare revenues for the previous year.

Additionally, HHAs were concerned about the retroactive impact of IPS. After HCFA implemented IPS, providers commented that the agency took too long in delivering the annual patient payment limits. As a result providers were given these cost limits after services had been delivered. Providers complained that this delay denied their businesses the ability to make administrative adjustments to ensure their financial viability and their ability to provide consistent care to their patients. HCFA responds that the law contained specific deadlines that the agency was pressed to make. Another small business concern was the application of regional cost limits that resulted in different capped patient payment limits in different regions of the country. According to some providers, the per beneficiary ceilings, derived from 1994 actual billings, had the effect of penalizing providers that had been most efficient. HCFA vigorously asserts that the legislation required this form of payment system. Congress recently modified the Balanced Budget Act in an effort to lessen the economic impact of the IPS on HHAs.

RegFair invited HCFA to three hearings in 1998, requesting that the agency provide testimony on its implementation of the 10 recommendations contained in the National Ombudsman's first annual Report to Congress. HCFA did not respond to previous letters inviting the agency to a hearing in Frontenac, Missouri but attended the Region X RegFair hearing in Boise, Idaho. At that hearing, the HHS representative of the Office of Small and Disadvantaged Business Utilization discussed SBREFA and small business broadly, but was unprepared to discuss either the National Ombudsman's 10 recommendations or the specific problems raised by small home health care providers. The representative instead referred the RegFair board to Congressional testimony on the IPS and surety bonds on HCFA's web site. HCFA later expressed regret that it did not have more appropriate representatives at the hearing.

At the hearing in Boise, several witnesses described how HCFA's actions and unresponsiveness were damaging their businesses. Verlene Kaiser, owner and administrator of Community Home Health, a 20-year-old small business that was the largest of Idaho's home health care providers, announced at the hearing that her firm was closing, effective that afternoon. Although Ms. Kaiser said she expected her business to be absorbed by competitors, she testified that the closing would put several hundred health care professionals out of work, and leave several thousand rural Idaho patients without access to adequate care. Small businesses asserted that the long-term effect of these efforts to save money by curbing fraud and overuse of medical services may result in higher costs to taxpayers because patients, especially the elderly in rural areas, will be treated in hospitals at higher cost. The HHS representative expressed surprise at the very emotional testimony he heard at the hearing and assured the board that the issue "is being taken seriously."

In September, at the Region III RegFair hearing in Richmond, Virginia, HHS was again invited to testify on these issues and about the delay in HCFA's response to the small business comments received by RegFair and sent to the agency for review and response. In his testimony, the HHS representative offered his personal apology to the National Ombudsman and the Fairness Boards. He also assured the board that responses to the small business comments were in preparation and would be sent to the National Ombudsman's office shortly. As of February 24, nearly five months later, HCFA's responses have not been received. Despite having sent the HHAs comments to the HHS representatives designated to receive comments on HCFA, and two letters to HCFA's Administrator alerting her to the serious lack of response by the agency, HCFA recently reported that it was aware of only two small business comments.

Wire service, television and newspaper coverage of the RegFair hearing in Frontenac, Missouri, and subsequent hearings in Augusta, Maine and Boise, Idaho, focused on the effects of HCFA's actions on the home health care industry. Following our RegFair hearing in Frontenac, Fairness Board Member Scott George contacted Senator Christopher Bond, Chair of the Senate Small Business Committee, and told him of the emotional testimony and the effects of HCFA's regulatory approach on small businesses providing home health care. Senator Bond's staff had also been present at the hearing.

On June 10, 1998, Senator Bond introduced a Joint Resolution (S.J. Res 50) disapproving HCFA's surety bond rule. After a majority of Senators agreed to co-sponsor Senator Bond's resolution, HCFA agreed in meetings with Senator Bond's staff, to postpone the bond requirement and to reconsider the nature, amount and terms of the bond requirement.

HCFA very recently responded to RegFair on some of the enforcement and compliance issues raised by home health care providers. HCFA strenuously asserts that any of the adverse economic consequences to small businesses were the result of the statute, rather than its implementation. Most importantly, HCFA asserts that it had no discretion in its enactment of the IPS, which was statutorily required. As to the surety bond, HCFA points out that it responded to the concerns of small businesses by making modifications to the surety regulation and suspending the enforcement of the surety requirement.

Working to Pass Regulatory Fairness Legislation at the State Level

RegFair's small business customers have stated that they believe small business owners often do not understand government bureaucracy well enough to know whether an issue should be addressed at the federal or state level. This is understandable, since in many instances a state agency is designated to enforce federal law.

Over the past year, Regional Fairness Board members have interacted with state business leaders and association directors around the country. They have found widespread support for developing legislation on the state level similar to SBREFA which applies only to federal agencies.

As a result, Fairness Board members determined that one method by which they could have a significant impact working with the states to share their efforts on the federal level. This complements RegFair's goal to promote and address regulatory issues on a federal level.

As an outgrowth of these events, Fairness Board members have followed up with state policy leaders who have indicated an interest in establishing state SBREFA legislation. The result of these efforts has been the proliferation of efforts to craft and pass state-level SBREFA legislation.

The strongest effort to date was led by Tim Moore, Fairness Board Member from Hawaii, who was asked by the Governor to lead a commission to draft a new state law. The effort was successful and it resulted in landmark legislation being passed and signed into law.

The new law in Hawaii contains the following key elements:

- Covers state and local laws;
- Reviews existing rules as well as newly proposed rules; and
- Creates a small business defender that can represent small businesses in the administrative appeals process.

Bobby Clark, Fairness Board Member from Kentucky, also led an effort in the Kentucky State Legislature. It resulted in passage of a resolution to create a commission to study the best type of legislation to complement Kentucky law. The commission was appointed and is studying the issue.

Two Fairness Board members from Pennsylvania have led similar efforts. Fairness Board Member Vic Tucci has been meeting with Governor Ridge's staff in Pennsylvania, who indicated interest and are actively considering legislation. Meanwhile, Board Member Shawn Marcel has also been working with state legislators on the issue.

Fairness Board Member Linda Nielsen from Montana worked diligently with SBA Regional Advocate Joan Coplan and SBA District Director JoAlice Mospan to set up a Business Leader Roundtable. In that roundtable, state trade association leaders as well as a staff person from U.S. Senator Burns office discussed working towards passing legislation in Montana. Since that time, Linda Nielsen has continued to work with state associations and business leaders across Montana.

In Nevada, Fairness Board Member Tom Guthrie has been working closely with the Nevada SBDC State Director, who also is chairing a regulatory commission of the state SBDC Directors, to

develop a better referral system to disseminate information to businesses. They have begun discussions with several state lawmakers and the Governor's office, and it is believed that there will be legislation introduced in 1999 similar to the landmark legislation passed in Hawaii.

Another recent and very significant effort has been led in part by Larry Mocha, Fairness Board member in Region VI. Under Mocha's leadership as Chairman of the Oklahoma Governor's Conference on Small Business, the Conference adopted key aspects of the federal SBREFA legislation, using the Hawaiian legislation as a model. Oklahoma Representative Jack Bonny and Senator Jim Maddox will introduce H.B. 1816, the Oklahoma Small Business Regulatory Enforcement Fairness Act, or OSBREFA, in the upcoming legislative session.

In Rhode Island, Fairness Board Member Larry Morse has led an effort to bring regulatory fairness to the state level. The "Rhode Island Small Business Regulatory Flexibility Act (99-H 5688)" has been forwarded to the House Corporations Committee. This bill is modeled after legislation enacted in Hawaii last year, and was co-sponsored by Representative Brian Patrick Kennedy and Representative Eileen Naughton.

Fairness Board members have indicated they will work to encourage more states over the course of the next year to introduce legislation to bring regulatory fairness legislation to the state and local level.

Outreach

Publicizing RegFair to the small business community still proves to be the biggest challenge. Often, outreach includes educating the public and the small business community on one of the main goals of the program which is to help create a change in the way agencies do business with small business and to replace adversity with cooperation. Many small businesses would like the National Ombudsman to advocate for them with the agency involved, and some decline to comment on agency action when informed that RegFair does not seek resolution of individual small business problems or issues, but pursues changes in the regulatory climate.

To better reach the national small business community, the program has initiated a number of new outreach avenues. Some of the most recent innovations include the Business Leader Roundtable, the Association of the Month program, the RegFair Report and Stat Sheet, a new RegFair information card, and a study done by an outside consultant to identify new areas for and methods of outreach. These outreach innovations are described in detail in Recent RegFair Outreach Innovations below.

A critical form of outreach, and one which utilizes the Fairness Board members to their full advantage as the program's direct link to the private sector and small business owners, are speeches, presentations and media interviews which are continuously given by the Fairness Board members and the National Ombudsman. These program activities are described in RegFair Program Activities below.

Recent RegFair Outreach Innovations

Business Leader Roundtables

Business Leader Roundtables are designed to be focus groups, in which local business and industry leaders are brought together by the Regulatory Fairness Board member in the region, and by the district or regional SBA office. Roundtables are hosted by Board members and the National Ombudsman has given a presentation at each of the Roundtables held to date.

The goal in developing the Roundtables as an outreach vehicle was to help gauge the effectiveness of our past marketing efforts, gain insight on how to improve outreach efforts, and enlist local support in marketing the RegFair Program. The meetings allow the development of strong relationships with small business associations at both state and regional levels. The first Business Leader Roundtable Discussion Group was held on August 5, 1998 in Cleveland, Ohio, and was an unqualified success, bringing top business leaders from eight industries together for a meaningful discussion on how to build awareness of the RegFair Program.

The second Business Leader Roundtable was held in Honolulu, Hawaii in September, 1998. The meeting was very well attended, and participants included representatives from over 20 trade associations and small business related groups, as well as many of the state's delegates to the White House Conference on Small Business. This Roundtable generated an excellent exchange of ideas and suggestions on how RegFair can better reach the Hawaiian small business community.

A Business Leader Roundtable was held in Chicago, co-hosted by the Chicagoland Chamber of Commerce and the Illinois Department of Commerce and Community Affairs as well as Board members Hazel King and Thelma Ablan. These board members, as well as Acting SBA District Director Tony McMahon, deserve credit for an excellent turnout of approximately 42 attendees representing 18 trade associations throughout Illinois. One of the key associations in attendance was the American Society of Association Executives. With 3,000 members in Chicago alone, we hope to work more closely with the Society in publicizing RegFair in the region.

Also in Region V, a Business Leader Roundtable was also held in Madison, Wisconsin. This successful Roundtable was hosted by Reid Ribble, Fairness Board Member from Menasha, WI. The meeting was very productive, with a responsive group of 17 attendees representing 15 trade associations, including the National Roofing Contractors Association, of which Mr. Ribble is a member.

A Business Leader Roundtable was held in Helena, Montana, on November 18, 1998. The meeting was excellent with approximately 20 attendees representing 11 different trade associations, including the Montana Auto Dealers, Nurserymen, Logging Association, Mining Association, and Tourism Coalition. This Roundtable was extremely helpful in generating ideas on how to better reach small businesspersons in less densely populated areas, such as Montana, and Linda Nielsen, Fairness Board Member in the region, was instrumental in this exchange.

Association of the Month

Another innovation is the Association of the Month program which began in June, 1998. To be the Association of the Month, national trade and professional associations are requested to make a concentrated effort to send RegFair information and materials to their state and local affiliates requesting them to distribute the information to their small business members. Associations of the Month are also requested to invite Fairness Board members to speak at their next group meeting or event.

This program is a success. For example, during tenure as Association of the Month, the National Federation of Independent Business (NFIB) devoted an entire web page to Regulatory Fairness, prominently featuring RegFair and the public hearings. The NFIB published information about RegFair in two online newsletters concerning the Health Care Financing Administration/home health care provider issues, and helped publicize the hearings in Cleveland and Nashville to the small business communities in both regions, and to their members at large.

In June 1998, National Small Business United (NSBU) became the first association to participate. Other participating groups include the NFIB, the National Association of Manufacturers (NAM), the National Association of Women Business Owners (NAWBO), the National Association for the Self Employed (NASE), and the U.S. Chambers of Commerce.

RegFair Report Newsletter

The RegFair Report is a monthly newsletter that contains program achievements, success stories in outreach and other efforts by Fairness Board members during the past month. The RegFair Report also includes the program's goals and initiatives for the coming month.

RegFair Stat Sheet

The RegFair Report is usually accompanied by the RegFair Stat Sheet, a one-page fact sheet containing data on the number of small business comments received, number of hits on the RegFair Internet web site, number of calls on the RegFair Hotline, and any major successes or initiatives during the past month. The initiation of the Stat Sheet was the answer to the request of Fairness Board members for information and data they could use in presentations about RegFair to industry groups, trade associations, and other small business groups.

Both RegFair Report and Stat Sheet are distributed to the Fairness Boards, the Small Business Committees of the House and Senate, the SBA National Advisory Council and Small Business Development Centers, as well as throughout the SBA and the general public.

RegFair Information Card

An informational card about RegFair has been developed to be inserted into a regular business size envelope and distributed to the public. The card describes the RegFair Program in more detail than does the current RegFair brochure. Once printed, the card will be distributed with the brochure by RegFair and other resource partners including Members of Congress, trade associations, and SBA sources such as the Small Business Development Centers, SCORE chapters, and the National Advisory Council.

Outreach Study

On the recommendation of Aida Alvarez, SBA Administrator, a study of current and possible outreach methods was commissioned through a competitive process, and a minority business and former 8 (a) participant was awarded the contract. As an important part of RegFair's outreach efforts, the study was proposed to help RegFair elicit feedback directly from its small business customers. Specifically, the goal is to identify areas in which efforts could be increased or redefined, to target new areas and constituents, and to help focus current strategies and identify additional outreach strategies. Additionally, some of the main precepts of the program were put to the test.

RegFair Program Activities

Without an aggressive advertising campaign or budget, the National Ombudsman and Fairness Board members have dynamically and determinedly promoted RegFair through speeches, presentations, media interviews, contact with the small business community through trade associations and other groups, and through direct contact with small business owners. These efforts are beginning to produce greater awareness of RegFair.

While all of the board members are committed to informing their colleagues throughout the country of their right to comment through RegFair, the following is a small sample of Fairness Board member activities during the past year.

Fairness Board Events / Activities

- After the Region II RegFair hearing was held on Long Island, Sandra Lee, then Chair of the Region II board, contacted New York State Assemblyman Thomas DeNapoli as the Chair. Assemblyman DeNapoli expressed interest in continuing dialogue and meeting to discuss a

possible state legislation modeled on SBREFA. Ms. Lee, who is a well-known business owner in the Chinese American business community, has succeeded in getting much needed media attention for RegFair in the New York/New Jersey area.

- In conjunction with EPA's Denver office, a series of panel discussions will be held in Region VIII on EPA regulations covering the dry cleaning industry. Efforts in this area were initiated by Albert Gonzalez and will be headed by Warren Toltz, owner of a dry cleaning establishment. Both men are members of the Fairness Board.
- Phyllis Hill Slater, Region II board member and past president of the National Association of Women Business Owners (NAWBO), was appointed by the President to the National Women's Business Council. She was also invited to testify on the Project Labor Agreement (PLA) before the House Small Business Committee.
- In July 1998, Hawaii became the first state to enact legislation modeled on SBREFA. Fairness Board Member Tim Moore was instrumental in helping to pass this legislation. Mr. Moore was honored for these efforts with a joint award from the RegFair Program and SBA's Office of Advocacy. He also wrote an article on RegFair and the newly passed Hawaiian legislation which was published in the state Chamber of Commerce monthly magazine.
- With help from Bobby Clark, Chair of the Region IV Fairness Board, Kentucky is considering state legislation modeled on SBREFA, to help make the state regulatory environment more small business-friendly. Mr. Clark was also instrumental in the development of a RegFair article for a newsletter distributed to manufacturers throughout Kentucky.
- In one month, Diane Denish, of the Region VI Fairness Board, met with each of five different small business-related organizations, including three Chambers of Commerce, the Hispanic Chamber, and the area SBDC.
- Stella Olsen, Region VII Fairness Board member was featured on the St. Louis television news to discuss RegFair.
- Elaine Demery, former Chair of the Region VIII Board, hosted a working group with the National Ombudsman on RegFair at the Women's Economic Summit '98 of over 50 attendees. Ms. Demery was also interviewed by KRRF, a talk radio show broadcasting to the Denver metropolitan area.
- Tom Gutherie, board member from Las Vegas in Region IX, will co-chair a joint Fairness Board/SBDC Regulatory Fairness Committee that plans to hold meetings on a regular basis to improve and expand the involvement of the SBDCs in the RegFair Program.
- Paula Easley, as the Fairness Board Member from Alaska, participated in a meeting with Senator Stevens of Alaska along with a number of business groups and associations.
- Reid Ribble, of the Region V board, met with the Executive Director of the National Roofing Contractors Association to discuss RegFair.

- Joanne Stockdale, board member in Iowa, is working with Cheryl Eftink, Des Moines SBA Deputy District Director, on a roundtable to be held next March or April in Des Moines.
- Vinh Cam of the Region I board is planning a Business Leader Roundtable focus group of small business leaders in her community, with the sponsorship of the Women's Entrepreneur Center at the People's Bank in Bridgeport, CT.
- Larry Morse, board member from Rhode Island, is working with the SBA District office there to set up a Business Leader Roundtable in February.
- Scott George, Region VII Fairness Board member was featured in an NFIB newsletter, gaining excellent coverage and support for RegFair.

As is illustrated here, Fairness Boards have done an admirable job of outreach to their communities and their industries. With the recent innovations described above, outreach efforts in 1999 will continue to progress. In the past year, presentations have been given to the following trade and professional associations, and public and private groups. This list of diverse and varied small business organizations is an indication of the outreach in progress.

Sample of Associations Active with RegFair in 1998

American Foundryman's Society	National Black Business Council's Trade Mission
American Trucking Association	National Federation of Independent Business
Associated Builders & Contractors	National Homebuilder's Association
Chinese American Banking Association	National Restaurant Association
Council of Growing Companies	National Small Business United
Home Health Care Association	New York Regional Gasoline and Automotive Service Dealers Assoc.
Maine District Advisory Board	Painting & Decorating Contractors of America
Muskegon, MI Economic Growth Alliance	Printing Industries of America
National Apartment Association	Retail Bakers of America
National Association of Investment Bankers	St. Louis Growth Association
National Association of Women Business Owners	Wisconsin Rotary

Sample of Press and Media Coverage

Bangor Daily News	Mississippi Business Journal
Business Week Magazine	New Jersey Star Ledger
Chicago Defender	Norwich Bulletin and the Harper Current (CT)
Chicago Tribune	Orlando Sun
Crain's New York Business	Providence Journal Bulletin
Fortune Magazine and website	Richmond Times Dispatch published and website
Great Neck Record Newspaper	Small Business News
Long Island Business News	Small Business Times, southeastern Wisconsin
Los Angeles Times	Working Woman Magazine

Sample of Trade Publications

Independent Rental Owners Forum of the National Apartment Association
National Public Accountant of the National Association of Accountants,
Washington Weekly of the National Restaurant Association

Sample of Television and Radio

CAN-TV: The Financial Advisor (Chicago metro area)
CNN Headline News called Comcast Newsmakers (regional)
Strictly Business (Cleveland cable)
WCIU-TV: Business Newsmakers (Chicago metro area)

Public Sector Resource Partners

The National Ombudsman was a panel member for a program addressing "The White House and Congressional Relations" for 30 new Members of Congress at Harvard University's JFK School of Government Institute of Politics during its Program for Newly Elected Members to the 106th Congress. The session lasted for 2 hours during which Mr. Barca gave a short presentation featuring RegFair and participated in Q&A.

The Federal Communications Commission (FCC) included the RegFair brochure in a package mailed to over 2,600 small businesses.

Subcommittee Chairwoman Sue Kelly suggested contact with the U.S. Postal Service to explore distributing RegFair materials in post office lobbies throughout the country, and the RegFair program is exploring this option with the Service.

The RegFair Program worked closely with Ken Yancey, the Executive Director of SCORE, on ways to promote RegFair through SCORE. Mr. Yancey included a RegFair brochure in his monthly mailing to approximately 400 SCORE chapters, and placed an article about RegFair in SCORE's monthly newsletter with distribution of about 16,000. Mr. Yancey also indicated he would include information on RegFair on the SCORE website, which averages roughly 900,000 hits a month.

A mailing was sent to all SBA District Directors of RegFair materials, encouraging their invitation of Fairness Board members to speak at Small Business Week activities.

The National Ombudsman spoke to the following SBA resource partners requesting their help in increasing awareness of the program with their small business customers, and with distribution of RegFair materials.

SBA Public Affairs Coordinators at the National Field Managers Meeting
National SBDC Conference of State Directors in Savannah, GA
District Directors and several state SBDC Directors in Las Vegas, Nevada
Wisconsin SCORE Chapter Directors
Regulatory Fairness Committee of the SBA's National Advisory in Seattle

National Association of Government Guaranteed Lenders (NAGGL)
SBA Field Managers, SBDCs and other resource partners in Denver

Collaborative efforts with regional offices in Region II about SBREFA included an August luncheon with District Director Aubrey Rogers of the SBA New York office, Sandra Lee, former Chair of the Region II Fairness Board and the New York Chinese Bankers Association.

Program Operations / Activities

The RegFair website has been a huge success. Over 167,000 "hits" have been received on the RegFair website. In 1997, after operation of only 10 months, the website garnered a total of 47,000 hits, averaging 4,700 per month. Last year saw a huge increase with nearly 120,000 hits registered, and hits are now averaging approximately 10,000 per month, with a high of 11,250 in October.

Calls received by the RegFair Program on the toll-free telephone line have increased from a total of 652 for the 10 months of 1997. Averaging approximately 150 calls per month, the total calls for 1998 was almost 1,800.

A Spanish translation of RegFair materials that became available on the toll-free RegFair telephone information line in May 1998, has generated nearly 120 calls.

RegFair achieved its goal, that transcripts for all ten RegFair hearings held in 1998 would be posted on the RegFair Internet web site by the end of October 1998. Proceedings of the hearings are therefore available to the small business community, Members of Congress, federal agencies and the public at large, who could not attend.

RegFair Works With Trade Associations

Trade associations across the country have begun to appreciate the regional Fairness Board hearings as a forum and a tool for registering their concerns about federal regulatory practices and decisions. Many of the largest national associations representing small businesses subject to federal regulation have already served as RegFair's Association of the Month, or have agreed to do so in 1999. These include the National Association of Women Business Owners, the National Association of Manufacturers, the National Federation of Independent Business, the National Association for the Self Employed, the International Franchise Association and the U.S. Chamber of Commerce.

One of the most encouraging aspects of RegFair's outreach efforts has been the response from less well-known regional and local small business organizations, including trade associations with little or no Washington representation. They have been a tremendous help in spreading the word to their members through newsletters, announcements at meetings, web site banners publicizing RegFair hearings, and other means of outreach.

A few examples of these efforts in 1998 included trade associations such as state and local Chambers of Commerce and chapters of the National Federation of Independent Business (NFIB) that co-hosted RegFair hearings. The NFIB also prominently featured regulatory reform on its web site, including information on and a jump site to the RegFair web site. Additionally, the NFIB featured the Office of the National Ombudsman in an e-mail newsletter column and in a message from the president to the membership urging them to participate in the program.

The National Restaurant Association twice featured RegFair on page one articles in its newsletter, *Washington Weekly*. They also inserted a copy of the RegFair comment form as a tear-off sheet in the newsletter, providing the form to a third of a million subscribers, most of whom are small business proprietors. The New York Chamber has agreed to link its web site to RegFair's web site, and the Chicagoland Chamber co-hosted a RegFair Business Roundtable, along with the Illinois Department of Commerce and Community Affairs.

The efforts of all of these organizations really began to bear fruit at RegFair's first 1998 hearings. Helicopter air services from three states, coordinated by the Helicopter Association International, attended the hearing in San Jose to register complaints about Federal Aviation Administration regulatory practices. Being uncommonly mobile, they were able to pass the word to their peers in other areas, to fly to attend subsequent hearings and present other concerns ranging from the ways the IRS allows expensing of engine overhauls to competition from state and local governments using military surplus helicopters.

A new plan for administering Medicare payments by the Health Care Financing Administration (HCFA) became an increasing concern this year for the home health care industry, one of the few aspects of medical care that is today largely operated by small businesses.

Along with national trade associations of home health care providers such as the National Association for Home Care, local and regional associations representing various components of the industry such as visiting nurses, portable X-ray and EKG technicians and other home therapists

encouraged their members to attend RegFair hearings in their areas. The result was that the home health care industry was better-represented at RegFair hearings this year than any other industry.

Fairness Board members have been leveraging trade associations to help promote small businesses' new rights to regulatory fairness. These national and state trade associations are one of the key components of the future success of RegFair.

Partnering with the Private Sector and Federal Agencies

The partnership between the public sector, represented by the National Ombudsman, and the private sector, represented by the regional Fairness Boards, gives America's 23 million small businesses an unprecedented opportunity to comment on how federal agencies are enforcing the regulations that influence their businesses.

With strong input from the Committees on Small Business of the U.S. Congress, the Fairness Boards, the SBA, and other important policymakers, RegFair was designed to make the best of its partnerships by illustrating in practice that government can and does change its culture.

One of the goals of RegFair is to further communication between small business owners and Federal Government agencies, so that small businesses and agencies can view each other more as partners than as adversaries.

RegFair is also building better communications within the Executive branch, with the federal agencies that have regulatory authority over small businesses. Over the past year, the National Ombudsman has worked with federal agencies to improve the level of communication and cooperation in achieving Regulatory Fairness goals. In 1998 the National Ombudsman met with several agency officials to discuss internal agency implementation of SBREFA, agency follow-up on last year's 10 recommendations, and the RegFair comment review and response processes. Summaries of a number of key meetings are presented below.

While each meeting had a different focus, the meetings clearly improved the level of communication and understanding between these agencies and RegFair. The RegFair Program also learned more about specific concerns agencies have, and the steps they have taken to improve the regulatory enforcement environment and implement the law. Where agreement has not yet been achieved, the communication serves to focus both parties on the issues.

Internal Revenue Service

Last June, early in his tenure as the head of the agency, Commissioner Rossotti met with the National Ombudsman to discuss the IRS's commitment to regulatory fairness and the agency's implementation of the 10 recommendations contained in the National Ombudsman's first annual Report to Congress.

In a very positive meeting, Commissioner Rossotti agreed to consider regulatory fairness when implementing the IRS's new improved structure. The Commissioner also agreed to provide RegFair with a more detailed review of the National Ombudsman's recommendations and a follow-up response. The IRS response that followed the meeting did indeed reflect the discussion and it appears the IRS has taken some concrete steps to implement the recommendations.

Other topics discussed included the IRS implementation of Taxpayer Advocate, a position within the IRS which will have more authority to deal with small business issues and problems throughout the agency, especially in hardship cases.

The IRS should also be commended for keeping RegFair well informed of changes and of the agency's progress throughout the IRS's 1998 reorganization.

Environmental Protection Agency

EPA's Regulatory Enforcement Director, Eric Schaeffer and a Compliance Division Director, Elliot Gilberg visited RegFair's headquarters in Chicago to meet with the National Ombudsman.

The meeting gave both EPA and RegFair an extended opportunity to discuss regulatory enforcement concerns. The meeting agenda included the small business comment process, notification of small businesses of their RegFair rights at the time of enforcement activities, specific concerns that had come to RegFair's attention, innovative EPA compliance and enforcement initiatives, and small business retaliation concerns.

The EPA obtained positive feedback from the National Ombudsman on the quality of its response to small business comments, and suggested improvement in the timeliness of the agency's responses, especially its initial response. The EPA agreed to provide the RegFair with the time frames and specific language it will use when advising small businesses of their RegFair rights at the time of enforcement.

Other topics of discussion at the EPA meeting were the following:

- A Region VIII amnesty program was discussed, which a number of small business thought had the appearance of blackmail. EPA realized that the problem stemmed from a lack of clarity in its emission reporting rules and inadequate guidance for small businesses on how to comply with the specific types of reporting required. EPA was working on the rules to make it easier for small businesses to understand their emission reporting obligations. After EPA has finished its revisions, it will give the industry one year to come into compliance before initiating enforcement proceedings.
- Included in the discussion was an innovative compliance/enforcement project with the Pork Producers Council. The Council and EPA, with \$5,000,000 in Congressional assistance, developed a voluntary compliance program for hog farmers. Participants in the project receive private sector compliance audits, reduced and/or capped penalties for violations, a reduction in the need for EPA audits, and an environmental seal of approval. Hog farmers, who previously feared EPA penalties, can now more reasonably attain compliance and can use the EPA's special seal of approval in their wholesale product marketing.
- EPA has also developed public/private resource centers that offer businesses compliance assistance resources. The centers use newspaper, Internet and telephone tools to help industry members understand their compliance responsibilities. The centers can provide advice to businesses with specific compliance questions on regulations. So far, the EPA has created eight industry specific centers in partnership with business associations. Use of the centers continues to grow as they begin utilizing additional technology, such as satellite conferences.
- Also discussed in the meeting with the National Ombudsman was the issue of retaliation. Some EPA agents believe retaliation does not exist in their agency and that retaliation policies risk reducing staff morale. However, during the discussion it was clear that the EPA understands the importance of addressing the perception in the small business community that retaliation is a major problem. The agency also understood that the perception of retaliation has a negative impact on the agency's compliance and enforcement activities. As noted in the agency's response to the National Ombudsman's recommendations, EPA has agreed to develop and issue a formal, unambiguous anti-retaliation policy by March 1999.

Department of Interior

RegFair met with the Department of Interior to discuss notification to small businesses of their RegFair rights, at the time of an enforcement action. The Department explained the function of its various programs, and how the notification process will be implemented.

During the meeting, the National Ombudsman offered to work closely with the different programs in addressing any questions, and in helping to train agency personnel on the requirements of SBREFA. The meeting helped clarify previous misunderstandings and developed better channels of communication for the future.

Department of Defense

The National Ombudsman met in September, 1998 with representatives from the Office of the Under Secretary of Defense at the Pentagon to discuss a number of issues relating to the applicability of SBREFA and the RegFair Program to the Department of Defense (DOD).

The meeting was held in response to DOD's position that they do not exercise regulatory authority over small business and are not a regulatory agency. The National Ombudsman indicated to the Department that the applicability of SBREFA is not limited to regulatory agencies, and encouraged a discussion that illuminated the Department's position.

The Department's representative agreed to provide details of its activities on behalf of small business, and discussed its strong commitment to small business programs. They also discussed the Department's success at incorporating small businesses into its acquisition framework. The National Ombudsman also requested the Department to reconsider its position and respond to the request for inclusion of SBREFA language at the time of enforcement or compliance.

Although the Department was not prepared to acknowledge SBREFA jurisdiction, it did agree to be responsive to inquiries from RegFair. The meeting was helpful by engendering a more cooperative atmosphere. And, although DOD disagrees with the applicability of SBREFA to the Department, it recently responded to a small business comment on an agency bonding requirement for shipping companies.

The Fairness Boards and National Ombudsman have serious concerns with the Department's insistence that SBREFA does not apply to it, despite stated comments by Members of Congress in a hearing held last Spring, and the subsequent letter from the Committee asking the Department to notify small businesses of their right to comment through RegFair.

Federal Deposit Insurance Corporation

The FDIC General Counsel along with the FDIC Ombudsman and Senior Counsel, visited Chicago to meet with the National Ombudsman and staff. The FDIC does not believe that any of its activities entail enforcement or compliance activities covered under Section 222 of SBREFA, and has so far refused to provide notification of RegFair rights to small businesses at the time of enforcement or compliance actions.

A concern of the FDIC was RegFair's expectation that they respond to a small business comment which was under internal FDIC review. This issue was resolved when it was made clear by the National Ombudsman that agencies are asked to promptly respond to only those issues which could be addressed without undermining an ongoing internal investigation or appeal. Responses to the remaining issues are not expected until the agencies complete their internal processes.

Also discussed was the applicability Section 222 of SBREFA to a specific small business comment in which the FDIC took action against a business owner in his official capacity. At issue is whether SBREFA is applicable in this case. There continues to be disagreement on this issue. However, the FDIC agreed to reconsider its jurisdictional position and respond to the comment and questions at the close of the enforcement activity.

A point of concern for the FDIC was that the agency believed that the National Ombudsman's request to notify small businesses of their RegFair rights at the time of enforcement meant that the Ombudsman wanted the agency to provide this notification before surprise inspections or audits. The National Ombudsman assured the FDIC that the intent of the request was not to undermine legitimate enforcement or compliance activities including surprise inspections, rather to inform small businesses of their new regulatory rights. As requested of all agencies, small businesses can be advised of their RegFair rights when an enforcement or compliance activity is made known to the business—such as after a surprise inspection. With that clarification, the FDIC agreed to reconsider its position.

As discussed above in *Regulatory Rights Notification at the Time of Enforcement*, the FDIC still has not agreed to provide the notification, which is mandated under Section 222 of SBREFA. The Regulatory Fairness Boards and the National Ombudsman are concerned about the position taken by the FDIC, and believe that follow up is needed.

Future Agency Dialogue

RegFair looks forward to expanding the number of meetings with federal agencies in the coming year. Upcoming meetings include the Federal Energy Regulatory Commission and the Department of Housing and Urban Development.

History of Regulatory Reform

The Small Business Regulatory Enforcement Fairness Act of 1996, P.L. 104-121 (SBREFA) provides small businesses with new and meaningful ways to participate in the federal regulatory process. SBREFA, as the culmination of ongoing governmental efforts, demonstrates the current Administration's commitment to reducing regulatory burden on small businesses. What follows is a brief history of those governmental efforts.

In the late 1970s, Congress held hearings and developed a record of the burdens federal regulations imposed on small businesses. The Senate and House Small Business and Judiciary Committees heard testimony from small businesses, small cities and towns, and small non-profit institutions about regulatory policies that failed to consider small entities' needs.

To address the concerns raised by small entities, Congress enacted the Regulatory Flexibility Act of 1980 (Pub. L. No. 96-354, 5 U.S.C. §601 *et seq*), effective January 1, 1981. The Regulatory Flexibility Act of 1980, or RFA, requires each federal agency to analyze the effects of its regulations on small businesses.

However, the Act failed to fully attain its initial promise. Sometimes, vague statutory language created uncertainty, and other times, agencies' varied interpretations caused inconsistent results. Because the RFA did not give permission to courts to review agency action, agencies often did not follow it.

Many attempts were subsequently made to improve rulemaking for small businesses. In 1981, President Ronald Reagan issued Executive Order 12291 on Federal Regulation. This Order required agencies to review each new rule to analyze the costs and benefits of that regulation, and to make sure it did not duplicate or conflict with any other rule.

Under Executive Order 12291, all agencies had to send a "preliminary regulatory impact analysis" for all "major" rules to the Office of Management and Budget (OMB). "Major" rules were those likely to result in an annual effect on the economy of \$100 million or more, a major increase in costs or prices, or "significant adverse effects" on competition, employment or other aspects of the economy.

On September 30, 1993, President Clinton issued Executive Order 12866 on Regulatory Planning and Review, which supersedes Executive Order 12291. This Order requires agencies to seriously consider costs and benefits. It also requires agencies to analyze and consider alternatives to rulemaking, and to take the size of the businesses into account. Executive Order 12866 gave OMB permission to declare rules that affect a sector of the economy, including small businesses, to be "major" rules. For "major" rules, agencies must complete a detailed analysis of the costs and benefits.

In 1993, the Clinton Administration's National Performance Review (NPR), now called the National Partnership for Reinventing Government (NPRG), recommended that courts should review agency compliance with the RFA. The NPR task force also recommended that the SBA Office of Advocacy should issue government-wide guidance on how to comply with RFA.

NPRG is designed to reform the way the Federal Government works. Its mission is to create a government that "works better, costs less, and gets results Americans care about." Begun in the early days of the current Administration, with Vice President Al Gore at its helm, the task force has undertaken numerous initiatives. It is the tenth federal reform effort this century and has been the longest-running federal reform effort to date.

The 1994 Federal Acquisition Streamlining Act (FASA) proposed to reform how the Federal Government buys \$200 billion of goods and services per year. Under FASA, taxpayers will save an estimated \$12.3 billion over five years, and makes it easier for small firms to do business with the government. FASA does the following:

- Encourages federal agencies to buy commercial components and products rather than products specially designed for the government;
- Raises the simplified-purchase threshold from \$25,000 to \$100,000 and reserves all purchases between \$2,500 and the new, higher threshold for small business. This enhances the ability of small firms to obtain government business totaling \$2.5 billion a year;
- Established a Federal Acquisition Computer Network (FACNET), allowing the government to conduct procurement electronically. This saves taxpayers money through increased competition and improves small business' access to procurement opportunities; and
- Established the new 5 percent government-wide procurement goal for women-owned businesses.

The Paperwork Reduction Act of 1995 (PRA) gave OMB power to control federal agency reporting and recordkeeping requirements (44 U.S.C. §§ 2904, 2905, 3501-3507). Designed to help small businesses, the PRA seeks to minimize the burdens placed on the public to respond to federal collections of information. Originally passed in 1980, the law gives OMB the authority to approve all federal paperwork and recordkeeping requirements.

In 1995, the PRA was reauthorized and amended. The new PRA requires agencies to reduce their paperwork requirements by 10 percent per year in 1996 and 1997 and by 5 percent each year after. The new PRA also extends coverage to include federal agency disclosure requirements and information required to be disclosed to third parties—for instance, manufacturers of hazardous chemicals must provide material safety data sheets to chemical purchasers. This significant change sought by small businesses overturned a 1990 Supreme Court decision that negatively affected millions of small businesses.

On February 21, 1995, the President ordered top regulatory officials to undertake an ambitious Regulatory Reinvention Initiative to reduce the burden on small businesses. The President directed agencies to accomplish the following:

- Conduct a page-by-page review of all regulations and identify those that should be eliminated or reformed;
- Change their measurement of front-line regulators' performance to focus on results, not process or punishment;
- Convene groups of front-line regulators and affected citizens at sites around the country; and
- Submit to the Office of Management and Budget a list of formal rule-making proceedings to convert into consensual negotiation.

To provide more flexibility for small businesses, the President specifically added the following provisions:

- Enabled government regulators to waive up to 100 percent of punitive fines for small businesses that act in good faith to correct a violation;
- Enabled regulators to waive fines for first-time violators who act quickly to correct problems; and
- Ordered federal agencies to cut in half the frequency with which firms must file most reports (e.g., quarterly reports would now be due semi-annually.)

Also, in April 1995, the President issued a Memorandum of Penalty Waiver. The Memorandum gives compliance officials more flexibility in dealing with small businesses and the authority to waive penalties and use enforcement discretion to help bring entities into compliance.

The Small Business Regulatory Enforcement Fairness Act of 1996, P.L. 104-121 (SBREFA) was passed by Congress on March 29, 1996. Its lead author was Senator Christopher Bond, Chairman of the Senate Small Business Committee. This law, as the culmination of previous governmental efforts to alleviate burden on small businesses, provides small businesses with new and meaningful ways to participate in the federal regulatory process. In addition to providing small businesses with enhanced authority to go to court to challenge agency rules, SBREFA created the following:

- A National Ombudsman and 10 regional Regulatory Fairness Boards were created specifically to collect comments from small businesses on federal regulatory enforcement and compliance action, issue an evaluation of agency progress, and report on them annually to Congress;
- Agencies must develop written guidelines in *plain language* to help small businesses understand how to comply with regulations;
- Agencies must develop a policy for reduction and waiver of penalties imposed on small businesses;
- Small businesses have enhanced authority to go to court to challenge agency rules;
- Congress may now review all major new rules; and
- The Office of Advocacy of the SBA has the responsibility to assemble panels of small business owners to review proposed regulations of the EPA and OSHA.

Most recently, on June 1, 1998, President Clinton issued an Executive Memorandum on "Plain Language in Government Writing" to all executive agencies. This memorandum's purpose is to make the Federal Government "more responsive, accessible, and understandable in its communications with the public." The memorandum calls on agencies to "save both the Government and the private sector time, effort, and money" by using plain language in all documents.

The memorandum directs agencies to use plain language in all new documents that explain how to obtain a benefit or service or how to comply with a requirement, other than regulations, which the agency administers or enforces by October 1, 1998, and in all other documents by January 1, 2002. Agencies must also use plain language in all proposed and final rulemakings published in the *Federal Register* by January 1, 1999.

Origin of RegFair

In 1996, the 104th Congress unanimously passed the Small Business Regulatory Enforcement Fairness Act (SBREFA), which was authored by Senator Christopher Bond and signed into law by President Clinton on March 29 of that year. SBREFA directed the Small Business Administration

to create a program through which small businesses could comment on the enforcement and compliance activities of the federal agencies that regulate them.

To carry out its mission, then SBA Administrator Phil Lader appointed a National Ombudsman and ten regional Regulatory Fairness Boards to provide the means by which small businesses could give meaningful input into the federal agency regulatory environment.

The Regulatory Fairness Boards are five-member boards in each of the SBA's ten regions throughout the country. Because board members are small business owners themselves, they understand the regulatory environment faced by small businesses. The boards advise the National Ombudsman, who reports on issues and matters of concern to the Nation's 23 million small businesses directly to Congress in the Report on Regulatory Fairness, every year.

On October 1, 1996, Peter Barca was appointed as National Ombudsman and 50 small business company presidents were invited to serve as members of the first regional Regulatory Fairness Boards. Thus, from a two-page statute and the intentions of a small business-minded Congress, the Regulatory Fairness Program was created from the ground up.

By February, 1997, the Fairness Boards had been appropriately chartered, the basic program tools had been created, and a National Kickoff had been held in Washington for all 50 Fairness Board members to meet the National Ombudsman, Chairs of the House and Senate Small Business Committees, and the Administrator of the Small Business Administration.

By mid-April, a brochure was available, the RegFair Internet web site had received 5,000 "hits" and almost 100 small businesses had accessed the toll-free hotline in its first month of operation. In June, 1997, planning meetings had been held with the Fairness Boards in all 10 regions and the RegFair Program had become fully operational, receiving small business comments, and preparing for public hearings.

1998 RegFair Hearings Synopses

Region I, New England States, Augusta, Maine, June 22, 1998

The Region I RegFair hearing was held in Augusta, Maine. It was an excellent hearing, with approximately 70 people attending and 13 small businesses testifying. The issue at the forefront of the hearing was the Health Care Financing Administration's recent regulation changes for home health care providers who participate in Medicare and Medicaid. Senator Snowe was represented at the hearing by her Legislative Coordinator. Agency presenters were the IRS and OSHA.

Region II, Mid-Atlantic States, Long Island, New York, September 28, 1998

The Region II RegFair hearing was held in New York, at Adelphi University on Long Island. Congresswoman McCarthy (Dist. 4) attended and addressed the group. The final RegFair hearing for 1998 was a great success with over 75 attendees, and testimony from 14 small business representatives. The IRS testified on the 10 recommendations included in the National Ombudsman's first annual Report to Congress. Board Members Phyllis Hill Slater, former president of National Association of Women Business Owners (NAWBO), and Sandra Lee, a prominent figure in the New York Asian-American business community, were responsible for excellent publicity for the hearing. Press coverage was good with local print media coverage and Channel 25, the Long Island News.

Region III, South Atlantic States, Richmond, Virginia, September 15, 1998

The Region III RegFair hearing was held in Richmond, Virginia on September 15. The hearing was an unqualified success with over 85 attendees, and testimony from 14 small business representatives. Testimony covered a wide range of issues and agencies, including the IRS, OSHA, SBA and HUD. Major trade associations attending included the Greater Richmond and Virginia Chambers of Commerce, the National Federation for Independent Business (NFIB), and the Virginia Home Health Care Association among others. HUD and Health Care Financing Administration testified on the 10 recommendations included in the National Ombudsman's first annual report to Congress. A representative from Senator Robb's office also attended.

Region IV, Southeastern States, Nashville, Tennessee, August 21, 1998

The Region IV RegFair hearing was held in Nashville, Tennessee. The hearing was a great success due to the efforts of the Nashville Chamber of Commerce and the NFIB. There were 72 attendees and 15 small businesses testified on various issues, although Health Care Financing Administration was again the agency most cited. Billy Max Paul, SBA Regional Administrator, Clint Smith, SBA Deputy District Director, and David Tiller, SBA District Public Information Officer (PIO), did a very good job publicizing the event to the small business community in the region, and small businesses from seven of the eight states in the region testified. They also obtained good media coverage, scheduling interviews with the Ombudsman on the radio and in the local press before the hearing, with additional articles following. Attendees included the Chamber of Commerce, NFIB, NAWBO and the Home Care Association of America.

Region V, Midwest States, Cleveland, Ohio, August 10, 1998

The Region V RegFair hearing was held in Cleveland, Ohio. The hearing was an unqualified success. Twenty-one small businesses testified on varied issues that included action by DOL, EPA, EEOC, DOL, FDA, and Health Care Financing Administration, which was again the agency most cited. Gil Goldberg, SBA District Director, and Russ Miller, SBA District PIO, did a very good job publicizing the event to the small business community, including the media. The State Director of the NFIB, and two NFIB members testified, and press coverage was obtained from three local newspapers, including the Cleveland Plain Dealer. The U.S. Department of Transportation testified at the hearing.

Region VI, Southern States, Tulsa, Oklahoma, May 1, 1998

The RegFair public hearing for Region VI, the Southern States, was held in Tulsa, Oklahoma. There were 70 people in attendance and 17 small business owners testified. The Tulsa Chamber of Commerce was instrumental in publicizing the hearing. Agency presenters were the U.S. Immigration and Naturalization Service and the Internal Revenue Service. The regulatory areas spotlighted in this hearing were new regulations issued by the U.S. Department of Health and Human Services requiring new billing procedures for nursing homes and new bond requirements for home health care agencies who participate in Medicare. Ray Harshman, District Director, and David Brown, Public Information Officer in the Oklahoma City SBA office did an excellent job in garnering press coverage for the hearing: two television stations attended (the local affiliates of NBC and ABC), as well as a reporter for the Tulsa World. Staff from the office of Senator Don Nickles also attended.

Region VII, Heartland States, Frontenac, Missouri, June 8, 1998

The RegFair hearing for Region VII, the Heartland States, was held in Frontenac, Missouri, a suburb of St. Louis. The hearing was well attended, with testimony provided by 11 small business owners. Senator Bond was represented at the hearing by Carol Platt, the District Office Director in Missouri. Like the previous hearing in Tulsa, this RegFair hearing was dominated by home health care providers commenting on regulations promulgated by the Health Care Financing Administration.

Region VIII, Rocky Mountain States, Salt Lake City, Utah, April 20, 1998

The RegFair public hearing for Region VIII was held in Salt Lake City, UT. There were approximately 55 attendees and 11 small businesses testified. Agency presenters were the U.S. Department of Labor and the Occupational Safety and Health Administration. Small business associations attending included the Chamber of Commerce and the Helicopter Association International, and the CPA Association. Resource partners included the SBDC, two National Advisory Council (NAC) members and the Governor's Small Business Advisory Council of Utah.

Region IX, Western States, San Jose, California, April 6, 1998

The Region IX public hearing was held in the Silicon Valley Chamber of Commerce office in San Jose, CA. There were approximately 50 attendees, with 10 small businesses testifying. Agency presenters were the Federal Communications Commission and the Environmental Protection Agency. Small business associations attending included the San Jose Minority Business Development Council, Hispanic Chamber of Commerce, and the Helicopter Association International. Congresswoman Zoe Lofgren also attended and addressed the audience.

Region X, Northwestern States, Boise, Idaho, June 25, 1998

The Region X RegFair hearing was held in Boise, Idaho. It was an excellent hearing, with approximately 73 people attending and 12 small businesses testifying. The hearing was a great success due, in part, to the efforts of Gretchen Sorenson, Regional Administrator, Tom Bergdoll, District Director, and Pat Hunt, Public Information Office in the Boise District office. Although the dominant small business concern at the hearing was the new Health Care Financing Administration regulations, testimony was also offered concerning the Fair Housing Act and the Americans with Disabilities Act. The hearing garnered excellent media coverage from the local affiliates of ABC, NBC and the Associated Press (AP), and each of Idaho's four Congressional offices also sent a representative.

NOTE: Complete transcripts of these hearings may be found on the RegFair Internet web site at www.sba.gov/regfair.

The RegFair Process

RegFair's main goal, as stated by Congress, is to help create a regulatory climate for small business that is more cooperative and less adversarial. The mission of the program is to convey small business concerns to the agencies and to encourage agencies to change contentious cultures where they exist, and to work to give small business a voice in evaluating the regulatory enforcement and compliance environment.

One of the ways RegFair works toward this mission is by providing forums in which small businesses can readily comment on federal agency enforcement and compliance activities by offering testimony at hearings, describing their experiences in a written comments, or discussing their issues with a Fairness Board member or the National Ombudsman. These forums can benefit both the government and small businesses by allowing the comments of small businesses on agency enforcement or compliance action to be addressed directly by the agency involved.

For small businesses, the benefit of this process is that their concerns will be heard by officials who can make changes. For agencies, receiving information on the direct experiences of their small business customers allows them an opportunity for internal review of their processes, policies and procedures from a small business perspective, which may drive new ways to achieve compliance using existing resources.

Individual small business comments about agency activities also allow the National Ombudsman to evaluate the enforcement activities of federal agencies, including rating the responsiveness of agency regional and program offices to small business, as directed by the Act.

Although RegFair is examining additional methods of distributing information and collecting small business comments, there are currently three ways in which small businesses can comment about federal regulatory enforcement: 1) file a written comment; 2) testify at a RegFair public hearing; and 3) discuss their experiences with a Fairness Board member. Small business testimony taken at the RegFair hearings becomes part of the public record, and is posted on the Internet web site for viewing by the public as well as Members of Congress and the agencies, themselves.

To file a comment, offer testimony at a hearing, discuss an issue or get further information on the program, small businesses can call the RegFair Hotline at 1-888-REG-FAIR, visit the RegFair website at www.sba.gov/regfair, contact a Fairness Board member in their area, or contact the National Ombudsman.

Completing a Written Comment and an Agency Appraisal Form

The number of small businesses filing written comments and agency appraisal forms with RegFair has tripled since the first annual Report to Congress, to more than 200 forms received. Two hundred comments are a good base upon which to form some ideas about general trends and indications of how agencies treat their small business customers. An increase in this number may also allow the identification of trends specific to industries or industry segments, and related issues in agency enforcement and compliance activities.

To file a written comment and receive an agency response on a federal regulatory issue, small businesses can complete a brief, one-page agency appraisal form, and describe the issue in their own terms. If the small business owner is comfortable disclosing its identity to the federal agency involved, the comment is sent to the agency to provide feedback and generate an independent review and response. If the small business owner is not comfortable revealing the identity of the business, a non-identifying summary of the comment is sent to the agency for review, which will generate a more general response.

In each letter from the National Ombudsman transmitting a small business comment, federal agencies are asked that a high-level official be designated to review and respond to the comment. High-level review serves two purposes: first, it helps to ensure that the review of any particular small business comment is independent of the personnel that actually undertook the enforcement or compliance action against the business. Second, a high-level official can explain the agency's action with regard to the small business, and can identify, suggest and/or implement changes in agency enforcement activities and policies so that they better serve the agency's small business customers, and so that similarly situated small businesses will not have to confront the same issues. Agency reviews which do not appear to be independent of involved enforcement officials are not accepted by the National Ombudsman, and the request for such reviews are repeated.

When an agency has completed an independent review and has responded to a small business comment, the Fairness Board or National Ombudsman may follow up with the agency to request additional details or clarification, and to confirm that the agency considered its responsibilities under SBREFA when taking the enforcement action. The small business that filed the comment is informed of each of these steps by the National Ombudsman's office, and receives a copy of the agency's final response in the matter.

Language on the form makes very clear to the small business that the identity of a company making a comment remains confidential unless the company representative chooses to reveal its identity. If a small business makes no choice on the form, the highest level of confidentiality is assigned to that comment, and that confidentiality is strictly upheld by the Fairness Boards and the National Ombudsman.

RegFair Public Hearings

Another way in which small businesses can provide input on federal regulatory enforcement and compliance issues is to offer testimony at a RegFair public hearing. RegFair hearings are held annually in each of 10 regions. Hearings are open to the public, and are well publicized by national and local trade associations, local Chambers of Commerce, other small business-related organizations, and by regional and district SBA offices. Transcripts of the hearings are available on the RegFair Internet web site (www.sba.gov/regfair).

At the hearings, small businesses offer specific testimony about any federal agency's regulatory enforcement and compliance activity, whether or not the agency is in attendance. Agencies with regulatory authority over small businesses do attend the hearings and offer information and answer questions posed by the businesses and the boards.

RegFair went beyond statutory requirements of the Act to hold at least 10 public hearings each year, and to move the hearings to various cities within each region in order to gather input on the regulatory enforcement environment from small businesses in as many cities and industries as

possible. The main goal in planning and organizing RegFair hearings is to allow the following to occur:

- Small businesses can tell the federal agencies involved of their perceptions and concerns, directly.
- Small businesses testify before the Fairness Boards on issues covering the entire range of "matters of concern to small business," as the statute broadly describes the board's duties in advising the National Ombudsman. Through testimony, captured in the hearing transcripts, small businesses share their unfiltered views and experiences with Congress and the Administration.
- Small businesses can offer testimony about any regulatory experience they have had with any federal agency, not just agencies attending the hearing.
- Bring together small businesses and the federal agencies that regulate them in an open, and non-threatening forum, thereby fostering the national debate on regulatory fairness for the country's 23 million small businesses.

In 1998 alone, over 650 people attended the 10 hearings held, and nearly 150 small businesses testified before the Regulatory Fairness Boards on issues as varied as tax reporting, import-export procedures, immigration, and health care.

A RegFair hearing held just outside of St. Louis, Missouri, was instrumental in facilitating Congressional action to amend new regulations that threaten to close many small home health care providers. The regulations, developed and implemented by the Health Care Financing Administration (HCFA) under the Balanced Budget Act of 1997, instituted new billing procedures for nursing homes and new bond requirements for home health care agencies who participate in Medicare.

Staff from the office of Senator Christopher Bond, Chairman of the Senate Small Business Committee, attended the hearing on June 8, 1998, and on June 10 1998, Senator Bond introduced a Joint Resolution (S.J. Res 50) that placed a moratorium on one of the regulations instituting the surety bond. HCFA subsequently agreed to suspend the effective date of the rule.

RegFair hearings have been successful at generating a greater awareness across the country of small businesses' new rights to regulatory fairness under SBREFA, and their right to comment on agency enforcement action through RegFair.

Referral to Agency Inspectors General

SBREFA requires the National Ombudsman to establish the means to refer comments from small businesses to the Inspectors General of agencies in appropriate circumstances. Appropriate circumstances are those in which an agency employee appears to have acted illegally or unethically.

In carrying out this directive, the National Ombudsman identified agencies with regulatory authority over small businesses and established a process to refer comments to the Inspectors General of these agencies. All of the agencies have been contacted to guarantee that the identity of the small business will be treated with the level of confidentiality provided other employee complaints received by agency Inspectors General.

Unless the Federal Code (18 U.S.C. § 4) which concerns knowledge of the commission of a felony, is applicable agencies must obtain permission from a small business before disclosing its identity in cases where a serious problem has been identified and referred to an agency Inspector General.

Plotting Our Course

Leader Roundtables, and a closer relationship with small business trade associations through the Association of the Month program.

Major Goals and Objectives for 1999 – 2000

With further development in mind, the following are RegFair's main goals and objectives for the coming year:

- Continue to develop and improve the methods and criteria the National Ombudsman and Fairness Boards use to evaluate federal agencies enforcement and compliance activities.
- Create additional marketing tools, and redevelop current items such as brochures, written comment form, Internet website, etc. to make them easier to use and informative;
- Develop new marketing strategies such as the Business Leaders Roundtables, Association of the Month, etc. to cement current outreach and resource partnerships, and build new relationships.
- Develop a marketing plan that successfully utilizes the media, to form the foundation on which to construct strategic alliances within the small business community, helping to increase awareness of the RegFair Program and to communicate and disseminate RegFair information to U.S. small businesses.
- Further develop and utilize the extensive efforts and expertise of the Fairness Board Members, continually strengthening their role as RegFair's direct link to U.S. small businesses.
- Work more closely with federal agencies to find ways to educate and inform their personnel, and their small business customers, about small businesses' new right to regulatory fairness under the Act.

Future Plans

- Distribute RegFair insert cards describing the program to Members of Congress to assist them in referring constituent with regulatory enforcement issues or concerns.
- Develop training program and materials in cooperation with interested agencies.
- Continue strengthening and improving the processes and procedures that allow the National Ombudsman to perform statutorily required activities such as coordinating the efforts of the Regional Fairness Boards, convening ten public hearings across the United States, and obtaining testimony and comments from small businesses on the regulatory environment;
- Continue to improve cooperative relationships with SBDCs and other resource partners, such as trade groups, the National Advisory Council or other specialized small business related associations to disseminate compliance guidelines and other information on small businesses' rights under SBREFA and the RegFair program;
- Increase the number of discussions with small businesses and small business leaders across the country on challenges to their businesses imposed through federal regulation and relate their experiences with regulatory compliance and enforcement actions taken by federal agencies;
- Increase the number of small business comments, both written and through testimony, in order to better evaluate agencies. This will allow the program to achieve its ultimate goal: to form an increasingly encompassing picture of the federal regulatory environment faced by small businesses for Congress.