

104TH CONGRESS
1ST SESSION

S. 942

To promote increased understanding of Federal regulations and increased voluntary compliance with such regulations by small entities, to provide for the designation of regional ombudsmen and oversight boards to monitor the enforcement practices of certain Federal agencies with respect to small business concerns, to provide relief from excessive and arbitrary regulatory enforcement actions against small entities, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JUNE 16 (legislative day, JUNE 5), 1995

Mr. BOND (for himself, Mr. DOMENICI, Mr. WARNER, Mrs. HUTCHISON, Mr. BURNS, Mr. FRIST, and Mr. COVERDELL) introduced the following bill; which was read twice and referred to the Committee on Small Business

A BILL

To promote increased understanding of Federal regulations and increased voluntary compliance with such regulations by small entities, to provide for the designation of regional ombudsmen and oversight boards to monitor the enforcement practices of certain Federal agencies with respect to small business concerns, to provide relief from excessive and arbitrary regulatory enforcement actions against small entities, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

1 **SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

2 (a) SHORT TITLE.—This Act may be cited as the
3 “Small Business Regulatory Fairness Act of 1995”.

4 (b) TABLE OF CONTENTS.—The table of contents for
5 this Act is as follows:

Sec. 1. Short title; table of contents.

Sec. 2. Purposes.

TITLE I—REGULATORY SIMPLIFICATION AND VOLUNTARY
COMPLIANCE

Sec. 101. Definitions.

Sec. 102. Compliance guides.

Sec. 103. No action letter.

Sec. 104. Voluntary self-audits.

Sec. 105. Defense to enforcement actions.

TITLE II—SMALL BUSINESS RESPONSIVENESS OF COVERED
AGENCIES

Sec. 201. Small business and agriculture ombudsman.

Sec. 202. Small business regulatory fairness boards.

Sec. 203. Services provided by small business development centers.

TITLE III—FINANCIAL ACCOUNTABILITY OF COVERED AGENCIES
RELATING TO FEES AND EXPENSES

Sec. 301. Administrative proceedings.

Sec. 302. Judicial proceedings.

6 **SEC. 2. PURPOSES.**

7 The purposes of this Act are—

8 (1) to change the relationship between regu-
9 lators and small entities;

10 (2) to ameliorate the concern of small entities
11 regarding the effects of arbitrary Federal regulatory
12 enforcement actions on small entities;

13 (3) to increase the comprehensibility of Federal
14 regulations affecting small entities;

1 (4) to make Federal regulators accountable for
2 their actions; and

3 (5) to provide small entities with a meaningful
4 opportunity for the redress of arbitrary enforcement
5 actions by Federal regulators.

6 **TITLE I—REGULATORY SIM-**
7 **PLIFICATION AND VOL-**
8 **UNTARY COMPLIANCE**

9 **SEC. 101. DEFINITIONS.**

10 For purposes of this title, the following definitions
11 shall apply:

12 (1) COMPLIANCE GUIDE.—The term “compli-
13 ance guide” means a publication made by a covered
14 agency under section 102(a).

15 (2) COVERED AGENCY.—The term “covered
16 agency” has the same meaning as in section 30(a)
17 of the Small Business Act (as added by section 201
18 of this Act).

19 (3) NO ACTION LETTER.—The term “no action
20 letter” means a written determination from a cov-
21 ered agency stating that, based on a no action re-
22 quest submitted to the agency by a small entity, the
23 agency will not take enforcement action against the
24 small entity under the rules of the covered agency.

1 (4) NO ACTION REQUEST.—The term “no ac-
2 tion request” means a written correspondence sub-
3 mitted by a small entity to a covered agency—

4 (A) stating a set of facts; and

5 (B) requesting a determination by the
6 agency of whether the agency would take an en-
7 forcement action against the small entity based
8 on such facts and the application of any rule of
9 the agency.

10 (5) RULE.—The term “rule” has the same
11 meaning as in section 601(2) of title 5, United
12 States Code.

13 (6) SMALL ENTITY.—The term “small entity”
14 has the same meaning as in section 601(6) of title
15 5, United States Code.

16 (7) SMALL BUSINESS CONCERN.—The term
17 “small business concern” has the same meaning as
18 in section 3 of the Small Business Act.

19 (8) VOLUNTARY SELF-AUDIT.—The term “vol-
20 untary self-audit” means an audit, assessment, or
21 review of any operation, practice, or condition of a
22 small entity that—

23 (A) is initiated by an officer, employee, or
24 agent of the small entity; and

25 (B) is not required by law.

1 **SEC. 102. COMPLIANCE GUIDES.**

2 (a) COMPLIANCE GUIDE.—

3 (1) PUBLICATION.—If a covered agency is re-
4 quired to prepare a regulatory flexibility analysis for
5 a rule or group of related rules under section 603
6 of title 5, United States Code, the agency shall pub-
7 lish a compliance guide for such rule or group of re-
8 lated rules.

9 (2) REQUIREMENTS.—Each compliance guide
10 published under paragraph (1) shall—

11 (A) contain a summary description of the
12 rule or group of related rules;

13 (B) contain a citation to the location of the
14 complete rule or group of related rules in the
15 Federal Register;

16 (C) provide notice to small entities of the
17 requirements under the rule or group of related
18 rules and explain the actions that a small entity
19 is required to take to comply with the rule or
20 group of related rules;

21 (D) be written in a manner to be under-
22 stood by the average owner or manager of a
23 small entity; and

24 (E) be updated as required to reflect
25 changes in the rule.

26 (b) DISSEMINATION.—

1 (1) IN GENERAL.—Each covered agency shall
2 establish a system to ensure that compliance guides
3 required under this section are published, dissemi-
4 nated, and made easily available to small entities.

5 (2) SMALL BUSINESS DEVELOPMENT CEN-
6 TERS.—In carrying out this subsection, each covered
7 agency shall provide sufficient numbers of compli-
8 ance guides to small business development centers
9 for distribution to small businesses concerns under
10 section 21(c)(3)(R) of the Small Business Act (as
11 added by section 202 of this Act).

12 (c) LIMITATION ON ENFORCEMENT.—

13 (1) IN GENERAL.—No covered agency may
14 bring an enforcement action in any Federal court or
15 in any Federal administrative proceeding against a
16 small entity to enforce a rule for which a compliance
17 guide is not published and disseminated by the cov-
18 ered agency as required under this section.

19 (2) EFFECTIVE DATES.—This subsection shall
20 take effect—

21 (A) 1 year after the date of the enactment
22 of this Act with regard to a final regulation in
23 effect on the date of the enactment of this Act;
24 and

1 (B) on the date of the enactment of this
2 Act with regard to a regulation that takes effect
3 as a final regulation after such date of enact-
4 ment.

5 **SEC. 103. NO ACTION LETTER.**

6 (a) APPLICATION.—This section applies to all covered
7 agencies, except—

8 (1) the Federal Trade Commission;

9 (2) the Equal Employment Opportunity Com-
10 mission; and

11 (3) the Consumer Product Safety Commission.

12 (b) ISSUANCE OF NO ACTION LETTER.—Not later
13 than 90 days after the date on which a covered agency
14 receives a no action request, the agency shall—

15 (1) make a determination regarding whether to
16 grant the no action request, deny the no action re-
17 quest, or seek further information regarding the no
18 action request; and

19 (2) if the agency makes a determination under
20 paragraph (1) to grant the no action request, issue
21 a no action letter and transmit the letter to the re-
22 questing small entity.

23 (c) RELIANCE ON NO ACTION LETTER OR COMPLI-
24 ANCE GUIDE.—In any enforcement action brought by a
25 covered agency in any Federal court, or Federal adminis-

1 trative proceeding against a small entity, the small entity
2 shall have a complete defense to any allegation of non-
3 compliance or violation of a rule if the small entity affirm-
4 atively pleads and proves by a preponderance of the evi-
5 dence that the act or omission constituting the alleged
6 noncompliance or violation was taken in good faith with
7 and in reliance on—

- 8 (1) a no action letter from that agency; or
- 9 (2) a compliance guide of the applicable rule
10 published by the agency under section 102(a).

11 **SEC. 104. VOLUNTARY SELF-AUDITS.**

12 (a) INADMISSIBILITY OF EVIDENCE AND LIMITATION
13 ON DISCOVERY.—The evidence described in subsection
14 (b)—

15 (1) shall not be admissible, unless agreed to by
16 the small entity, in any enforcement action brought
17 against a small entity by a Federal agency in any
18 Federal—

- 19 (A) court; or
- 20 (B) administrative proceeding; and
- 21 (2) may not be the subject of discovery in any
22 enforcement action brought against a small entity by
23 a Federal agency in any Federal—

- 24 (A) court; or
- 25 (B) administrative proceeding.

1 (b) APPLICATION.—For purposes of subsection (a),
2 the evidence described in this subsection is—

3 (1) a voluntary self-audit made in good faith;

4 and

5 (2) any report, finding, opinion, or any other
6 oral or written communication made in good faith
7 relating to such voluntary self-audit.

8 (c) EXCEPTIONS.—Subsection (a) shall not apply if—

9 (1) the act or omission that forms the basis of
10 the enforcement action is a violation of criminal law;

11 or

12 (2) the voluntary self-audit or the report, find-
13 ing, opinion, or other oral or written communication
14 was prepared for the purpose of avoiding disclosure
15 of information required for an investigative, adminis-
16 trative, or judicial proceeding that, at the time of
17 preparation, was imminent or in progress.

18 **SEC. 105. DEFENSE TO ENFORCEMENT ACTIONS.**

19 (a) IN GENERAL.—No covered agency may impose a
20 fine or penalty on a small entity if the small entity proves
21 by a preponderance of the evidence that—

22 (1) the covered agency rule is vague or ambigu-
23 ous; and

1 (2) the interpretation by the small entity of the
2 rule is reasonable considering the rule and any appli-
3 cable compliance guide.

4 (b) INTERPRETATION OF RULE.—In determining
5 whether the interpretation of a rule by a small entity is
6 reasonable, no deference shall be given to any interpreta-
7 tion of the rule by the agency that is not included in a
8 compliance guide.

9 **TITLE II—SMALL BUSINESS RE-**
10 **SPONSIVENESS OF COVERED**
11 **AGENCIES**

12 **SEC. 201. SMALL BUSINESS AND AGRICULTURE OMBUDS-**
13 **MAN.**

14 The Small Business Act (15 U.S.C. 631 et seq.) is
15 amended—

16 (1) by redesignating section 30 as section 31;
17 and

18 (2) by inserting after section 29 the following
19 new section:

20 **“SEC. 30. OVERSIGHT OF REGULATORY ENFORCEMENT.**

21 **“(a) DEFINITIONS.—**For purposes of this section, the
22 following definitions shall apply:

23 **“(1) BOARD.—**The term ‘Board’ means a Small
24 Business Regulatory Fairness Board established
25 under subsection (c).

1 “(2) COVERED AGENCY.—The term ‘covered
2 agency’ means any agency that, as of the date of en-
3 actment of the Small Business Regulatory Fairness
4 Act of 1995, has promulgated any rule for which a
5 regulatory flexibility analysis was required under
6 section 605 of title 5, United States Code, and any
7 other agency that promulgates any such rule, as of
8 the date of such promulgation.

9 “(3) OMBUDSMAN.—The term ‘ombudsman’
10 means a Regional Small Business and Agriculture
11 Ombudsman designated under subsection (b).

12 “(4) REGION.—The term ‘region’ means any
13 area for which the Administrator has established a
14 regional office of the Administration pursuant to
15 section 4(a).

16 “(5) RULE.—The term ‘rule’ has the same
17 meaning as in section 601(2) of title 5, United
18 States Code.

19 “(b) OMBUDSMAN.—

20 “(1) IN GENERAL.—Not later than 180 days
21 after the date of enactment of the Small Business
22 Regulatory Fairness Act of 1995, the Administrator
23 shall designate in each region a senior employee of
24 the Administration to serve as the Regional Small

1 Business and Agriculture Ombudsman in accordance
2 with this subsection.

3 “(2) DUTIES.—Each ombudsman designated
4 under paragraph (1) shall—

5 “(A) on a confidential basis, solicit and re-
6 ceive comments from small business concerns
7 regarding the enforcement activities of covered
8 agencies;

9 “(B) based on comments received under
10 subparagraph (A), annually assign and publish
11 a small business responsiveness rating to each
12 covered agency;

13 “(C) publish periodic reports compiling the
14 comments received under subparagraph (A);

15 “(D) coordinate the activities of the Small
16 Business Regulatory Fairness Board estab-
17 lished under subsection (c); and

18 “(E) establish a toll-free telephone number
19 to receive comments from small business con-
20 cerns under subparagraph (A).”.

21 **SEC. 202. SMALL BUSINESS REGULATORY FAIRNESS**
22 **BOARDS.**

23 Section 30 of the Small Business Act (as added by
24 section 201 of this Act) is amended by adding at the end
25 the following new subsection:

1 “(c) SMALL BUSINESS REGULATORY FAIRNESS
2 BOARDS.—

3 “(1) IN GENERAL.—Not later than 180 days
4 after the date of enactment of the Small Business
5 Regulatory Fairness Act of 1995, the Administrator
6 shall establish in each region a Small Business Reg-
7 ulatory Fairness Board in accordance with this sub-
8 section.

9 “(2) DUTIES.—Each Board established under
10 paragraph (1) shall—

11 “(A) advise the ombudsman on matters of
12 concern to small business concerns relating to
13 the enforcement activities of covered agencies;

14 “(B) conduct investigations into enforce-
15 ment activities by covered agencies with respect
16 to small business concerns;

17 “(C) issue advisory findings and rec-
18 ommendations regarding the enforcement activi-
19 ties of covered agencies with respect to small
20 business concerns;

21 “(D) review and approve, prior to publica-
22 tion—

23 “(i) each small business responsive-
24 ness rating assigned under subsection
25 (b)(2)(B); and

1 “(ii) each periodic report prepared
2 under subsection (b)(2)(C); and

3 “(E) prepare written opinions regarding
4 the reasonableness and understandability of
5 rules issued by covered agencies.

6 “(3) MEMBERSHIP.—Each Board shall consist
7 of—

8 “(A) 1 member appointed by the Presi-
9 dent;

10 “(B) 1 member appointed by the Speaker
11 of the House of Representatives;

12 “(C) 1 member appointed by the Minority
13 Leader of the House of Representatives;

14 “(D) 1 member appointed by the Majority
15 Leader of the Senate; and

16 “(E) 1 member appointed by the Minority
17 Leader of the Senate.

18 “(4) PERIOD OF APPOINTMENT; VACANCIES.—

19 “(A) PERIOD OF APPOINTMENT.—

20 “(i) PRESIDENTIAL APPOINTEES.—
21 Each member of the Board appointed
22 under subparagraph (A) of paragraph (2)
23 shall be appointed for a term of 3 years,
24 except that the initial member appointed

1 under such subparagraph shall be ap-
2 pointed for a term of 1 year.

3 “(ii) HOUSE OF REPRESENTATIVES
4 APPOINTEES.—Each member of the Board
5 appointed under subparagraph (B) or (C)
6 of paragraph (2) shall be appointed for a
7 term of 3 years, except that the initial
8 members appointed under such subpara-
9 graphs shall each be appointed for a term
10 of 2 years.

11 “(iii) SENATE APPOINTEES.—Each
12 member of the Board appointed under sub-
13 paragraph (D) or (E) of paragraph (2)
14 shall be appointed for a term of 3 years.

15 “(B) VACANCIES.—Any vacancy on the
16 Board—

17 “(i) shall not affect the powers of the
18 Board; and

19 “(ii) shall be filled in the same man-
20 ner and under the same terms and condi-
21 tions as the original appointment.

22 “(5) CHAIRPERSON.—The Board shall select a
23 Chairperson from among the members of the Board.

24 “(6) MEETINGS.—

1 “(A) IN GENERAL.—The Board shall meet
2 at the call of the Chairperson.

3 “(B) INITIAL MEETING.—Not later than
4 90 days after the date on which all members of
5 the Board have been appointed, the Board shall
6 hold its first meeting.

7 “(7) QUORUM.—A majority of the members of
8 the Board shall constitute a quorum for the conduct
9 of business, but a lesser number may hold hearings.

10 “(8) POWERS OF THE BOARD.—

11 “(A) HEARINGS.—The Board or, at its di-
12 rection, any subcommittee or member of the
13 Board, may, for the purpose of carrying out the
14 provisions of this section—

15 “(i) hold such hearings, sit and act at
16 such times and places, take such testi-
17 mony, receive such evidence, administer
18 such oaths; and

19 “(ii) require, by subpoena or other-
20 wise, the attendance and testimony of such
21 witnesses and the production of such
22 books, records, correspondence, memo-
23 randa, papers, documents, tapes, and ma-
24 terials as the Board or such subcommittee
25 or member considers advisable.

1 “(B) ISSUANCE AND ENFORCEMENT OF
2 SUBPOENAS.—

3 “(i) ISSUANCE.—Each subpoena is-
4 sued pursuant to subparagraph (A) shall
5 bear the signature of the Chairperson and
6 shall be served by any person or class of
7 persons designated by the Chairperson for
8 that purpose.

9 “(ii) ENFORCEMENT.—

10 “(I) IN GENERAL.—In the case
11 of contumacy or failure to obey a sub-
12 poena issued under subparagraph (A),
13 the United States district court for
14 the judicial district in which the sub-
15 poenaed person resides, is served, or
16 may be found may issue an order re-
17 quiring such person to appear at any
18 designated place to testify or to
19 produce documentary or other evi-
20 dence.

21 “(II) CONTEMPT OF COURT.—
22 Any failure to obey the order of the
23 court issued under subclause (I) may
24 be punished by the court as a con-
25 tempt of that court.

1 “(C) WITNESS ALLOWANCES AND FEES.—
2 Section 1821 of title 28, United States Code,
3 shall apply to witnesses requested or subpoenaed
4 to appear at any hearing of the Board.
5 The per diem and mileage allowances for any
6 witness shall be paid from funds available to
7 pay the expenses of the Board.

8 “(D) INFORMATION FROM FEDERAL AGEN-
9 CIES.—Upon the request of the Chairperson,
10 the Board may secure directly from the head
11 any Federal department or agency such infor-
12 mation as the Board considers necessary to
13 carry out the provisions of this section.

14 “(E) POSTAL SERVICES.—The Board may
15 use the United States mails in the same man-
16 ner and under the same conditions as other de-
17 partments and agencies of the Federal Govern-
18 ment.

19 “(F) DONATIONS.—The Board may ac-
20 cept, use, and dispose of donations of services
21 or property.

22 “(9) BOARD PERSONNEL MATTERS.—

23 “(A) COMPENSATION.—Members of the
24 Board shall serve without compensation.

1 “(B) TRAVEL EXPENSES.—Members of the
2 Board shall be allowed travel expenses, includ-
3 ing per diem in lieu of subsistence, at rates au-
4 thorized for employees of agencies under sub-
5 chapter I of chapter 57 of title 5, United States
6 Code, while away from their homes or regular
7 places of business in the performance of serv-
8 ices for the Board.”.

9 **SEC. 203. SERVICES PROVIDED BY SMALL BUSINESS DE-**
10 **VELOPMENT CENTERS.**

11 Section 21(c)(3) of the Small Business Act (15
12 U.S.C. 648(c)(3)) is amended—

13 (1) in subparagraph (O), by striking “and” at
14 the end;

15 (2) in subparagraph (P), by striking the period
16 at the end and inserting a semicolon; and

17 (3) by inserting immediately after subpara-
18 graph (P) the following new subparagraphs:

19 “(Q) providing assistance to small business
20 concerns regarding regulatory requirements, in-
21 cluding providing training with respect to cost-
22 effective regulatory compliance;

23 “(R) developing informational publications,
24 establishing resource centers of reference mate-
25 rials, and distributing compliance guides pub-

1 lished under section 102(a) of the Small Busi-
 2 ness Regulatory Fairness Act of 1995 to small
 3 business concerns; and

4 “(S) developing a program to provide con-
 5 fidential onsite assessments and recommenda-
 6 tions regarding regulatory compliance to small
 7 business concerns and assisting small business
 8 concerns in analyzing the business development
 9 issues associated with regulatory implementa-
 10 tion and compliance measures.”.

11 **TITLE III—FINANCIAL ACCOUNT-**
 12 **ABILITY OF COVERED AGEN-**
 13 **CIES RELATING TO FEES AND**
 14 **EXPENSES**

15 **SEC. 301. ADMINISTRATIVE PROCEEDINGS.**

16 Section 504 of title 5, United States Code, is amend-
 17 ed—

18 (1) in subsection (b)(1)(B)—

19 (A) by striking “, or (ii)” and inserting “,
 20 (ii)”;

21 (B) by striking the semicolon at the end of
 22 the subparagraph and inserting the following:
 23 “, or (iii) a small entity as such term is defined
 24 in subsection (g)(1)(D);” and

1 (2) by adding at the end the following new sub-
2 section:

3 “(g)(1) For purposes of this subsection, the term—

4 “(A) ‘covered agency’ has the same meaning as
5 in section 30(a) of the Small Business Act;

6 “(B) ‘fees and other expenses’ has the same
7 meaning as in subsection (b)(1)(A), except that—

8 “(i) clause (ii) of such subparagraph (A)
9 shall not apply; and

10 “(ii) attorney’s fees shall not be awarded
11 at a rate of pay in excess of \$150 per hour un-
12 less the adjudicative party determines that re-
13 gional costs or other special factors justify a
14 higher fee;

15 “(C) ‘prevailing small entity’—

16 “(i) means a small entity that raised a suc-
17 cessful defense to an agency enforcement action
18 by a covered agency in an adversary adjudica-
19 tion; and

20 “(ii) includes a small entity that is a party
21 in an adversary adjudication in which the adju-
22 dicative officer orders a corrective action or
23 penalty against the small entity that is less bur-
24 densome than the corrective action or penalty

1 initially sought or demanded by the covered
2 agency; and

3 “(D) ‘small entity’ has the same meaning as in
4 section 601(6).

5 “(2) For the purpose of making a finding of whether
6 an award under subsection (a)(1) is unjust, in any case
7 in which fees and other expenses would be awarded to a
8 prevailing small entity as a prevailing party—

9 “(A) the adjudicative officer of the agency shall
10 not consider whether the position of the agency was
11 substantially justified; and

12 “(B) special circumstances shall be limited to
13 circumstances in which—

14 “(i) the matters in the adversary adjudica-
15 tion are matters for which there is little or no
16 legal precedent; or

17 “(ii) findings of fact or conclusions of law
18 are based on inconsistent interpretations of ap-
19 plicable law by different courts.

20 “(3) If a prevailing small entity is awarded fees and
21 other expenses as a prevailing party under subsection
22 (a)(1), such fees and other expenses shall include all fees
23 and expenses incurred by the small entity in appearing
24 in any proceeding the purpose of which is to determine
25 the amount of fees and other expenses.

1 “(4) Fees and other expenses awarded to a prevailing
2 small entity as a prevailing party under this section shall
3 be paid by the covered agency from funds made available
4 to the agency by appropriation or from fees or other
5 amounts charged to the public if authorized by law. A cov-
6 ered agency may not increase any such fee or amount
7 charged for the purpose of paying fees and other expenses
8 awarded to a prevailing small entity as a prevailing party
9 under this section.”.

10 **SEC. 302. JUDICIAL PROCEEDINGS.**

11 Section 2412 of title 28, United States Code, is
12 amended—

13 (1) in subsection (d)(2)(B)—

14 (A) by striking “, or (ii)” and inserting
15 “, (ii)”;

16 (B) by striking the semicolon at the end of
17 the subparagraph and inserting the following:

18 “, or (iii) a small entity as defined under sub-
19 section (g)(1)(D);” and

20 (2) by adding at the end the following new sub-
21 section:

22 “(g)(1) For purposes of this subsection, the term—

23 “(A) ‘covered agency’ has the same meaning as
24 in section 30(a) of the Small Business Act;

1 “(B) ‘fees and other expenses’ has the same
2 meaning as in subsection (d)(2)(A), except that—

3 “(i) clause (ii) of such subparagraph (A)
4 shall not apply; and

5 “(ii) attorney’s fees shall not be awarded
6 at a rate of pay in excess of \$150 per hour un-
7 less the court determines that regional costs or
8 other special factors justify a higher fee;

9 “(C) ‘prevailing small entity’—

10 “(i) means a small entity that raised a suc-
11 cessful defense to an agency enforcement action
12 by a covered agency in a civil action; and

13 “(ii) includes a small entity that is a party
14 in a civil action in which the court orders a cor-
15 rective action or penalty against the small en-
16 tity that is less burdensome than the corrective
17 action or penalty initially sought or demanded
18 by the covered agency; and

19 “(D) ‘small entity’ has the same meaning as
20 the term ‘small entity’ in section 601(6) of title 5.

21 “(2) For the purpose of making a finding of whether
22 an award under subsection (d)(1)(A) is unjust, in any case
23 in which fees and other expenses would be awarded to a
24 prevailing small entity as a prevailing party—

1 “(A) the court shall not consider whether the
2 position of the United States was substantially justi-
3 fied; and

4 “(B) special circumstances shall be limited to
5 circumstances in which—

6 “(i) the matters in the civil action are mat-
7 ters for which there is little or no legal prece-
8 dent; or

9 “(ii) findings of fact or conclusions of law
10 are based on inconsistent interpretations of ap-
11 plicable law by different courts.

12 “(3) If a prevailing small entity is awarded fees and
13 other expenses as a prevailing party under subsection
14 (d)(1)(A), such fees and expenses shall include all fees and
15 expenses incurred by the small entity in appearing in any
16 proceeding the purpose of which is to determine the
17 amount of fees and other expenses.

18 “(4) Fees and other expenses awarded to a prevailing
19 small entity as a prevailing party under this section shall
20 be paid by the covered agency from funds made available
21 to the agency by appropriation or from fees or other
22 amounts charged to the public if authorized by law. A cov-
23 ered agency may not increase any such fee or amount
24 charged for the purpose of paying fees and other expenses

1 awarded to a prevailing small entity as a prevailing party
2 under this section.”.

○

S 942 IS—2