

Congress of the United States
U.S. House of Representatives
Committee on Small Business
2361 Rayburn House Office Building
Washington, DC 20515-6315

To: Members, House Committee on Small Business
From: Committee Staff
Date: June 25, 2012
Re: Hearing: "Regulatory Flexibility Act Compliance: Is EPA Failing Small Businesses?"

I. Introduction

On Wednesday, June 27, 2012, at 1:00 pm in Room 2360 of the Rayburn House Office Building, the Committee on Small Business will meet for the purpose of receiving testimony on whether the Environmental Protection Agency (EPA) is complying with the Regulatory Flexibility Act (RFA).¹ The RFA requires federal agencies to assess the economic impact of their regulations on small businesses, small non-profits, and small governmental jurisdictions (collectively referred to in the RFA as "small entities") and if the impact is significant, consider alternatives that are less burdensome. In addition, the EPA is one of three federal agencies required to conduct Small Business Advocacy Review (SBAR) panels for all rules that are expected to have a significant economic impact on a substantial number of small entities.

II. Impact of Regulations on Small Businesses

By virtue of their size and resources, small businesses are disproportionately burdened by the cost of regulations in comparison to their larger counterparts. Regulations with fixed compliance costs, such as environmental regulations that require a specific pollution control device, may have a particularly disproportionate impact on small business; large firms with more employees can spread regulatory compliance costs over a greater number of employees, thereby gaining a cost advantage in comparison to smaller firms.

Given the longstanding concerns about the impact of regulations on small entities (particularly small businesses), Congress had to take action. This concern about regulatory impact was buttressed by small business underrepresentation in federal rulemaking proceedings.

¹ 5 U.S.C. §§ 601-12.

III. Regulatory Flexibility Act

The RFA applies to every federal rule, both proposed and final, for which an agency must conduct notice and comment rulemaking as required by section 553 of the Administrative Procedure Act (APA) or any other law. The basic premise of the RFA is that a one-size-fits-all regulation may impose disproportionate cost burdens on small entities. Under the RFA, each agency must review its regulations to ensure that, while accomplishing its statutory mandate, the ability of small entities to invent, produce and compete is not inhibited. The RFA forces agencies to identify and account for the potentially excessive cost consequences and disproportionate impact on small entities of federal rulemaking. The RFA is not a cost-benefit statute; rather it is a cost-effective statute forcing agencies to examine whether there is a way to achieve a regulatory objective by imposing lower costs on small businesses.

A. RFA Analytical Requirements

Under the RFA, an agency has an obligation to complete a threshold analysis of the economic impact of a proposed or final rule. This preliminary assessment is used by the agency to determine whether to prepare a regulatory flexibility analysis or certify the rule. If the agency determines, after completion of its threshold analysis, that “the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities,” then the agency head (or the person the agency head delegates) is entitled to certify to such a conclusion (the agency must provide the factual and legal basis for the RFA certification) and need not prepare a regulatory flexibility analysis.²

An agency that determines a proposed or final rule will have a significant economic impact on a substantial number of small entities is required to prepare a regulatory flexibility analysis.³ Each regulatory flexibility analysis must contain the following: 1) a description of the reasons why action by the agency is being considered (for a proposed rule) or taken (for a final rule); 2) a succinct statement of the objectives of, and legal basis for, the rule; 3) a description of, and when feasible, an estimate of, the number of small entities to which the rule will apply; 4) a description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the recordkeeping or reporting requirement; 5) an identification, to the extent practicable, of all relevant federal rules which may duplicate, overlap, or conflict with the rule; and 6) alternatives to the rule that might reduce the economic impact on small entities. The final regulatory flexibility analysis also must describe the steps an agency has taken to minimize the significant economic impact on small entities and why each alternative that would lessen economic impact was rejected.⁴

² *Id.* at § 605(b).

³ The RFA is economically neutral. An agency must prepare a regulatory flexibility analysis whether the rule will have a beneficial or negative effect. However, the agency is only required in a final regulatory flexibility analysis (FRFA) to explain what steps it has taken to minimize the impact on small entities, i.e., only address negative impacts.

⁴ A certification at the proposed rule stage does not mean that the agency is entitled to certify at the final rule stage. Data obtained during the notice and comment process may force an agency to rethink its decision to certify. If sufficient information is submitted to the agency that demonstrates a significant economic impact on a substantial number of small entities, then the agency is required to prepare a FRFA.

The critical element of an initial regulatory flexibility analysis (IRFA) or FRFA is the consideration of alternatives. Alternatives contemplated by the authors of the RFA may include separate reporting requirements or compliance standards to take account of the limited resources of small entities. The agency may ultimately develop a tiered regulation with different requirements for entities of different sizes or a decision not to regulate small entities because they only contribute to a small portion of a problem that the agency is trying to ameliorate.

Consideration of these alternatives does not require the adoption of any particular regulatory alternative. An agency may adopt a regulatory strategy that imposes substantial burdens on small entities as long as the agency has complied with the analytical requirements of the RFA.⁵

B. Small Business Administration Office of the Chief Counsel for Advocacy⁶

Congress gave the Chief Counsel for Advocacy of the Small Business Administration (SBA Advocacy) the responsibility of monitoring agency compliance with the RFA. On an annual basis, the Chief Counsel for Advocacy is required to report to the President and the Committees on Small Business and the Judiciary of the United States Senate and House of Representatives on agency compliance with the RFA. In addition, the Chief Counsel for Advocacy is authorized to appear as amicus curiae in any action in a court of the United States to review a rule.⁷ In addition, SBA Advocacy helps federal agencies to comply with the RFA by providing compliance training to agency personnel, issuing comment letters on proposed regulations, and participating in SBAR panels.

C. SBAR Panel Process

Congress has mandated that the EPA, the Occupational Safety and Health Administration (OSHA) and the Consumer Financial Protection Bureau (CFPB) must comply with special requirements with respect to affirmative outreach to small entities.⁸ When any of these agencies are ready to issue a proposed rule for which they would have to prepare an IRFA, they are

⁵ Compare *Stryckers Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 227-28 (1980) (holding NEPA only a procedural statute not mandating a specific outcome) with *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 625 (5th Cir. 2000) (RFA only a procedural statute), citing *Associated Fisheries of Maine v. Daley*, 127 F.3d 104, 114 (1st Cir. 1997).

⁶ The position of Chief Counsel for Advocacy was created in 1974 by Public Law 93-386 signed by President Gerald Ford, but the law did not provide specific administrative or staffing powers. BACKGROUND PAPER ON THE OFFICE OF ADVOCACY, 2001-2008 5 (2008), available at <http://archive.sba.gov/advo/backgr08.pdf> (hereinafter "Background Paper on SBA Advocacy"). Recognizing the role of the Chief Counsel for Advocacy needed to be detailed and strengthened, Congress enacted and President Ford signed Public Law 94-305, which established the Office of Advocacy within the SBA and vested management of the Office in the Chief Counsel for Advocacy, who was to be appointed by the President with the advice and consent of the Senate. Background Paper on SBA Advocacy at 6; see 15 U.S.C. § 634a. Among the Office of Advocacy's duties is to "represent the views and interests of small businesses before . . . Federal agencies whose policies and activities may affect small business." 15 U.S.C. § 634c(4).

⁷ 5 U.S.C. § 612.

⁸ *Id.* at § 609(b)-(d).

required to follow a formal procedure (colloquially abbreviated to a SBAR panel).⁹ A SBAR panel must be convened before a regulation is published in the Federal Register that is expected to have a significant economic impact on a substantial number of small entities.

The panel process requires the establishment of a SBAR panel consisting of a member of SBA Advocacy, a member of the Office of Management and Budget's Office of Information and Regulatory Affairs, and a member of the agency writing the rule. The agency, in consultation with SBA Advocacy, identifies small entities from the affected industries to serve as small entity representatives (SERs). The agency is required to provide the SERs with any draft of the proposed rule and a description of any significant alternatives to the proposed rule, as well as any materials the agency has prepared to determine the impact of the proposed rule on the small entities as required by the RFA.¹⁰

The SERs then provide their assessment of the proposed rule, and its potential impacts on small businesses, to the panel. Within 60 days after the panel is convened by the agency, the SBAR Panel must report on the comments from the SERs on the proposed rule. The panel drafts a report for submission to the covered agency, which has the opportunity to respond prior to publication of the proposed rule. The report and the agency response must be placed in the public rulemaking record and summarized in the notice of proposed rulemaking.

IV. Regulatory Concerns Remain

Despite the enactment of the RFA, the cumulative burden of regulations and uncertainty about the future costs of new regulations are top concerns of small businesses. A United States Chamber of Commerce poll conducted by Harris Interactive in March 2012 found that concerns about over-regulation were at the highest levels seen in the last year. Fifty-two percent of the small business executives who were polled cited regulations as the top threat to their business, which was an increase of 9 percent from June 2011.¹¹ According to a Gallup poll released on October 24, 2011, small business owners are most likely to say complying with government regulations (22 percent) is the most important problem facing them today.¹²

These concerns are bolstered by the fall 2011 Regulatory Plan and the Unified Agenda of Federal Regulatory and Deregulatory Actions. The Unified Agenda lists federal regulatory actions at various stages of implementation; 60 federal departments, agencies, and commissions reported having 4,128 regulations at various stages of implementation.¹³ Of those regulations,

⁹ Some people call them SBREFA panels after the Small Business Regulatory Enforcement Fairness Act, which created the requirement for EPA and OSHA. Pub. L. No. 104-121, Title II, § 244, 110 Stat. 857, 867 (1996). The CFPB was added to the list of agencies in the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1100G, 124 Stat. 1376, 2112 (2010).

¹⁰ Section 1100G of the Dodd-Frank Act added another requirement specific to CFPB. The CFPB also must assess and describe the impact on credit availability for small entities and any significant alternatives that would minimize any increase in the cost of credit for small entities. 5 U.S.C. § 603(d)(1).

¹¹ http://www.uschamber.com/sites/default/files/reports/ChamberEconomySurvey_March2012Final.pdf.

¹² <http://www.gallup.com/poll/150287/gov-regulations-top-small-business-owners-problem-list.aspx>.

¹³ CLYDE WAYNE CREWS, JR., COMPETITIVE ENTERPRISE INSTITUTE, TEN THOUSAND COMMANDMENTS 2012: AN ANNUAL SNAPSHOT OF THE FEDERAL REGULATORY STATE 3 (2012), available at http://cei.org/sites/default/files/Wayne%20Crews%20-%2010,000%20Commandments%202012_0.pdf (hereinafter "Ten Thousand Commandments 2012").

federal agencies identified 822 rules expected to affect small businesses with 418 rules requiring regulatory flexibility analyses.¹⁴ Thus far in calendar year 2012, the federal government has imposed \$55.7 billion in regulatory compliance costs and more than 108.3 million annual paperwork burden hours.¹⁵

V. Environmental Protection Agency Regulations

The EPA is charged with protecting human health and the environment in the United States and promulgates regulations to implement various environmental laws. From 1996-2010, the EPA has annually identified, on average, 136 rules in development affecting small business.¹⁶

Small businesses and the SBA Office of Advocacy have expressed concerns with EPA's compliance with the RFA analytical requirements and its SBAR panel process.¹⁷ These concerns include, but are not limited to: improper certification; insufficient analysis of potential impacts; incorrect analysis of the number and type of affected entities; and inadequate preparation for SBAR panels. While concerned with all EPA rules that have small business impacts, the Committee's hearing will focus on two sets of rules that illustrate specific RFA compliance issues.

A. Boiler MACT Rules

In 1970, Congress enacted the Clean Air Act (CAA) "to protect and enhance the quality of the Nation's air resources."¹⁸ EPA is required to list categories and subcategories of major sources and area sources of hazardous air pollutants (HAPs)¹⁹ and to establish emission standards for those categories and subcategories under Section 112 of the CAA.²⁰ On March 21, 2011, EPA finalized four interrelated rules to reduce emissions of HAPs from industrial, commercial and institutional boilers and solid waste incinerators by imposing new emissions standards and work practice requirements.²¹ Concurrent with publication of the final rules, EPA announced its

¹⁴ *Id.* at 28.

¹⁵ <http://americanactionforum.org/rodeo-database>.

¹⁶ Ten Thousand Commandments 2012, *supra* note 13, at 57. The average was calculated by using the data from the table in Part G.

¹⁷ To assist its staff, the EPA has produced a comprehensive document to provide them guidance on how to comply with the RFA requirements and conduct a SBAR panel. ENVIRONMENTAL PROTECTION AGENCY, EPA'S ACTION DEVELOPMENT PROCESS, FINAL GUIDANCE FOR EPA RULEWRITERS: REGULATORY FLEXIBILITY ACT AS AMENDED BY THE SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT (2006), *available at* <http://www.epa.gov/rfa/documents/Guidance-RegFlexAct.pdf>.

¹⁸ 42 U.S.C. § 7401(b)(1). The CAA underwent major revisions in 1977 and 1990.

¹⁹ "Major source" is defined as "any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants." *Id.* at § 7412(a)(1). "Area source" is defined as "any stationary source of hazardous air pollutants that is not a major source." *Id.* at § 7412(a)(2).

²⁰ Section 112 does not specify emission levels for pollutants identified by EPA. Rather it requires EPA to develop standards based on maximum achievable control technologies or MACTs.

²¹ National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters, 76 Fed. Reg. 15,608 (Mar. 21, 2011) (to be codified at 40 C.F.R. pt. 63) (Boiler Rule); National Emission Standards for Hazardous Air Pollutants for Area Sources: Industrial, Commercial, and Institutional Boilers, 76 Fed. Reg. 15,554 (Mar. 21, 2011) (to be codified at 40 C.F.R. pt. 63) (Area Source

intention to reconsider parts of the rules.²² These four interrelated rules are referred to collectively as Boiler MACT. According to the EPA, the standards will cover 200,000 boilers and incinerators nationwide.²³

Coal, natural gas, biomass (e.g., wood) or other fuels are burned in boilers to produce steam. The steam is then used to generate electricity or provide heat that is used to conduct industrial processes. Raw or intermediate materials are heated by process heaters during an industrial process. Waste is burned at commercial or industrial facilities to dispose of it. Similar units may be considered boilers or incinerators depending on whether or not they burn solid waste materials. Thus, the rules promulgated to set emission standards for boilers and incinerators are interrelated.²⁴ The rules are complicated and costly (cost estimates for the major source rule range from \$9.5 billion in up front capital costs to \$20 billion).²⁵ It is not surprising, given the potential impact, that the affected small entities such as lumber mills, municipal waste incinerators, schools, churches, and lodging businesses, filed numerous comments on the Boiler MACT rules.²⁶

The SBA Office of Advocacy and small businesses raised concerns about the impact of the rules on small entities while they were under development.²⁷ As a result, EPA determined that the rules would have a significant economic impact on a substantial number of small entities. Accordingly, it conducted a SBAR panel for the Boiler and Area Source rules. EPA did make some changes to the final rules but EPA did not adopt a health-based emission standard as suggested by the SERs.

As part of the suite of Boiler MACT rules, EPA also promulgated the Non-Hazardous Secondary Materials That Are Solid Waste (NHSM) and Commercial and Industrial Solid Waste

Rule); Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Commercial and Industrial Solid Waste Incineration Units, 76 Fed. Reg. 15,704 (Mar. 21, 2011) (CISWI Rule) (to be codified at 40 C.F.R. pt. 60); Identification of Non-Hazardous Secondary Materials That Are Solid Waste, 76 Fed. Reg. 15,456 (Mar. 21, 2011) (to be codified at 40 C.F.R. pt. 241).

²² National Emission Standards for Hazardous Air Pollutants; Notice of Reconsideration, 76 Fed. Reg. 15,266 (Mar. 21, 2011). The EPA published the proposed changes to the Boiler MACT and interrelated rules in the Federal Register on December 23, 2011. National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters, 76 Fed. Reg. 80,598 (Dec. 23, 2011) (to be codified at 40 C.F.R. pt. 63) (Boiler Rule); National Emission Standards for Hazardous Air Pollutants for Area Sources: Industrial, Commercial, and Institutional Boilers, 76 Fed. Reg. 80,532 (Dec. 23, 2011) (to be codified at 40 C.F.R. pt. 63) (Area Source Rule); Commercial and Industrial Solid Waste Incineration Units: Reconsideration and Proposed Amendments; Non-Hazardous Secondary Materials That Are Solid Waste, 76 Fed. Reg. 80,452 (Dec. 23, 2011) (to be codified at 40 C.F.R. pt. 241) (CISWI and NHSM Rules). EPA has not issued the final rules.

²³ <http://www.epa.gov/airquality/combustion/>.

²⁴ <http://www.epa.gov/airquality/combustion/>.

²⁵ Comments of the Council of Industrial Boiler Owners on EPA Proposed Rule National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters (Aug. 20, 2010), available at http://www.cibo.org/pubs/boilermaect_epacomment3.pdf.

²⁶ SMALL BUSINESS ADVOCACY REVIEW PANEL, FINAL REPORT ON EPA'S PLANNED PROPOSED RULE: COMBINED RULEMAKING FOR INDUSTRIAL, COMMERCIAL, AND INSTITUTIONAL BOILERS AND PROCESS HEATERS AT MAJOR SOURCES OF HAP AND INDUSTRIAL BOILERS AND COMMERCIAL AND INSTITUTIONAL BOILERS AT AREA SOURCES 20 (2009), available at <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2002-0058-0797>.

²⁷ REPORT ON THE REGULATORY FLEXIBILITY ACT FY 2011: ANNUAL REPORT OF THE CHIEF COUNSEL FOR ADVOCACY 28-29 (2012), available at http://www.sba.gov/sites/default/files/11regflx_0.pdf (hereinafter "Report on the RFA FY 2011").

Incineration Units (CISWI) rules. The NHSM rule was promulgated under the Resource Conservation and Recovery Act (RCRA)²⁸ to determine which non-hazardous secondary materials are solid wastes when burned in combustion units. Classification of particular materials as solid wastes is important because the classification determines whether the CAA section 112 emissions standards for commercial, industrial, and institutional boilers, or the more stringent CAA section 129 emission standards for solid waste incineration units, applies.²⁹ Pursuant to section 129 of the CAA, the CISWI rule was promulgated to revise emission standards for units that burn solid waste at commercial and industrial facilities.³⁰ Thus, fuels and other materials previously considered not to be solid waste but classified as solid waste under the NHSM rule would be subject to the new CISWI rule and its more stringent emission standards.³¹

The EPA certified that both the NHSM and the CISWI rules will not have a significant economic impact on a substantial number of small entities. Consequently, the EPA did not conduct SBAR panels for either rule. In certifying the NHSM rule, the EPA stated that the rule “[did] not directly invoke any costs”³² and “[n]o small entities are directly regulated by this proposal.”³³

However, the EPA failed to consider the regulatory consequences and economic impact that flowed from its revision of the NHSM solid waste definition. Small entities believed that they would be significantly adversely affected because the revised definition would require them to replace the NHSMs they combust with more costly fuels (e.g., replacing biomass fuels with fossil fuels), increase their costs by requiring them to incinerate NHSMs (e.g., used oil) in CISWI units instead of boilers or industrial furnaces, and disrupt economic activity and nationwide efforts to recycle secondary materials for energy recovery.³⁴ SBA Advocacy believes that EPA inappropriately certified the rules because it failed to prepare a sufficient analysis of the potential economic impacts of the NHSM rule and failed to properly evaluate

²⁸ 42 U.S.C. § 6901-91.

²⁹ Identification of Non-Hazardous Secondary Materials That Are Solid Waste, 75 Fed. Reg. 31,844 (June 4, 2010) (hereinafter “NHSM Proposed Rule”). Section 129 requires EPA to set new source performance standards for new solid waste combustion units and emissions guidelines (which are implemented by the States through state plans that are federally enforceable) for existing units. <http://www.epa.gov/ttn/atw/129/gil2.pdf>. Under Section 112 of the CAA, EPA has the option to set different emissions standards for major versus area sources; in contrast, under Section 129, all combustion units are treated the same, regardless of size.

³⁰ <http://www.epa.gov/air/oaqps/combustion/docs/20110221ciswifs.pdf>.

³¹ Letter from Susan M. Walthall, Acting SBA Chief Counsel for Advocacy and Keith W. Holman, Assistant Chief Counsel, to Lisa P. Jackson, Administrator, EPA 1, 4 (July 30, 2010), available at http://www.sba.gov/sites/default/files/Letter%20dated%202007-30-10%20-%20Environmental%20Protection%20Agency_0.pdf.

³² NHSM Proposed Rule, 75 Fed. Reg. at 31,889.

³³ *Id.* at 31,890.

³⁴ Letter from Susan M. Walthall, Acting SBA Chief Counsel for Advocacy, and Keith W. Holman, Assistant Chief Counsel, to Lisa P. Jackson, Administrator, EPA at 2, 6. SBA Advocacy also has submitted comments on the EPA’s proposed revisions to the NHSM final rule promulgated on March 21, 2011 and suggests that EPA promulgate a non-waste designation for NHSM that is recycled by combusting it for energy recovery including: coal refuse in legacy piles; off-speculation used oil; scrap tires in stockpiles; treated wood; animal manure; pulp and paper sludge; and pulp and paper processing residuals. Letter from Winslow Sargeant, SBA Chief Counsel for Advocacy, and Kevin Bromberg, Assistant Chief Counsel, to Lisa P. Jackson, Administrator, EPA 12-13 (Feb. 21, 2012), available at <http://www.sba.gov/sites/default/files/files/NHSM%20Comments%20%20for%20submission%281%29.pdf>.

whether the CISWI rule will have a significant economic impact on a substantial number of small entities.³⁵

B. Lead Renovation, Repair and Painting Rule

Section 402(c)(3) of the Toxic Substances Control Act requires the EPA to address “renovation or remodeling activities in target housing, public buildings constructed before 1978, and commercial buildings that create lead-based paint hazards.”³⁶ “Target housing” is defined as “any housing constructed prior to 1978,” subject to a few exceptions.³⁷

On April 22, 2008, the EPA published a final rule that requires remodeling and renovation firms that carry out work on pre-1978 housing and child-occupied facilities to be certified by the EPA and follow certain work practice standards when undertaking renovation, repair and painting activities in homes and facilities that may have lead-based paint (colloquially known as the Residential Lead Renovation, Repair and Painting rule (Residential LRRP rule)). In preparing the proposed rule, the EPA convened a SBAR panel and estimated that 189,000 small entities³⁸ including contractors, builders, remodelers, building owners and others would be affected by the rule.

After the final rule was published, it was challenged by several groups in the United States Court of Appeals for the District of Columbia Circuit. The EPA signed a settlement agreement with the Sierra Club and several other petitioners on April 24, 2009.³⁹ Under the terms of the settlement, EPA agreed to propose changes to the Residential LRRP rule⁴⁰ and agreed to initiate rulemakings to address renovations in public and commercial buildings that create lead-based paint hazards. On May 6, 2010, EPA issued a revised final rule on the Residential LRRP rule which eliminated the Opt-Out Provision.⁴¹

The agency also published an advance notice of proposed rulemaking (ANPR) to notify the public that it intended to consider regulations for the renovation, repair and painting of public and commercial buildings (Public and Commercial LRRP rule).⁴² EPA also announced that it

³⁵ Report on the RFA FY 2011, *supra* note 27, at 29.

³⁶ 15 U.S.C. § 2682(c)(3).

³⁷ *Id.* at § 2681(17).

³⁸ Lead: Renovation, Repair, and Painting Program, 73 Fed. Reg. 21,692, 21,753 (Apr. 22, 2008).

³⁹ http://www.nchh.org/Portals/0/Contents/RRP_Settlement_Agreement_Signed_8-24-09.pdf.

⁴⁰ EPA agreed to make several changes to the Residential LRRP rule, including removal of the Opt-Out Provision that allowed homeowners without children under the age of six or pregnant women living in the residence to choose not to require the contractors to follow the training and work practice requirements. The National Association of Home Builders, the Hearth, Patio & Barbecue Association, and the National Lumber and Building Material Dealers Association filed a petition on July 8, 2010 with the United States Court of Appeals for the District of Columbia Circuit to challenge the elimination of the Opt-Out Provision. The petitioners claimed that EPA acted arbitrarily and capriciously in amending the rule and violated the RFA by failing to convene a SBAR Panel before finalizing the revised Residential LRRP rule that eliminated the Opt-Out Provision. Brief of Petitioners at 1-2, *Nat'l Ass'n of Home Builders v. EPA*, No. 10-1183 (D.C. Cir. Mar. 30, 2011). The court denied the petition for review and rejected the claims of the petitioners. *Nat'l Ass'n of Home Builders v. EPA*, No. 10-1183 (D.C. Cir. June 22, 2012).

⁴¹ Lead; Amendment to the Opt-Out and Recordkeeping Provisions in the Renovation, Repair, and Painting Program, 75 Fed. Reg. 24,802 (May 6, 2010).

⁴² Lead; Renovation, Repair, and Painting Program for Public and Commercial Buildings, 75 Fed. Reg. 24,848 (May 6, 2010).

would be convening a SBAR panel to get small entity input on the Public and Commercial LRRP rule. Since there are many public buildings owned by non-profits and governmental jurisdictions, it is logical to presume that a not insignificant number of buildings subject to the Public and Commercial LRRP rule may be owned by small non-profits and small governmental jurisdictions. Therefore, any SBAR panel convened by EPA needs to include these small entities, as well as, small businesses that are likely to be affected by the Public and Commercial LRRP rule.

Small businesses and EPA's Scientific Advisory Board (SAB)⁴³ Lead Review Panel have expressed concerns with the path on which EPA is proceeding to promulgate the Public and Commercial LRRP rule. Over 40 written comments were received in response to the ANPR from renovation firms, window installers, property management firms, and trade associations representing the affected industries. Small businesses raised a number of concerns regarding: the lack of data on the presence of lead-based paint hazards in commercial and public buildings; the availability and costs of certification and training classes; and compliance costs. Some of the small business community's concerns with the Public and Commercial LRRP rule stem from EPA's promulgation and implementation of the Residential LRRP rule.⁴⁴

In August 2010, EPA's SAB Lead Review Panel wrote a letter to EPA Administrator Lisa Jackson stating that "[t]he lack of data . . . highlights the need for research and data collection efforts" to support the approach the agency intended to pursue for developing lead dust hazard standards for public and commercial buildings.⁴⁵ A pre-SBAR panel meeting was held on

⁴³ The EPA Scientific Advisory Board was established by Congress in 1978 and provides the agency with advice on technical matters, including the quality of the scientific and/or technical data being proposed or used by the agency as the foundation for regulations. Subcommittees or panels that are focused on specific environmental issues do most of the preliminary work for the SAB. <http://yosemite.epa.gov/sab/sabpeople.nsf/WebCommittees/BOARD>.

⁴⁴ The affected industry believes that EPA significantly underestimated the compliance costs of the Residential LRRP rule due to flaws in its economic analysis. In addition, EPA has failed to meet the Residential LRRP rule's requirement that EPA approve an accurate lead test kit that yields no more than 10 percent false positives. Letter from the Coalition for Reform of EPA Lead: Renovation, Repair and Painting Rule to Representatives Fred Upton, Henry Waxman, John Shimkus and Gene Green (Mar. 20, 2012) (on file with author). Legislation has been introduced in the House (H.R. 5911) and Senate (S. 2148) to reform the Residential LRRP rule and address concerns with the lack of data for the Public and Commercial LRRP rule.

⁴⁵ Letter from Timothy Buckley, Chair, EPA SAB Review Panel, to Lisa Jackson, Administrator, EPA (Aug. 20, 2010), *available at* [http://yosemite.epa.gov/sab/sabproduct.nsf/F8DA254881FEC6898525778F004C789A/\\$File/EPA-SAB-10-011-unsigned.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/F8DA254881FEC6898525778F004C789A/$File/EPA-SAB-10-011-unsigned.pdf).

The SAB Review Draft dated December 6-7, 2010 states:

- Extensive literature revealed relatively little information concerning typical levels of floor and window sill dust lead in public and commercial buildings. Most studies identified by EPA evaluated dust loading or concentration in "public areas" of residential buildings, in highly contaminated urban environments, or in buildings known or suspected of being lead-contaminated (e.g., firing ranges). Because of the lack of data specific to public and commercial buildings, floor and window sill dust-lead loading estimates for such buildings were set to the average values reported in a national survey of childcare centers (Westat 2003).

Environmental Protection Agency, Office of Pollution Prevention and Toxics, Approach for Developing Lead Dust Hazard Standards for Public and Commercial Buildings 36 (2010), *available at*

February 15, 2011 with potential SERs including: building construction contractors; specialty trade contractors; public and commercial buildings owners, tenants, and managers; and facilities support services.⁴⁶ The renegotiated deadline from the settlement agreement for EPA to publish a proposed rule was June 15, 2012; however, EPA has yet to convene the SBAR panel or issue the proposed rule.⁴⁷ Small entities are concerned that EPA will proceed with the rulemaking without scientific evidence of lead exposure risks to children and pregnant women from commercial and public building renovation and remodeling activities and without meeting their obligations under the RFA.

VI. Conclusion

EPA is required to comply with the Regulatory Flexibility Act and assess the impact of proposed rules on small entities. Small businesses and SBA Advocacy have expressed concerns with EPA's compliance with the RFA analytical requirements and its conduct of the SBAR panel process. When the EPA fails to perform robust regulatory flexibility analysis, does not identify the correct number or type of small entities that will be affected by a rule, or fails to provide SERs with sufficient information on which to provide comment, the EPA fails to meet its RFA legal obligations. Unfortunately, this gives the small business community the impression that the RFA analytical process and the SBAR panel process are box-checking exercises for EPA instead of collaborative processes that give small businesses a voice in the regulatory process and improve the quality of rules that EPA is promulgating.

[http://yosemite.epa.gov/sab/sabproduct.nsf/0/9C733206A5D6425785257695004F0CB1/\\$File/Pub&CommBldgPbDust.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/0/9C733206A5D6425785257695004F0CB1/$File/Pub&CommBldgPbDust.pdf).

⁴⁶ United States Environmental Protection Agency, Office of Pollution Prevention and Toxics, Renovation, Repair and Painting Program for the Exterior of Public and Commercial Buildings PowerPoint 17 (Feb. 15, 2011).

⁴⁷ <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201110&RIN=2070-AJ56>;
<http://yosemite.epa.gov/oepi/rulegate.nsf/byRIN/2070-AJ56>.