

The Small Business Amendment in Dodd-Frank

The Small Business Fairness and Regulatory Transparency amendment sponsored by Senators David Pryor (D-Arkansas) and Olympia Snowe (R- Maine) became section 1100 G of the Dodd-Frank law. The Snowe-Pryor amendment to the Dodd-Frank Consumer Financial Protection Act will change in fundamental ways how the new Bureau of Consumer Financial Protection (the Bureau) will issue all of its regulations, including the 18 Enumerated Consumer Financial Laws it took over on July 21st. This provision makes the new Bureau one of only three federal agencies (Occupational Safety and Health Administration (OSHA) and Environmental Protection Agency (EPA)) that must comply with special requirements designed to protect small business.

Background

The Regulatory Flexibility Act of 1980 (RFA) requires most federal agencies to determine whether each regulation they promulgate has a substantial impact on a significant number of small entities (SISNOSE), and to assess and mitigate the disproportionate cost of federal regulation on small business.

In 1996, President Clinton signed into law the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) in response to increasing concerns about poor compliance among federal agencies with the RFA. SBREFA required special procedures to be used for regulations issued by the EPA and OSHA. It also permits the SBA's Office of Advocacy (Advocacy) to file amicus briefs in regulatory appeals brought by small business entities.

SBREFA Now Applies to the Bureau

Section 1100 G imposes two sets of requirements on the Bureau, compelling it:

- to convene a small business review panel (a SBREFA Panel) before promulgating regulations that are expected to have a significant impact on a substantial number of small business entities (the same requirements that apply to EPA and OSHA), and
- to consider the impact its rules will have on the cost of credit for small businesses, and to evaluate specific alternatives to minimize any increases in the cost of credit.

What Is a Small Business?

The SBA publishes a table matching small business size standards with North American Industry Classification System Codes, found at http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_sstd_tablepdf.pdf. The threshold for commercial banking, savings institutions, credit unions, other depository credit intermediation, credit card issuers, and international trade financing is \$175 million in assets; for other financial institutions, the cutoff is \$7 million in receipts. The term "receipts" in this context appears to refer to the gross profit of the enterprise.

SBREFA Panels

Although unfamiliar in banking circles, the SBREFA process begins with a determination of whether a proposed regulation is expected to have a SISNOSE. If the head of the agency certifies that the regulation is not expected to have such an effect, no panel need be convened. When no certification is made (including when the impact is uncertain), the agency must notify Advocacy, which recommends small-entity representatives (SERs) to provide input to a SBREFA panel. The SBREFA panelists include officials from the agency, Advocacy, and the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB).

The panel reviews the proposed rule and agency analyses, considers SERs advice and input, and submits a report to the agency within 60 days. Panel reports often include comments on the agency's analysis of expected impacts on small business and recommendations for alternative measures, such as phased-in deadlines, reduced obligations, or exemptions for small business, where these changes will not materially interfere with the agency's objectives for the proposed rule. The agency need not take the recommendations of the panel, but must offer some explanation of its basis for adopting or rejecting the suggested alternatives. Consensus recommendations of the panel have a very strong chance of adoption by the agency.

SEC. 1100G. SMALL BUSINESS FAIRNESS AND REGULATORY TRANSPARENCY.

(a) **PANEL REQUIREMENT.**—Section 609(d) of title 5, United States Code, is amended by striking “means the” and all that follows and inserting the following: “means—

“(1) the Environmental Protection Agency;

“(2) the Consumer Financial Protection Bureau of the Federal Reserve System; and

“(3) the Occupational Safety and Health Administration of the Department of Labor.”.

(b) **INITIAL REGULATORY FLEXIBILITY ANALYSIS.**—Section 603 of title 5, United States Code, is amended by adding at the end the following:

“(d)(1) For a covered agency, as defined in section 609(d)(2), each initial regulatory flexibility analysis shall include a description of—

“(A) any projected increase in the cost of credit for small entities;

“(B) any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any increase in the cost of credit for small entities; and

“(C) advice and recommendations of representatives of small entities relating to issues described in subparagraphs (A) and (B) and subsection (b).

“(2) A covered agency, as defined in section 609(d)(2), shall, for purposes of complying with paragraph (1)(C)—

“(A) identify representatives of small entities in consultation with the Chief Counsel for Advocacy of the Small Business Administration; and

“(B) collect advice and recommendations from the representatives identified under subparagraph (A) relating to issues described in subparagraphs (A) and (B) of paragraph (1) and subsection (b).”.

(c) **FINAL REGULATORY FLEXIBILITY ANALYSIS.**—Section 604(a) of title 5, United States Code, is amended—

(1) in paragraph (4), by striking “and” at the end;

(2) in paragraph (5), by striking the period at the end and inserting “; and”; and

(3) by adding at the end the following:

“(6) for a covered agency, as defined in section 609(d)(2),
a description of the steps the agency has taken