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Calendar No. 273

106TH CONGRESS, *1st Session* | SENATE | REPORT 106–153

AMENDING PROVISIONS OF LAW ENACTED BY THE SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT OF 1996 TO ENSURE FULL ANALYSIS OF POTENTIAL IMPACTS ON SMALL ENTITIES OF RULES PROPOSED BY CERTAIN AGENCIES, AND FOR OTHER PURPOSES

SEPTEMBER 8, 1999.—Ordered to be printed

Mr. BOND, from the Committee on Small Business, submitted the following

REPORT

[To accompany S. 1156]

The Committee on Small Business to which the bill (S. 1156) to amend provisions of law enacted by the Small Business Regulatory Enforcement Fairness Act of 1996 to ensure full analysis of potential impacts on small entities of rules proposed by certain agencies, and for other purposes, was referred, having considered the same, reports favorably on the bill as amended and recommends that the bill do pass. The bill (S. 1156) amends provisions of law enacted by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) to ensure full analysis of potential economic and other impacts on small entities of rules proposed by certain agencies, and for other purposes. An amendment to the bill was offered by Senator Wellstone during the markup of the bill, and was accepted by the committee by unanimous consent.

The Committee reported S. 1156 to improve the opportunities of small businesses to participate in the Federal rulemaking process and to include the Internal Revenue Service (IRS) of the Department of the Treasury in the small entity panel review process established under SBREFA in 1996. This legislation is in response to concerns raised by small businesses since the implementation of the SBREFA panel process.

I. INTRODUCTION

In 1996, Congress passed the Small Business Regulatory Enforcement Fairness Act with the intent of ensuring that small busi-

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nesses would be given an opportunity to participate directly in those rulemakings of certain Federal agencies that often have the most impact on them, namely those from the Occupational Safety and Health Administration (OSHA) and the Environmental Protection Agency (EPA). The signature provision of the Act was the requirement that OSHA and EPA convene panels consisting of personnel from the covered agency, a representative from the Office of Information and Regulatory Affairs within the Office of Management and Budget and the Chief Counsel for Advocacy of the Small Business Administration. In addition, individuals representative of small businesses affected by the regulation are to be selected to review the draft regulation and make recommendations to the panel about the potential impacts of the proposed rule. This was expected to yield better, more tailored rules, with less burden on small businesses.

Since the implementation of SBREFA, there have been a total of 18 rulemakings from OSHA and EPA that have triggered the requirement to convene review Panels. These rulemakings have demonstrated the practicality and merits of bringing small business input into the process at the time it can have the most impact. The Small Business Advocacy Review Panel Technical Amendments Act of 1999 will refine that process so that small businesses will be able to participate to a greater extent and allow them additional time to review data and materials submitted to them by the agency during the process. In addition, the bill will bring the Internal Revenue Service, the agency that has perhaps the most impact on small businesses, into the Panel process by mandating the agency to convene panels for certain proposed rulemakings that will impact small businesses.

Like the Regulatory Flexibility Act, which it amended, SBREFA is a remedial statute, designed to redress the fact that uniform Federal regulations impose disproportionate impacts on small entities, including small business, small not-for-profits, and small governments. It is well settled that small businesses continue to face higher regulatory compliance costs, as a percentage of their gross revenues, than their big-business counterparts. With the vast majority of businesses in this nation being small enterprises, it only makes sense for the rulemaking process to ensure that the concerns of such small entities get a fair airing early in the development of a Federal regulation.

Consistent with the overall purpose of the Regulatory Flexibility Act and SBREFA, the objective of the panel process is to help agencies develop rules that will be effective while imposing the least possible burden on the small businesses affected. To date, the results have been encouraging. Chief Counsel for Advocacy, Jere Glover, has stated that "Small entities have brought extremely valuable information to the regulatory deliberations of the panels. As a result, major changes have been made to the agencies' draft regulations. What is important to note is that these changes were accomplished without sacrificing the agencies' public policy objectives. Unquestionably, the SBREFA panel process has had a very salutary impact on the regulatory deliberations of [OSHA and EPA]." (Annual Report of the Chief Counsel for Advocacy on Implementation of the Regulatory Flexibility Act, Calendar Year 1998, page iv.)

Another provision of SBREFA (§ 603(a)) requires the IRS to generate an Initial Regulatory Flexibility Analysis for interpretative rules to determine the impact of these rules on small businesses. However, the Treasury Department has interpreted this requirement in a way that all but eliminates its application. If the Treasury Department and the IRS had implemented SBREFA as Congress originally intended, the regulatory burdens on small businesses could have been identified and then reduced, and small businesses could have been saved considerable trouble in fighting unwarranted rulemaking actions.

For instance, with input from the small business community early in the process, the IRS' 1997 temporary regulations on the uniform capitalization rules could have taken into consideration the adverse effects that inventory accounting would have on farming businesses, and especially nursery growers. See Temp. Treas. Reg. § 1.263A–4T, 62 Fed. Reg. 44542 (1997). Similarly, if the IRS had conducted an Initial Regulatory Flexibility Analysis, it would have learned of the enormous problems surrounding its limited-partner regulations prior to issuing the proposal in January 1997. See Prop. Treas. Reg. § 1.1402(a)–2, 62 Fed. Reg. 1701 (1997). These proposed regulations, which have become known as the "stealth tax regulations," would raise self-employment taxes on countless small businesses operated as limited partnerships or limited liability companies and also would impose burdensome new recordkeeping and collection of information requirements.

Therefore, to make sure that the IRS properly considers the impact of tax regulations on small businesses, S. 1156 specifically requires the Treasury Department and the IRS to comply with the Regulatory Flexibility Act and SBREFA when promulgating rules. In particular, the Committee expects that the IRS will conduct and publish Initial as well as Final Regulatory Flexibility Analyses. The bill also includes the IRS in the agencies required to convene Small Business Advocacy Review Panels as described under SBREFA. Coverage of the IRS under the panel process and the other technical changes are strongly supported by the Small Business Legislative Council, the National Association for the Self-Employed, the National Federation of Independent Business, the United States Chamber of Commerce, and many other organizations representing small businesses. It is also significant that the changes have the support of the Chief Counsel for Advocacy.

II. DESCRIPTION OF THE BILL

The Small Business Advocacy Review Panel Technical Amendments Act of 1999 clarifies and amends certain provisions of law enacted as part of the Small Business Regulatory Enforcement Fairness Act of 1996.

The bill focuses on Section 244 of the Small Business Regulatory Enforcement Fairness Act of 1996, which amended chapter 6 of title 5, United States Code (commonly known as the Regulatory Flexibility Act). As a result, each "covered agency" (which under current law is only OSHA and EPA) is required to convene a Small Business Advocacy Review Panel (panel) to receive advice and comments from small entities. Specifically, under Section 609(b), each covered agency is to convene a panel of Federal employees, rep-

resenting the Office of Information and Regulatory Affairs within the Office of Management and Budget, the Chief Counsel of Advocacy of the Small Business Administration, and the covered agency promulgating the regulation, to receive input from small entities prior to publishing an Initial Regulatory Flexibility Analysis for a proposed rule with a significant economic impact on a substantial number of small entities. Not later than 60 days after the panel is convened, it produces a report containing comments from the small entities and the panel's own recommendations. The report is provided to the head of the agency, who reviews it and, where appropriate, modifies the proposed rule, initial regulatory analysis, or the decision on whether the rule significantly impacts small entities. The panel report then becomes a part of the rulemaking record.

In 1996, SBREFA expressly included the IRS under the Regulatory Flexibility Act directing the agency to conduct and publish Initial and Final Regulatory Flexibility Analyses. However, the Treasury Department has interpreted the law essentially to exclude the Treasury Department and the IRS from being covered. The Small Business Advocacy Review Panel Technical Amendments Act of 1999 clarifies which interpretative rules involving the Internal Revenue Code are to be subject to compliance with SBREFA, and thus with the Regulatory Flexibility Act. In addition, the IRS would be required, under the bill, to convene a Small Business Advocacy Review Panel for rules that would have a significant economic impact on a substantial number of small entities in the same way as OSHA and EPA have been doing since SBREFA went into effect. The Committee is confident that the IRS will be able to implement the panel process as required under the bill without jeopardizing tax administration just as OSHA and EPA have been able to implement the process without sacrificing their policy objectives.

Specifically, the bill strikes the language in Section 603 of title 5 that included IRS interpretative rules under the Regulatory Flexibility Act, "but only to the extent that such interpretative rules impose on small entities a collection of information requirement." The Treasury Department has misconstrued this language in two ways. First, unless the IRS imposes a requirement on small businesses to complete a new OMB-approved form, the Treasury Department determines that the Regulatory Flexibility Act does not apply. In so doing, the IRS has failed to consider the burdens imposed on small business taxpayers of complying with new IRS regulations. Second, in the limited circumstances where the IRS has acknowledged imposing a new reporting requirement, the Treasury Department has limited its analysis of the impact on small businesses to the burden imposed by any new tax form with which a taxpayer must comply. As a result, the Treasury Department and the IRS have turned Regulatory Flexibility Act compliance into an unnecessary, second Paperwork Reduction Act.

To address this problem, S. 1156 revises the fifth sentence in Section 603 to read as follows:

> In the case of an interpretative rule involving the internal revenue laws of the United States, this chapter applies to interpretative rules (including proposed, temporary and

final regulations) published in the Federal Register for codification in the Code of Federal Regulations.

The remaining provisions of the bill address the mechanics of convening a panel, the selection of the small entity representatives invited to submit advice and recommendations to the panel, and the publication of the panel reports.

This bill would lengthen, by 30 days, the time that small entity representatives, participating in the panel process, have to review the usually technical and voluminous materials to be considered during panel deliberations. The Committee is concerned that this task would be almost impossible for the average small businessperson who spends most of his or her time actually running a business. For those small business owners who would like to participate but do not have a great deal of time to review technical data, the bill requires OSHA, EPA and IRS to prepare detailed summaries of background data and information, if a small entity representative requests that they do so.

The bill would also allow a small entity representative, if he or she chooses, to make an oral presentation to the panel. The Committee is aware that many small entity representatives expressed a desire to make oral presentations, and learned that this opportunity was not available. This bill would make it clear that agencies are to provide this opportunity.

Many small entities have expressed their interest in reviewing the panel report before the rule is proposed. This bill would require the panel report, including any written comments submitted by the small entity representatives, to be printed in the Federal Register with the proposed rule, or as soon as practicable but not later than 180 days after the date the head of the agency receives the report.

The role of the Chief Counsel for Advocacy in the selection of small entities to serve on the panels is enhanced by specifying that the selections are to be made by the agency promulgating the regulation "in consultation" with the Chief Counsel. The original bill language required that the Chief Counsel "concur" with the agency's selections. That language was changed to the "consultation with" language under an amendment submitted by Senator Wellstone. The Committee realizes that it is the agency who convenes these panels and appoints the small entity representatives who will participate. However, it is the Committee's expectation that the Chief Counsel's views on the selection of participants for a panel will be respected. The Committee wishes to emphasize the importance of effective, meaningful consultation between covered agencies and the Chief Counsel on the selection of small entity representatives for a panel. The Committee intends for covered agencies to rely on the Chief Counsel as a resource for identifying small entity representatives to participate in the process and to accommodate suggestions from the Chief Counsel for panel participants, if possible. The Chief Counsel has significant and specific expertise with SBREFA, and therefore, his opinions and suggestions should carry significant weight.

The bill also expands the definition of a small entity to make clear that an organization that "primarily represents the interests of 1 or more small entities" may participate in the Panels. Through another amendment offered by Senator Wellstone, this expansion

was clarified to provide that only those organizations that "primarily" represent small businesses would qualify to participate in the panel process. This amendment addressed a concern that organizations that are dominated by large entities could have been considered small entity representatives under the original bill language. Individuals representing "primarily" small entities are also permitted to participate in the panel process.

The Committee's intention is to ensure that the small entities and businesses that are affected by regulations from OSHA, EPA, and IRS have the opportunity to participate directly in the rulemaking process at the point when their views can have the most effect. In short, the bill is intended to continue and expand on the early success that EPA and OSHA have shown this process has for small businesses.

III. COMMITTEE VOTE

In compliance with rule XXVI(7)(b) of the Standing Rules of the Senate, the following vote was recorded on July 15, 1999.

After a quorum was established pursuant to Committee rules, amendments offered by Senator Wellstone were adopted under unanimous consent, and then a motion by Senator Bond to adopt the Small Business Advocacy Review Panel Technical Amendments Act of 1999, S. 1156, as amended by Senator Wellstone, was approved unanimously with the following senators voting to approve: Bond, Kerry, Burns, Coverdell, Bennett, Snowe, Enzi, Fitzgerald, Crapo, Abraham, Levin, Harkin, Lieberman, Wellstone, Cleland, Landrieu, Edwards.

IV. EVALUATION OF REGULATORY IMPACT

In compliance with rule XXVI(11)(b) of the Standing Rules of the Senate, it is the opinion of the Committee that no significant additional regulatory impact will be incurred in carrying out the provisions of this legislation. There will be no additional impact on the personal privacy of companies or individuals who utilize the services provided.

V. COST ESTIMATE

In compliance with rule XXVI(11)(a)(1) of the Standing Rules of the Senate, the Committee estimates the cost of the legislation will be equal to amounts indicated by the Congressional Budget Office in the following letter.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 26, 1999.

Hon. CHRISTOPHER S. BOND,
Chairman, Committee on Small Business,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 1156, the Small Business Advocacy Review Panel Technical Amendments Act of 1999.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Mark Hadley and Cynthia Dudzinski.

Sincerely,

BARRY B. ANDERSON
(For Dan L. Crippen, Director).

Enclosure.

S. 1156—Small Business Advocacy Review Panel Technical Amendments Act of 1999

CBO estimates that implementing S. 1156 would cost between $13 million and $15 million a year over the 2000–2004 period, assuming appropriation of the necessary amounts. S. 1156 would not affect direct spending or receipts; therefore, pay-as-you-go procedures would not apply. The bill contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

Under the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA) must convene panels, prior to publishing regulations, to analyze the potential impact of those regulations on small businesses. Panels consist of employees of the agency proposing the regulation, the Small Business Administration (SBA), and the Office of Management and Budget (OMB). Panels collect advice from representatives of the small businesses that would be affected and submit a report to the agency proposing the regulation.

S. 1156 would amend SBREFA to include the Internal Revenue Service (IRS), thus requiring that agency to convene panels to analyze the regulations it intends to issue, including interpretive rules involving U.S. internal revenue laws. The bill also would change the panel process by allowing small business representatives to make oral presentations to panels, extending the period of review, requiring agencies to print reports by panels in the Federal Register, and making agencies provide more information.

Based on the number of regulations the IRS expects to issue each year and the experiences of EPA and OSHA, CBO estimates that implementing S. 1156 would cost the IRS about $13 million in 2000, and similar amounts in subsequent years. Annual costs would rise gradually to about $15 million by 2004. We expect that the bill would apply to about 50 IRS regulations each year. In addition, CBO estimates that implementing the changes to the panel review process would cost EPA, OSHA, OMB, and SBA less than $500,000 a year.

On May 28, 1999, CBO transmitted an estimate for H.R. 1882, the Small Business Review Panel Technical Amendments Act of 1999, as ordered reported by the House Committee on Small Business on May 25, 1999. CBO estimated that bill would cost about $2 million each year over the 2000–2004 period. H.R. 1882 would not apply to interpretive rules issued by the IRS; therefore, CBO expects that it would apply to fewer than 10 regulations each year.

The CBO staff contacts are Mark Hadley and Cynthia Dudzinski. This estimate was approved by Robert A. Sunshine, Deputy Assistant Director for Budget Analysis.

VI. SECTION BY SECTION

Section 1. Short title

This Act may be cited as the "Small Business Advocacy Review Panel Technical Amendments Act of 1999."

Section 2. Findings and purposes

This section sets forth Congressional findings on the impact of regulations on small businesses and the early successes of the Small Business Regulatory Enforcement Fairness Act.

Section 3. Ensuring full analysis of potential impacts on small entities of rules proposed by certain agencies

This section clarifies the process for selection of the small entity representatives and the timing of the panel's activities. Small entity representatives affected by the draft proposal are to be identified by the covered agency in consultation with the Chief Counsel for Advocacy. The number of days provided for this process is extended from 15 to 30 days. The panel is to be convened not earlier than 30 days after the covered agency transmits information to the identified small entity representatives. Small entity representatives may request the opportunity to present their comments orally. The panel report is to be printed in the Federal Register within 180 days after the date the agency head receives the report or as part of the publication of the notice of proposed rulemaking, whichever is earlier.

Section 4. Definitions

This section expands the definition of a "covered agency" to include the Internal Revenue Service. Currently, only EPA and OSHA are included. The definition of a "small entity representative" eligible to participate on a Panel is also specified as a small entity, or an individual or organization that "primarily represents the interests of 1 or more small entities."

Section 5. Collection of information requirement

This section deletes language that limited the scope of IRS interpretative rules covered by The Regulatory Flexibility Act. It amends Section 601 to strike the definitions for "collection of information" and "recordkeeping." Also, the section amends the fifth sentence in Section 603(a) to read:

> In the case of an interpretative rule involving the internal revenue laws of the United States, this chapter applies to interpretative rules (including proposed, temporary and final regulations) published in the Federal Register for codification in the Code of Federal Regulations.

Section 6. Effective date

This section provides that the Act will be effective 90 days after the date of enactment.

VII. CHANGES IN EXISTING LAW

In the opinion of the Committee, it is necessary to dispense with the requirement of Section 12 of rule XXVI of the Standing Rules of the Senate in order to expedite the business of the Senate.

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