the provisions of section 604 of this title impracticable. If the agency has not prepared a final regulatory analysis pursuant to section 604 of this title within one hundred and eighty days from the date of publication of the final rule, such rule shall lapse and have no effect. Such rule shall not be repromulgated until a final regulatory flexibility analysis has been completed by the agency.''

FRFAs may not be waived because they serve a vital function in the regulatory process. The preparation of a FRFA allows an agency to carefully tailor its regulations and avoid unnecessary and costly requirements while maintaining important public policy objectives. Without a careful analysis—which should include things like data, public comments and a full description of costs—agencies would be operating in a vacuum without sufficient information to develop suitable alternatives.

Since the agency did not issue a proposed rule, the agency had an obligation to consider carefully all of the significant comments regarding the impact of the final rule. After all, the agency was apparently unsure of the impact.[13] The congressional letter should have been some indication that there would be a significant economic impact and that further analysis was required. HCFA did extend the deadline for obtaining a surety bond for 60 days, and in some ways limited the liability of sureties. However, the agency did not change the bond or capitalization requirements, or explain why such changes were not feasible. Inasmuch as the agency failed to heed any of the comments regarding impact—even those from Congress—the comment period served no real function here.

The dearth of information regarding less costly alternatives is possibly the most serious defect in the analysis presented. To begin with, HCFA never demonstrated why the $50,000 bond was insufficient or would not accomplish the objective of discouraging bad actors from entering the Medicare program. The agency did not demonstrate why the 15 percent rule would not cause a significant economic impact—particularly when the $50,000 bond amount changed from a maximum level to a maximum level. There is no evidence that HCFA attempted to find less costly alternatives. Before heaping on additional regulations, would it not be prudent to first determine whether the programs and policies recently put in place by the Administration, and the prospective payment rules yet to come will work?

IV. CONCLUSION

Not everyone in the home health industry is a bad actor. More importantly, home health providers that cannot afford to comply with HCFA's regulations are not necessarily bad actors either. HCFA has twisted Congress' intent and changed the rule into a vehicle for punishing legitimate home health agencies and for securing overpayments by Medicare rather than a vehicle to discourage bad actors from entering the Medicare program. There must be a middle ground—a place where legitimate home health providers can survive and compete in the marketplace, and where fraud and abuse can be controlled. This final rule is not that place.

Therefore, the Office of Advocacy petitions HCFA to amend its final rule to remove the 15% bonding requirement and the capitalization requirement until such time as proper notice and comment procedures can be completed. Thank you for your prompt attention to this urgent matter. Please contact our office if we may assist you in your efforts to comply with the RFA on this or any other rule effecting small entities, 202–205–6533.

Sincerely,

JERE W. GLOVER,
Chief Council for Advocacy.

SHAWNE CARTER MCGIBBON,
Asst. Chief Counsel for Advocacy.

FOOTNOTES

[1] Regulatory Flexibility Act. 5 U.S.C. §601, as amended by the Small Business Regulatory Enforcement Fairness Act, Pub. L. No. 104–121. 110 Stat. 866 (1996).

[2] *See* 143 CONG. REC. H6253–6254 (daily ed. July 29, 1997).

[3] 143 CONG. REC. S6159 (daily ed. July 24, 1997) (statement of Sen. Hatch).

[4] *Id.* at S6159–60.

[5] Those requirements include basing the amount of the bond on a flat rate in combination with the $50,000 minimum bond. The flat rate is designated as 15 percent of the annual amount paid to the HHA by Medicare as reflected in the HHA's most recently accepted cost report. The other major requirement for new the HHAs is for minimum capitalization. The amount of the reserve is to be determined by Medicare intermediaries based on the first year experience of other HHAs. First the intermediary determines an average cost per visit based on first-year cost report data for at least three HHAs that it serves that are comparable to the HHA seeking to enter the Medicare program. The average cost per visit is determined by dividing the sum of the total reported costs of care for all patients of the HHAs by the sum of their total visits. Then, the intermediary multiplies the average cost per visit by the projected number of visits for all patients (Medicare. Medicaid and all other patients) for the first three months of operation of the HHA asking to inter the program. HCFA also designates which funds count toward satisfying the capitalization requirement (—fifty percent of the funds required for capitalization must be non-borrowed funds) Medicare expects those funds to be available in cash or, in some cases short term highly liquid cash equivalents.

[6] 63 Fed. Reg. at 308.

[7] In September 1997. President Clinton announced that the Department of Health and Human Services was declaring the first ever moratorium to stop new home health providers from entering the Medicare program. The moratorium was lifted in January after the instant final rules were published in the Federal Register. The Office of Advocacy received at least one call form an anxious home health agency just starting their business. The agency had completed the reams of paperwork and all the other necessary requirements for entering the Medicare program, but had to put everything on hold because of the 4-month moratorium—announced just days before their Medicare application would have been approved. Where is this business going to get three months reserve to demonstrate that their business is adequately capitalized? Unable to enter the Medicare program, how have they survived thus far (when you consider that 95% of home health patients are Medicare eligible)?

Another business contacted the Office of Advocacy to complain that their home health agency had been audited three times in one year under the Administration's ''Operation Restore Trust.''

[8] Some of those statements include the following: ''Because of the scope of the rule, all HHAs will be affected, but we do not expect that effect to be significant.'' 63 Fed. Reg. at 303. ''We expect to have a 'significant impact' on an unknown number of such entities, effectively preventing some from repeating their past aberrant billing activities [but, t]he majority of HHAs will not be significantly affected by this rule.'' *Id.* ''[A]ny possible impact that this [capitalization] requirement may have on HHAs entering the Medicare program is more than offset by savings to the Trust Funds in situations in which HHAs go out of business due to undercapitalization . . .'' *Id.* at 308. ''We are not preparing a rural impact statement [pursuant to section 1102(b) of the Social Security Act] since we have determined, and certify, that this rule would not have a significant impact on the operations of a substantial number of small rural hospitals.'' *Id.* ''If a new HHA for some reason cannot raise the capital necessary to meet Medicare's [capitalization] requirement and, therefore, is not permitted to enter the Medicare program, that clearly has an impact on the HHA.'' *Id.*

[9] *See* 13 C.F.R. §121.201. Based on Standard Industrial Classification code 8082. Home Health Care Services include home health care agencies and visiting nurse associations (establishments primarily engaged in providing skilled nursing or medical care in the home, under supervision of a physician. Establishments of registered or practical nurses engaged in the independent practice of their professions and nurses' registries and classified in another category. Similarly, establishments primarily engaged in selling, renting or leasing health care products for personal or household use are classified in another category).

[10] In 1996. $14,357,504,894 was paid to HHAs, $1,061,157,961 was overpaid, and $153,628,056 was uncollected.

[11] *Senators Ask HCFA to Delay Final Rule Requiring Surety Bonds of All Agencies.* BNA DAILY REPORT FOR EXECUTIVES. Jan 27, 1998, at A–24.

[12] Small firms in service industries find it more difficult to obtain credit—where judgments in terms of character, markets, and cash flow are more likely to dominate—than in manufacturing industries, which typically have hard assets such as real property, equipment, and inventory. OFFICE OF ADVOCACY, U.S. SMALL BUSINESS ADMINISTRATION. THE STATE OF SMALL BUSINESS: A REPORT OF THE PRESIDENT (1995) at 86.

[13] Unsure of the actual impact, the agency specifically solicited comments on its assertions and assumptions. *See* 63 Fed. Reg. at 304.

Mr. BAUCUS. Mr. President, I would like to say a few words about the Bond-Baucus-Grassley Joint Resolution introduced today that nullifies a regulation which threatens to put many of my state's home health agencies, or HHAs, out of business. Our resolution officially disapproves the regulation issued by the Health Care Financing Administration on June 1 of this year. The rule requires each home health agency that receives Medicare reimbursement to buy a costly surety bond. This expensive bond is out of reach for many of the agencies that provide in-home service to Montana's elderly and low income residents.

Let me say from the outset that I support the provision in the Balanced Budget Act of 1997 requiring HHAs to post a surety bond for Medicare and Medicaid. Perhaps we need to make some changes to the statute, but the underlying idea—to protect the Medicare program by requiring home health agencies to post a bond—is a good one. Unfortunately, the regulation HCFA plans to implement requires a much higher bond amount.

One Montana home health agency based in Butte would have to post a bond of more than $600,000 under the HCFA regulation. That's an outrage. And it will put that company, and many others across the country, out of business.

I am also concerned that HCFA has incorrectly interpreted Congressional intent by using the bonds to collect on Medicare overpayments, not just fraud. As a result, many HHA owners are being asked to put up personal assets, such as their house, as collateral for the bond. These agencies tend to be non-hospital based and not tied to a larger corporate structure. All have far less than $600,000 in personal and business assets. We shouldn't expect anyone to sign over those assets just to do business in the Medicare program.

Also, many HHAs are family-owned small businesses. We cannot let any federal regulation force small businesses to close their door. This not only affects businesses, but also their customers—our bed-ridden elderly.

That is why we have acted here today. The Bond-Baucus-Grassley resolution will invoke the Congressional

Review Act to disapprove HCFA's regulation. And I urge quick action in the Senate on this important matter.

By Mr. SARBANES (for himself, Mr. BYRD, Mr. ROCKEFELLER, and Ms. MIKULSKI):

S.J. Res. 51. A joint resolution granting the consent of Congress to the Potomac Highlands Airport Authority Compact entered into between the Stats of Maryland and West Virginia; to the Committee on the Judiciary.

POTOMAC HIGHLANDS AIRPORT AUTHORITY COMPACT

Mr. SARBANES. Mr. President, today I am introducing legislation together with my colleagues Senators BYRD, ROCKEFELLER, and MIKULSKI to grant Congressional consent to a Compact entered into between the States of West Virginia and Maryland that established the Potomac Highlands Airport Authority. The purpose of this legislation is to help facilitate a regional approach to the operations, use, management and future development of the Greater Cumberland Regional Airport.

Greater Cumberland Regional Airport is an important transportation hub serving the commercial, general aviation and corporate communities in the tri-state area of Maryland, Pennsylvania, and West Virginia. It is not only an essential link in the region's transportation network, but a critical part of the strategy to attract new business and tourism to the area.

The airport was established in 1944, when the City of Cumberland, Maryland purchased property in Wiley Ford, WV—three miles south of Cumberland—and began construction of airport facilities. Unfortunately, this unusual situation—a commercial service airport located in one state while owned by a local unit of government in a contiguous state—has greatly complicated the operation, financing and development of the airport over the years. With two states, two counties and two municipalities having jurisdiction over different aspects of the airport and enforcing different laws, taxing authorities and regulations, it was difficult, at best, to transcend the political and boundary lines and achieve a consensus on the future of the airport.

In order to address this situation, in 1976, the General Assemblies of the State of Maryland and the State of West Virginia enacted a bi-state compact authorizing creation of a public agency known as the Potomac Highlands Airport Authority (PHAA) to govern and operate the airport. However, no action was taken to implement that Compact until 1990, when the two states, the Board of County Commissioners of Allegany County, Maryland and Mineral County, West Virginia and the Mayor and City Council of Cumberland, Maryland signed an intergovernmental agreement to transfer airport management and control to the Authority and changed the name to the Greater Cumberland Regional Airport.

Since that time, the Potomac Highlands Airport Authority has actively maintained and operated the airport, and has been working to develop and implement a 20-year, $10 million airport modernization and expansion program designed to facilitate current operations and anticipated growth in utilization of the facility. In the process of seeking investment capital, loans and airport development grants, questions have been raised by the Federal Aviation Administration, USDA Rural Development, and others about the Authority's eligibility to function as legal sponsor for the airport and borrow money and give security, absent Congressional Consent to the Interstate Compact which established the Authority.

Article I, Section 10 of the Constitution requires Congressional approval of compacts between States and Bond Counsel for the airport has recommended that the Compact creating the Airport Authority receive the consent of Congress in order to provide some certainty as to the legal status of the airport and to permit the Authority to borrow funds.

The legislation I am introducing today would ratify the Interstate Compact enacted by Maryland and West Virginia in 1976 and reaffirmed in the 1990 Intergovernmental Agreement. It will allow the Potomac Highlands Airport Authority to fully exercise the powers and authority set forth by the Compact and to provide a truly regional approach to the operation, use and future development of the airport. It will help advance the public interest by ensuring the future viability of Greater Cumberland Regional Airport to serve the transportation needs of the tri-state area.

I urge the swift enactment of this legislation and ask unanimous consent that the legislation be printed in the RECORD.

There being no objection, the joint resolution was ordered to be printed in the RECORD, as follows:

S. J. RES. 51

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. CONGRESSIONAL CONSENT.

Congress hereby consents to the Potomac Highlands Airport Authority Compact entered into between the States of Maryland and West Virginia. The compact reads substantially as follows:

"Potomac Highlands Airport Authority Compact

"SECTION 1. COUNTY COMMISSIONS EMPOWERED TO ENTER INTO INTERGOVERNMENTAL AGREEMENTS RELATING TO CUMBERLAND MUNICIPAL AIRPORT.

''The county commissions of Mineral County, West Virginia, and of other West Virginia counties contiguous to Mineral County, and the governing bodies of municipal corporations situated in those counties, may enter into intergovernmental agreements with this State, Allegany County, Maryland, other Maryland counties contiguous to Allegany County and Cumberland, Maryland, and other municipal corporations situated in those Maryland counties, and with the Potomac Highlands Airport Authority regarding the operation and use of the Cumberland Municipal Airport situated in Mineral County, West Virginia. The agreements shall be reciprocal in nature and may include, but are not limited to, conditions governing the operation, use, and maintenance of airport facilities, taxation of aircraft owned by Maryland residents and others, and user fees.

"SEC. 2. POTOMAC HIGHLANDS AIRPORT AUTHORITY AUTHORIZED.

''The county commissions of Mineral County, West Virginia, and of other West Virginia counties contiguous to Mineral County, and the governing bodies of municipal corporations situated in those counties, or any one or more of them, jointly and severally, may create and establish, with proper governmental units of this State, Allegany County, Maryland, other Maryland counties contiguous to Allegany County, and Cumberland, Maryland, and other municipal corporations situated in those Maryland counties, or any one or more of them, a public agency to be known as the 'Potomac Highlands Airport Authority' in the manner and for the purposes set forth in this Compact.

"SEC. 3. AUTHORITY A CORPORATION.

''When created, the Authority and the members of the Authority shall constitute a public corporation and, as such, shall have perpetual succession, may contract and be contracted with, sue and be sued, and have and use a common seal.

"SEC. 4. PURPOSES.

''The Authority may acquire, equip, maintain, and operate an airport or landing field and appurtenant facilities in Mineral County, on the Potomac River near Ridgeley, West Virginia, to serve the area in which it is located.

"SEC. 5. MEMBERS OF AUTHORITY.

''(a) IN GENERAL.—The management and control of the Potomac Highlands Airport Authority, its property, operations, business, and affairs, shall be lodged in a board of seven or more persons who shall be known as members of the Authority and who shall be appointed for terms of three years each by those counties, municipal corporations, or other governmental units situated in West Virginia and Maryland as contribute to the funds of the Authority, in such proportion between those States and counties, municipal corporations, and units, and in whatever manner, as may from time to time be provided in the bylaws adopted by the Authority.

''(b) FIRST BOARD.—The first board shall be appointed as follows:

''(1) The County Commission of Mineral County shall appoint two members for terms of two and three years, respectively.

''(2) The governing official or body of the municipal corporation of Cumberland, Maryland, shall appoint three members for terms of one, two, and three years, respectively.

''(3) The governing official or body of Allegany County, Maryland, shall appoint two members for terms of one and two years, respectively.

"SEC. 6. POWERS.

''The Potomac Highlands Airport Authority has power and authority as follows:

''(1) To make and adopt all necessary bylaws, rules, and regulations for its organization and operations not inconsistent with law.

''(2) To take all legal actions necessary or desirable in relation to the general operation, governance, capital expansion, management, and protection of the Cumberland Municipal Airport.

''(3) To increase the number of members of the Authority, and to set the terms of office and appointment procedures for those additional members.

''(4) To elect its own officers, to appoint committees, and to employ and fix the compensation for personnel necessary for its operation.

''(5) To enter into contracts with any person, firm, or corporation, and generally to do anything necessary for the purpose of acquiring, equipping, expanding, maintaining, and operating an airport.

''(6) To delegate any authority given to it by law to any of its officers, committees, agents, or employees.

''(7) To apply for, receive, and use grants in aid, donations, and contributions from any sources.

''(8) To take or acquire lands by purchase, holding title to it in its own name.

''(9) To purchase, own, hold, sell, and dispose of personal property and to sell and dispose of any real estate which it may have acquired and may determine not to be needed for its purposes.

''(10) To borrow money.

''(11) To extend its funds in the execution of the powers and authority hereby given.

''(12) To take all necessary steps to provide for proper police protection at the airport.

''(13) To inventory airplanes and other personal property at the airport and provide the assessor of Mineral County and other proper governmental officials with full particulars in regard to the inventory.

''SEC. 7. PARTICIPATION BY WEST VIRGINIA.

''(a) APPOINTMENT OF MEMBERS; CONTRIBUTION TO COSTS.—The county commissions of Mineral County and of counties contiguous to Mineral County, and the governing bodies of municipal corporations situated in those counties, or any one or more of them, jointly and severally, may appoint members of the Authority and contribute to the cost of acquiring, equipping, maintaining, and operating the airport and appurtenant facilities.

''(b) TRANSFER OF PROPERTY.—Any of the foregoing county commissions or municipal corporations may transfer and convey to the Authority property of any kind acquired previously by the county commission or municipal corporation for airport purposes.

''SEC. 8. FUNDS AND ACCOUNTS.

''(a) CONTRIBUTION AND DEPOSIT OF FUNDS.—Contributions may be made to the Authority from time to time by the various bodies contributing to its funds and shall be deposited in whatever bank or banks a majority of the members of the Authority direct and may be withdrawn from them in whatever manner the Authority directs.

''(b) ACCOUNTS AND REPORTS.—The Authority shall keep strict account of all of its receipts and expenditures and shall make quarterly reports to the public and private bodies contributing to its funds, containing an itemized account of its operations in the preceding quarter. The accounts of the Authority shall be regularly examined by the State Tax Commissioner in the manner required by Article nine, Chapter six of the Code of West Virginia.

''SEC. 9. PROPERTY AND OBLIGATIONS OF AUTHORITY EXEMPT FROM TAXATION.

''The Authority is exempt from the payment of any taxes or fees to the State of West Virginia or any subdivisions of that State or to any officer or employee of the State or other subdivision of it. The property of the Authority is exempt from all local and municipal taxes. Notes, debentures, and other evidence of indebtedness of the Authority are declared to be issued for a public purpose and to be public instrumentalities, and, together with interest on them, are exempt from taxes.

''SEC. 10. SALE OR LEASE OF PROPERTY.

''In the event all of the public corporations contributing to the funds of the Authority so determine, the Authority shall make sale of all of its properties and assets and distribute the proceeds of the sale among those contributing to its funds. In the alternative, if such of the supporting corporations contributing a majority of the funds of the Authority so determine, the Authority may lease all of its property and equipment upon whatever terms and conditions the Authority may fix and determine.

''SEC. 11. EMPLOYEES TO BE COVERED BY WORKMEN'S COMPENSATION.

''All eligible employees of the Authority are considered to be within the Workmen's Compensation Act of West Virginia, and premiums on their compensation shall be paid by the Authority as required by law.

''SEC. 12. LIBERAL CONSTRUCTION OF COMPACT.

''It is the purpose of this Compact to provide for the maintenance and operation of an airport in a prudent and economical manner, and this Compact shall be liberally construed as giving to the Authority full and complete power reasonably required to give effect to the purposes hereof. The provisions of this Compact are in addition to and not in derogation of any power existing in the county commissions and municipal corporations herein named under any constitutional, statutory, or charter provisions which they or any of them may now have or may hereafter acquire or adopt.''.

SEC. 2. RIGHT TO ALTER, AMEND, OR REPEAL.

The right to alter, amend, or repeal this joint resolution is hereby expressly reserved. The consent granted by this joint resolution shall not be construed as impairing or in any manner affecting any right or jurisdiction of the United States in and over the region which forms the subject of the compact.

ADDITIONAL COSPONSORS

S. 361

At the request of Mr. JEFFORDS, the name of the Senator from New Hampshire (Mr. SMITH) was added as a cosponsor of S. 361, a bill to amend the Endangered Species Act of 1973 to prohibit the sale, import, and export of products labeled as containing endangered species, and for other purposes.

S. 597

At the request of Mr. BINGAMAN, the name of the Senator from Maryland (Ms. MIKULSKI) was added as a cosponsor of S. 597, a bill to amend title XVIII of the Social Security Act to provide for coverage under part B of the medicare program of medical nutrition therapy services furnished by registered dietitians and nutrition professionals.

S. 831

At the request of Mr. SHELBY, the name of the Senator from Minnesota (Mr. GRAMS) was added as a cosponsor of S. 831, a bill to amend chapter 8 of title 5, United States Code, to provide for congressional review of any rule promulgated by the Internal Revenue Service that increases Federal revenue, and for other purposes.

S. 887

At the request of Ms. MOSELEY-BRAUN, the names of the Senator from Vermont (Mr. LEAHY) and the Senator from Ohio (Mr. GLENN) were added as cosponsors of S. 887, a bill to establish in the National Service the National Underground Railroad Network to Freedom program, and for other purposes.

S. 1413

At the request of Mr. LUGAR, the names of the Senator from Montana (Mr. BURNS) and the Senator from Oregon (Mr. SMITH) were added as cosponsors of S. 1413, a bill to provide a framework for consideration by the legislative and executive branches of unilateral economic sanctions.

S. 1423

At the request of Mr. HAGEL, the name of the Senator from Hawaii (Mr. AKAKA) was added as a cosponsor of S. 1423, a bill to modernize and improve the Federal Home Loan Bank System.

S. 1868

At the request of Mr. NICKLES, the name of the Senator from Missouri (Mr. BOND) was added as a cosponsor of S. 1868, a bill to express United States foreign policy with respect to, and to strengthen United States advocacy on behalf of, individuals persecuted for their faith worldwide; to authorize United States actions in response to religious persecution worldwide; to establish an Ambassador at Large on International Religious Freedom within the Department of State, a Commission on International Religious Persecution, and a Special Adviser on International Religious Freedom within the National Security Council; and for other purposes.

S. 1981

At the request of Mr. HUTCHINSON, the name of the Senator from North Carolina (Mr. FAIRCLOTH) was added as a cosponsor of S. 1981, a bill to preserve the balance of rights between employers, employees, and labor organizations which is fundamental to our system of collective bargaining while preserving the rights of workers to organize, or otherwise engage in concerted activities protected under the National Labor Relations Act.

S. 2007

At the request of Mr. COCHRAN, the name of the Senator from Minnesota (Mr. GRAMS) was added as a cosponsor of S. 2007, a bill to amend the false claims provisions of chapter 37 of title 31, United States Code.

S. 2017

At the request of Mr. D'AMATO, the names of the Senator from Connecticut (Mr. LIEBERMAN), the Senator from Nevada (Mr. REID), the Senator from Illinois (Mr. DURBIN), and the Senator from Georgia (Mr. CLELAND) were added as cosponsors of S. 2017, a bill to amend title XIX of the Social Security Act to provide medical assistance for breast and cervical cancer-related treatment services to certain women screened and found to have breast or cervical cancer under a Federally funded screening program.

S. 2022

At the request of Mr. DEWINE, the name of the Senator from Arizona (Mr.