

GAMING THE RULES

How Big Business Hijacks the Small Business Review Process to Weaken Public Protections



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 Center for
**EFFECTIVE
GOVERNMENT**

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TABLE OF CONTENTS

Forward	1
Executive Summary	3
Introduction	9
Methodology	14
Findings	17
A. Agencies Engaged in Extensive Outreach Prior to the Panel Process	17
B. Trade Associations Were Heavily Involved in Identifying Small Business Representatives	18
C. Failure to Verify Small Entity Representatives' Eligibility Undermines the Purpose of Review Panels	21
D. Trade Associations Were Major Participants in the Panel Process	23
i. Trade Associations Advised Small Business Review Panels	23
ii. Professional Small Entity Representatives	25
iii. Small Entity Representative "Helpers" and Non-Small Entity Representative Participants	26
iv. Office of Advocacy Encouraged Trade Association Participation	29
E. Office of Advocacy Met with Trade Associations and Small Entity Representatives Prior to Panel Convenings and Developed Content for their Comments	31
F. The Public Was Left in the Dark	36
i. EPA and CFPB Withheld Lists of Small Entity Representative Advisors Until a Proposed Rule Was Published	36
ii. The Public Had Limited Access to Panel Documents	37
iii. Panel Reports on Small Business Concerns May Be Withheld Indefinitely	38
G. The Impact of the Panel Process on Proposed and Final Rules	39
i. Small Entity Advisor Comments Were Not Limited to Small Business Impacts	40
ii. Agencies Changed Rules Based on Recommendations That Were Not Small Business-Specific	45
Recommendations: Reclaiming the Voice of Small Business	47
Appendix A: Background	49
Appendix B: EPA'S Small Business Review Panel Policies and Procedures	55
Appendix C: OSHA'S Small Business Review Panel Policies and Procedures	62
Appendix D: CFPB'S Small Business Review Panel Policies and Procedures	69



FORWARD

Small businesses are the lifeblood of the American free enterprise system.

Entrepreneurship is the pathway that many choose, leading to 66 percent of new jobs being created by small businesses. That's why the federal government and so many others believe it is important for them to succeed.

We agree. We appreciate the loans, technical assistance, and help navigating new rules and standards that are key components of the Small Business Administration's mission.

But this study by the Center for Effective Government raises important concerns about the role the Small Business Administration's Office of Advocacy is playing in the federal rulemaking process. The report confirms my organization's belief that the Office of Advocacy has seriously strayed from its mission of representing the interests of small businesses before federal agencies.

Recently, the Office of Advocacy asked the U.S. Environmental Protection Agency to withdraw a rule (Waters of the U.S.) that will help EPA and the Army Corps of Engineers better protect our nation's waterways from pollution. My organization, the American Sustainable Business Council, commissioned an independent poll of over 550 small businesses with fewer than 100 employees and found that 80 percent of them supported the rule. Moreover, 62 percent agree that government regulation is needed to prevent water pollution, and 61 percent believe that government safeguards for water are good for businesses and local communities. I would note that 43 percent of the small business owners in our sample were Republicans, 28 percent were Democrats, and 19 percent were Independents – which is representative of small businesses nationally.

The same was true of the recommendations that the Office of Advocacy has been making on chemicals issues. Counter to Advocacy's perspective, polling found that three-quarters of small businesses support stricter regulation of chemicals used in everyday products.

Our organization's experience echoes a key finding of this report: the Office of Advocacy promotes the views of polluting industries, certain large corporations, and the trade association lobbyists they finance rather than defending the interests of genuine small businesses. *Gaming the Rules* makes a convincing argument that Advocacy's bias toward the positions of large corporations – which often have interests that diverge from those of their small business counterparts – occurs throughout the entire small business review process.

Contrary to the claims of conservative pundits and policymakers, the majority of small businesses don't want to roll back health and safety and environmental regulations. They are business owners who care about their communities and don't believe you have to choose between a strong economy and protecting our health and environment. Small business owners accept that regulations are a necessary part of a modern economy. They provide a level floor for business behavior and can encourage innovation as businesses strive to develop new technologies to meet health standards and energy-saving requirements, which in turn provide social and economic benefits. Consumers are demanding safer and healthier products, too. For business, this means doing everything we can to secure consumers' confidence in the marketplace, including providing transparent and clear regulations.

Small business leaders are ready, willing, and able to give agencies the input they need to ensure that strong national standards and safeguards take the interests of small businesses into account. Agencies need to reach out to them and ensure that they get input from actual small businesses. And if Congress and the president really want small businesses involved in rulemaking, they need to scrutinize the activities of the Office of Advocacy much more closely. We do believe that small businesses should be an integral part of the dialogue and decision making. When done correctly, business and government can work together to build our economy while advancing our shared economic, social, and environmental priorities.

As the leading representative of small and medium businesses that want a robust and sustainable economy, together with our member organizations that represent more than 200,000 companies, we want a regulatory process that keeps American businesses on the cutting edge of best practice, protects the environment, and fosters healthy families and communities.

David Levine

President and Chief Executive Officer
American Sustainable Business Council

EXECUTIVE SUMMARY

Laws defining the federal government's role in protecting public health and safety have been in effect for almost half a century. In 1970, President Richard Nixon created the U.S. Environmental Protection Agency (EPA) to centralize authority previously dispersed among 13 federal agencies and departments responsible for reducing water pollution, improving air quality, restricting toxic pesticides, reducing radiation exposure, regulating solid waste disposal, and strengthening natural resource conservation. Later that year, Nixon signed into law the Occupational Safety and Health Act to "assure safe and healthful working conditions for working men and women."

EPA and Occupational Safety and Health Administration (OSHA) standards are working. From 1970 to 2013, combined national emissions of six common air pollutants dropped an average of 68 percent, and the number of lakes and rivers that meet water quality standards has doubled since 1972. The annual number of on-the-job deaths fell from almost 14,000 in 1970 to under 5,000 in 2012. Yet the actions of both agencies are constantly challenged.

Business lobbyists and industry associations grumble that reducing pollution and industrial waste and improving workplace health and safety costs time and money and cuts into their profits. The biggest firms in the dirtiest industries protest the loudest about adhering to health and environmental standards. Yet it is complaints of small businesses that worry the public and legislators most.



Small businesses are heroic and iconic figures in the American story of opportunity. The vast majority of private enterprises in the U.S. today employ fewer than 100 workers, and many workers aspire to own their own business. So when small businesses argued that the federal rulemaking process should pay attention to their special needs, policymakers listened.

*“The Small Business
Advocacy Review panel
process is manipulated by
trade associations.”*

In 1974, a new “Office of Advocacy” was established within the Small Business Administration to “represent the views and interests of small businesses before other Federal agencies.” In effect, Congress created an office within the executive branch to lobby other federal agencies on behalf of small business. Six years later, President Jimmy Carter signed into law the Regulatory Flexibility Act, which required executive agencies to consider the potential impacts on small businesses of any new rules the agency was considering. And in 1996, a Republican Congress passed and President Bill Clinton signed the Small Business Regulatory Enforcement Fairness Act, requiring EPA and OSHA to convene a Small Business Advocacy Review panel any time either agency planned to issue a rule that could have a “significant economic impact on a substantial number of small entities.” When the Consumer Financial Protection Bureau (CFPB) was established in 2010, it too was required to convene small business review panels early in the rulemaking process.

Who participates in the review panel process? Are these panels representing and protecting the interests of small businesses in federal rulemaking? Does this process allow for the creation of needed public protections while mitigating any harmful impacts on small businesses?

To answer these questions, staff at the Center for Effective Government examined 20 Small Business Advocacy Review panels convened between 1998 and 2012. Our analysis is based on the panel reports, materials received from the Office of Advocacy in response to Freedom of Information Act requests filed with the office in 2013 and 2014, and on interviews with officials at the three regulatory agencies and the Office of Advocacy. Here is what we found:

- The current Small Business Advocacy Review process is costly, resource intensive, and duplicative of other agency outreach efforts to the business community.

- Of the 23 rules covered by the 20 review panels examined in this study, 17 rules have been finalized. Some of the public protection provisions in at least eight of the 17 final rules were, in our judgment, weakened as a result of the panel review process. In every case, the review process delayed the publication of the rule.
- The Small Business Advocacy Review panel process is manipulated by trade associations. They help identify “small businesses” to advise the panels, participate in meetings with selected representatives, and even help write their comments. They may also submit their own comments.
- EPA, OSHA, and CFPB lack formal procedures to verify that prospective small business advisors are in fact eligible small entity representatives.
- Many individuals nominated by trade associations to be small business advisors to the panels were representatives, board members, lawyers, or consultants for trade associations and did not own or operate a small entity likely to be affected by the rule under development.
- Office of Advocacy staff encouraged trade associations to participate in the small business review panel process in a variety of roles, including serving as informal “helpers” to the formally designated small business advisors.
- The Office of Advocacy inappropriately collaborated with trade association representatives and “small business” advisors in developing the content of comments submitted to the

Case Study: The Chrome Coalition, an industry group, nominated 14 representatives to advise an OSHA panel reviewing a rule to limit occupational exposure to toxic hexavalent chromium. One was Joel Barnhart, chairman of the Chrome Coalition. J. Lawrence Robinson, president of the Color Pigments Manufacturers Association, an industry trade association, was another nominee, even though he was not connected to a small business potentially affected by the rule. When OSHA attempted to exclude these two nominees from advising the panel, the Chrome Coalition threatened to sue the agency.

review panel. Since the Office of Advocacy is a formal member of the small business review panel that examines comments and makes recommendations based on them, it appears to be a manipulation of the process for Advocacy to also shape the comments submitted to the panel.

- On numerous occasions, the “small business” representatives advising the review panels recommended rule changes that went beyond the small business impacts that the panels were convened to review.
- EPA and CFPB withheld the names of review panel participants from the public until after the publication of the rule under review – preventing questions about the qualifications of appointed small business advisors or potential conflicts of interest.

To expand and deepen input from actual small businesses, enhance public access to rulemaking information, minimize opportunities for large industry capture, and ensure the integrity of public protections, we recommend the following:

- EPA, OSHA, and CFPB should screen the panel recommendations and the comments of small business advisors and only consider changes to a rule that specifically address the impacts on small businesses subject to the rule. If the agency is considering weakening a rule in response to a recommendation, the agency should solicit comments on such changes from the public.
- Each agency should develop written eligibility criteria that define who qualifies as a small entity representative, and each nominee should certify in writing that he or she meets the criteria.
- Agencies should avoid the use of trade association representatives as designated small business advisors. A trade association representative should only be able to serve as a designated small business advisor to a panel if he or she can verify that the trade association is comprised primarily of small businesses *that are likely to be directly affected by the rule under review*. If an agency selects a representative from a trade association that includes large and small businesses, the agency should require the representative to certify

in writing that he or she will restrict his or her comments to issues of concern to the association's small business members.

“Several public protections were, in our judgment, weakened as a result of the panel review process. In every case, the review process delayed the publication of the rules.”

- Agencies should establish policies that limit the role of “helpers” and other unofficial participants and make their role transparent. A designated small business advisor who wants a helper should provide a written request to the agency for assistance so the agency can track those helpers advising small business representatives. The helpers and unofficial participants in the panel process should be required to identify any comments to the panel they drafted or co-authored, and their input should be noted in the final report. If a panel accepts comments from any party other than a designated small business advisor, it should also accept comments from the general public.
- The Office of Advocacy should help agencies identify qualified small business owners to advise the panels instead of recommending trade association representatives as advisors.
- The small business representatives that the review panels consult should reflect the diversity and richness of the millions of small businesses currently operating in the U.S. Agencies should permit and encourage small business owners to self-nominate for review panels and widely publicize opportunities to participate in an easily accessible location on their websites, in relevant trade publications, and in the *Federal Register*.
- Agencies should publicly post the names and affiliations of small business advisors at least one month prior to the panel convening so the public and other small business associations have the opportunity to examine the list for potential conflicts of interest.

- Since the Office of Advocacy serves as a panel member that reviews input and comments submitted by small business advisors, helpers, and other unofficial participants, it should be precluded from collaborating in the development of comments submitted to the panel to avoid the appearance of unduly influencing the review process.

Unless meaningful improvements are made to the small business review panel process to ensure genuine small businesses participate and share their unique concerns, the process will continue to be a waste of public funds and agency resources. Big businesses, their lobbyists, and trade associations have many opportunities to register their views during the already lengthy rulemaking process. This small business review process is intended to provide an opportunity for input from genuine small businesses. It should not serve as another avenue for trade associations and their lobbyists to weaken critical public health, environmental, worker safety, and consumer finance protections.

“Unless meaningful improvements are made to the small business review panel process to ensure genuine small businesses participate and share their unique concerns, the process will continue to be a waste of public funds and agency resources.”





INTRODUCTION

Small businesses hold a special place in American culture. Many individuals either started their working lives in a small business or aspire to own a business in the future. In 2011, over 5.5 million firms – 98 percent of all U.S. firms – employed under 100 people; these firms provided jobs to about 39 million workers, or 34 percent of the workforce.¹ Yet since World War II, small businesses have found it increasingly difficult to compete with their larger counterparts. The federal government has actively championed their health and survival, starting with the creation of the Small Business Administration in 1953 to provide small businesses with financial assistance and access to government-backed loans.²

In the decades after the Small Business Administration (SBA) was established, new pollution controls and worker safety laws were put in place. In 1970, President Richard Nixon created the U.S. Environmental Protection Agency (EPA), centralizing authority previously dispersed among 13 federal agencies and departments responsible for reducing water pollution, improving air quality, restricting certain toxic pesticides, reducing radiation exposure, regulating solid waste disposal, and strengthening natural resource conservation. Later that year, he also signed into law the Occupational Safety and Health Act to “assure safe and healthful working conditions for working men and women.”

As a result of these new standards, combined national emissions of six common air pollutants dropped an average of 68 percent between 1970 and 2013, and the number of lakes and rivers that meet water quality standards has doubled since 1972.³ The annual number of on-the-job deaths fell from almost 14,000 in 1970 to under 5,000 in 2012.⁴

1 In 2011, the last year for which detailed data is available, there were 5,684,424 firms in the U.S. employing 113,425,965 people. By contrast, firms with over 5,000 employees provided over one-third of all jobs. *Number of Firms, Number of Establishments, Employment, and Annual Payroll by Small Enterprise Employment Sizes for the United States and States, NAICS Sectors: 2011, Statistics of U.S. Businesses*, U.S. CENSUS BUREAU, <http://www.census.gov/econ/subs/> (select “U.S. & states, NAICS sectors, small employment sizes” to download xls data) (released Dec. 2013).

2 Small Business Act of 1953, Pub. L. No. 83-163, 67 Stat. 232 (current version at 15 U.S.C. §§ 631-657 (2012)).

3 *Comparison of Growth Areas and Emissions, 1970-2013*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/air/airtrends/images/y70_13.png (last visited Nov. 3, 2014); Amena H. Saiyid, *Clean Water Act Has Helped Grow Nation's Economy*, EPA Official Says, BLOOMBERG BNA, Oct. 22, 2014, http://dailyreport.bna.com/drpt/display/alpha.adp?mode=topics&letter=W&frag_id=58184901&item=5519&prod=drln.

4 AFL-CIO, DEATH ON THE JOB: THE TOLL OF NEGLECT 51 (23d ed. 2014), <http://www.aflcio.org/content/download/126621/3464561/DOTJ2014.pdf>.

Yet the actions of both EPA and the Occupational Safety and Health Administration (OSHA) are constantly challenged by business lobbyists and industry trade associations who complain that curbing pollution, toxic waste, and workplace hazards costs time and money. The biggest firms in the dirtiest industries usually protest the loudest. But it is complaints of small businesses that worry the public and legislators. When small businesses say that health and safety regulations make it harder for them to compete with bigger businesses, policymakers listen.

In 1974, a new “Office of Advocacy” was established within SBA to “represent the views and interests of small businesses before other Federal agencies.”⁵ In 1976, the Office of Advocacy became an independent office within SBA, headed by the Chief Counsel for Advocacy. In effect, Congress created an office within the executive branch to lobby other executive agencies on behalf of small businesses.

Six years later, President Jimmy Carter signed into law the Regulatory Flexibility Act of 1980, which *requires* executive agencies to consider the potential impacts of any new rules on small businesses.⁶ In 1996, a Republican Congress passed and President Bill Clinton signed into law the Small Business Regulatory Enforcement Fairness Act,⁷ amending the Regulatory Flexibility Act. The amended law requires EPA and OSHA to convene Small Business Advocacy Review panels early in the development of new rules that could have a “significant economic impact on a substantial number of small entities.”⁸

As part of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, the Consumer Financial Protection Bureau (CFPB) is also required to convene Small Business Advocacy Review panels early in its rulemaking process.⁹

5 Small Business Amendments of 1974, Pub. L. No. 93-386, sec. 10, § 5(e)(4), 88 Stat. 742, 749, *amended by* Small Business Act and Small Business Investment Act of 1958, amendments, Pub. L. No. 94-305, tit. 2, § 201, 90 Stat. 663, 668 (1976) (current version at 15 U.S.C. § 634c(4) (2012)).

6 The Regulatory Flexibility Act defines a small entity as a for-profit enterprise or nonprofit organization that is independently owned and operated and is not dominant in its field of operation, or a small governmental jurisdiction with a population under 50,000. In addition to meeting the statutory definition, an enterprise must satisfy the Small Business Administration’s (SBA) size standards. These complex size standards vary by industry. In a few, businesses with up to 1,500 employees or that have annual receipts up to \$38.5 million (or \$500 million in assets for many financial institutions) are considered “small.” 15 U.S.C. § 642(a) (2012); *see also* *Small Business Size Standards*, U.S. SMALL BUS. ADMIN., <http://www.sba.gov/content/what-are-small-business-size-standards> (last visited Oct. 31, 2014). Most small business groups, including the Small Business Majority and the American Sustainable Business Council, define small businesses as those with less than 100 employees, and that is the standard we use.

7 Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 857 (codified in scattered sections of 5 U.S.C., 15 U.S.C., and 28 U.S.C.). Executive Order (E.O.) 13272 and the Small Business Jobs Act of 2010 also task agencies and the Office of Advocacy with certain responsibilities related to the Regulatory Flexibility Act. E.O. 13272, issued by President George W. Bush in 2002, requires the Office of Advocacy to notify and train federal agencies on Regulatory Flexibility Act compliance and to submit an annual report to the Office of Information and Regulatory Affairs (OIRA). Agencies are also required to develop procedures for determining whether a regulatory action may have a “significant economic impact on a substantial number of small entities.” Agencies must advise the Office of Advocacy of any draft rules that meet these criteria and must take into consideration and respond to regulatory comments submitted by the office. The Small Business Jobs Act of 2010 codified the E.O.’s requirement that agencies respond to comments submitted by the Office of Advocacy.

8 Small entities may include small business owners, small governments, and small nonprofit organizations.

9 Consumer Financial Protection Act of 2010, Pub. L. No. 111-203, tit. X, sec. 1100G(a), § 609(d), 124 Stat. 1955, 2112-13 (codified as amended at 5 U.S.C. § 609(d) (2012)).

The review panels convened by these agencies are formally comprised only of officials from the rulemaking agency (EPA, OSHA, or CFPB), the Office of Advocacy, and the Office of Information and Regulatory Affairs (OIRA), an office in the White House Office of Management and Budget. The rulemaking agency, in consultation with the Office of Advocacy, selects a designated set of small business representatives to advise the panel about the potential small business impacts of the particular rule under development. After the panel convenes and receives input from the representatives, it develops recommendations for the rulemaking agency about how to ensure the rule minimizes any adverse effects on small businesses. The agency must consider these recommendations as it moves forward in developing the new rule.

“The actions of both EPA and the Occupational Safety and Health Administration (OSHA) are constantly challenged by business lobbyists and industry trade associations who complain that curbing pollution, toxic waste, and workplace hazards costs time and money. The biggest firms in the dirtiest industries usually protest the loudest.”



Small Business Review Panel Process

1

Staff at the regulating agency (EPA, OSHA, or CFBP) determine that a small business advocacy review panel needs to be convened.¹

The Small Business Regulatory Enforcement Fairness Act allows judicial review of a final rule that may affect small businesses, so even if agency staff determine there will be no impact, a panel may be convened to avoid a legal challenge at the end of the lengthy rulemaking process.

2

A review panel is created comprised of staff from the rulemaking agency, the Small Business Administration Office of Advocacy, and the White House Office of Information and Regulatory Affairs (OIRA).

The Office of Advocacy often advocates for big businesses and the trade associations that represent them, instead of small business.

3

In consultation with the SBA Office of Advocacy, the rulemaking agency identifies small business representatives that will advise the review panel.

No agency formally verifies that a nominee is an eligible representative of a small business. EPA, OSHA, and the Office of Advocacy consult with trade associations to help identify nominees.

4

Information about the rule is distributed to the small business representatives; panel members then hold a consultative meeting with the small business representatives for input on the rule's impacts on small businesses.²

Office of Advocacy sometimes holds informal outreach meetings with trade association representatives and small business advisors prior to the meeting with the full panel without inviting staff from the regulating agency; Advocacy and trade association staff may help develop comments submitted to the panel; comments are sometimes not limited to reducing the impact of the rule on small businesses.

5

The panel members review the input received and develop recommendations for the regulating agency on mitigating small business impacts in developing the rule. A final panel report is submitted to the agency head within 60 days of the panel convening.

EPA and CFBP withhold the final panel report from the public until the proposed rule is published; OSHA publishes the panel report once it is finalized.

6

The rulemaking agency considers the panel report in developing the proposed and final rule.³

The rulemaking agency sometimes changes the rule in ways that weaken public protections.

1: Agency will convene a panel and develop an initial regulatory flexibility analysis if a rule will likely have a significant economic impact on a substantial number of small entities. Otherwise, the agency follows standard rulemaking procedures.

2: Small business representatives may submit written comments one to two weeks after the meeting.

3: The agency potentially adopts recommendations from the panel report as it prepares the proposed and final rule. The agency finalizes its initial regulatory flexibility analysis and publishes it with the proposal unless there will no longer be a potentially significant economic impact on a substantial number of small entities. Similarly, the agency may need to prepare a final regulatory flexibility analysis in conjunction with the draft final rule.

When the regulating agency drafts the proposed rule (complete with any revisions based on the panel recommendations), it must then send the rule to OIRA for review, where it can languish for months or even years or may be rejected and sent back to the agency to begin the process again.

The Consumer Financial Protection Bureau is an independent agency, and OIRA is not supposed to review its rules. The requirement that CFPB submit each new rule that could affect small entities to a review panel that includes staff from OIRA gives the office some formal input into the activities of this particular independent agency.

Assuming the rule is finalized, the Small Business Regulatory Enforcement Fairness Act allows a small business to seek judicial review of the rule on grounds that it would be adversely affected by the rule or that the agency failed to comply with the Regulatory Flexibility Act. The Chief Counsel for Advocacy may also choose to participate in the court challenge by filing an *amicus* brief. If this happens, the court may order the agency to begin the entire rulemaking process again, even though the agency spent years examining scientific evidence, conducting outreach, and drafting the rule.

This analysis reviews 20 small business review panels convened since the enactment of the Small Business Regulatory Enforcement Fairness Act in 1996 and asks the following questions about the panel process:

- Do the panels represent and protect the interests of small businesses in federal rulemaking?
- Who are the designated small entity advisors? How are they selected? Do they accurately and fairly represent the interests of affected small businesses?
- Do the review panels help the three agencies that use them produce rules that protect the public's interests while mitigating any adverse impacts the new rules might have on small businesses?

In addition to reviewing the actions of the three rulemaking agencies, Center for Effective Government staff examined the activities of the Office of Advocacy and OIRA in this process.

We found extensive involvement by trade associations, their lobbyists, and their big business members throughout the panel process. The Office of Advocacy invited individuals who were clearly not representing small business entities to participate in the process. None of the three rulemaking agencies has policies in place to ensure that the individuals selected as small business representatives to advise their review panels do in fact represent small businesses. The recommendations that came out of the review process were not limited to small business concerns, and agencies sometimes changed rules in ways that weakened public protections and

benefited big business. Public interest groups were not able to offer alternative views to counter the engagement of industry groups at this early stage in rulemaking.

We conclude that the small business review panel process has created another avenue for trade association representatives, corporate lobbyists, and big businesses to influence rulemaking. The final section of this report outlines a set of recommendations that would enhance public access to information and curtail opportunities for big business influence.

METHODOLOGY

Center for Effective Government staff found that little research has been conducted on the small business review panel process beyond a 1998 Government Accountability Office (GAO) report.¹⁰ Our research began with a review of each agency's written policies for conducting Small Business Advocacy Review panels required by the Small Business Regulatory Enforcement Fairness Act (SBREFA).¹¹ We interviewed officials from each of the three rulemaking agencies responsible for conducting small business review panels, including the Small Business Advocacy Chairperson for all three agencies. We also interviewed staff at the Office of Advocacy.

To compare the agencies' written policies with actual practice, we reviewed a sample of 20 panels that were completed between 1998 and 2011.¹² For the U.S. Environmental Protection Agency (EPA), we chose 10 completed panels covering a range of agency programs: the Office of Water, Office of Air and Radiation, and the Office of Chemical Safety and Pollution Prevention over 13 years. For the Occupational Safety and Health Administration (OSHA), we selected the seven most recent of the 10 panels OSHA has completed. The panels selected span several years. At the start of our research, the Consumer Financial Protection Bureau (CFPB) had only completed three panels since its establishment in 2010, and we included all three of those panels in our analysis.¹³

As an additional research step, we submitted a Freedom of information Act (FOIA) request to the Office of Advocacy for materials and communications related to the panels we analyzed. The intent of this request was

10 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/GGD-98-36, REGULATORY REFORM: IMPLEMENTATION OF THE SMALL BUSINESS ADVOCACY REVIEW PANEL REQUIREMENTS (1998) [hereinafter GAO 1998 REPORT], available at <http://www.gao.gov/assets/230/225342.pdf>; see also *infra* Appendix A (discussing the findings and recommendations of the 1998 review).

11 OFFICE OF POLICY, ECON., & INNOVATION, U.S. ENVTL. PROT. 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) [hereinafter EPA SBREFA GUIDANCE], available at <http://www.epa.gov/rfa/documents/Guidance-RegFlexAct.pdf>; Occupational Safety & Health Admin., OSHA Procedures for Compliance with the Regulatory Development and Review Requirements of the Regulatory Flexibility Act, U.S. DEP'T OF LAB. [hereinafter OSHA SBREFA GUIDANCE], <http://www.dol.gov/dol/regs/appendix.htm> (last visited Aug. 25, 2014); CONSUMER FIN. PROT. BUREAU, FACT SHEET: SMALL BUSINESS REVIEW PANEL PROCESS (2012) [hereinafter CFPB SBREFA GUIDANCE], available at http://files.consumerfinance.gov/f/2012/02/20120221_cfpb_factsheet-small-business-review-panel-process.pdf.

12 Due to resource constraints, we could not review all Small Business Advocacy Review (SBAR) panels that the three agencies have completed to date.

13 Since Center for Effective Government staff began research, the Consumer Financial Protection Bureau (CFPB) has completed a fourth panel on improving information about potential changes to mortgage information reported under the Home Mortgage Disclosure Act. FINAL REPORT OF THE SMALL BUSINESS REVIEW PANEL ON THE CFPB'S PROPOSALS UNDER CONSIDERATION FOR THE HOME MORTGAGE DISCLOSURE ACT (HMDA) RULEMAKING (2014).

to provide insight into the Office of Advocacy’s role in the panel process, as well as the extent of involvement by trade associations that may not primarily represent the interests of small businesses in the process. Over a nine-month period, the Office of Advocacy provided documents for only two-thirds of the requested panels.¹⁴

Table 1. Descriptions of Rules Covered by 20 Small Business Panels Reviewed

Agency	Year Panel Ended	Rule(s) Reviewed by Panel	Description of Rule(s)
EPA	1998	National Primary Drinking Water Regulations: Ground Water Rule (Ground Water Panel)	This rule increases water quality standards for public water systems that rely on groundwater in order to reduce the risks of contaminated drinking water.
EPA	1998	Findings of Significant Contribution and Rulemaking on Section 126 Petitions for Purposes of Reducing Interstate Ozone Transport (Section 126 Petitions Panel)	This rule requires reductions in cross-state air pollutants so that lower standards in one state don’t affect residents of a downwind state.
EPA	2000	Lead; Renovation, Repair, and Painting Program (Lead Paint Panel)	This rule requires containment of health hazards associated with disturbing lead-based paint during renovations, repairs, or painting in most houses and child-occupied facilities built before 1978.
EPA	2001	Effluent Limitation Guidelines and New Source Performance Standards for Construction and Development Point Source Category (C&D Effluents Panel)	This rule regulates the amount of sediment and other pollutants that can be released from construction sites into our nation’s water bodies.
EPA	2004	National Pollution Discharge Elimination System; Establishing Requirements for Cooling Water Intake Structures at Phase III Facilities (CWIS Panel)	This rule regulates new offshore oil and gas extraction facilities that use large volumes of water for cooling in order to minimize environmental damage.
EPA	2008	National Primary Drinking Water Regulations: Revisions to the Total Coliform Rule (Total Coliform Panel)	This rule strengthens the standards regulating microbial contaminants in public drinking water systems.
EPA	2009	National Emissions Standards for Hazardous Air Pollutants for Area Sources: Industrial, Commercial, and Institutional Boilers and for Major Sources: Industrial Commercial, and Institutional Boilers and Process Heaters (Boiler MACT Panel)	The two rules require reductions in toxic air pollutants emitted from boilers (systems that produce steam used to generate electricity or heat) and process heaters (systems used to heat materials during industrial processes) to improve air quality.
EPA	2011	National Emissions Standards for Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units (Utility MACT Panel)	This rule sets higher limits on the amount of toxic air pollutants that power plants can emit.

¹⁴ Center for Effective Government staff submitted a Freedom of Information Act (FOIA) request to the Small Business Administration Office of Advocacy on Jan. 28, 2014. The request asked for all materials related to 18 of the 20 SBAR panels selected for review. We did not request materials for two of the panels in January (for the U.S. Environmental Protection Agency’s (EPA) rule on Formaldehyde Emissions from Pressed Wood Products or the Occupational Safety and Health Administration’s (OSHA) rule on Occupational Exposure to Respirable Crystalline Silica) because the Office of Advocacy had previously produced those materials in response to a prior FOIA request. As of the release of this report, the Office of Advocacy has provided Center for Effective Government staff with materials for only 12 of the 18 panels included in our request.

EPA	2011	Formaldehyde Emission Standards for Composite Wood Products and Third-Party Certification Framework for the Formaldehyde Emissions Standards for Composite Wood Products (Formaldehyde Panel)	The two rules would reduce worker exposure to formaldehyde in facilities producing composite wood products (used in kitchen cabinets, some furniture, etc.).
EPA	2011	Control of Air Pollution from Motor Vehicles: Tier 3 Motor Vehicle Emission and Fuel Standards (Tier 3 Panel)	This rule reduces the toxic emissions allowed for passenger cars and trucks.
OSHA	2003	Confined Spaces in Construction (Confined Spaces Panel)	This rule would improve health and safety standards for construction workers who work in confined spaces and are exposed to hazardous materials.
OSHA	2003	Electric Power Generation, Transmission, and Distribution; Electrical Protective Equipment (Electric Power Panel)	This rule improves health and safety standards for workers in electric power generation, transmission, and distribution facilities.
OSHA	2003	Occupational Exposure to Respirable Crystalline Silica (Silica Panel)	This rule limits workers' exposure to deadly silica dust, which causes lung cancer and debilitating lung disease.
OSHA	2004	Occupational Exposure to Hexavalent Chromium (Hex Chrome Panel)	This rule limits worker exposure to hexavalent chromium, a cancer-causing heavy metal used in color pigments, paints, and more.
OSHA	2006	Cranes and Derricks in Construction (Cranes and Derricks Panel)	This rule establishes new safety protocols for construction workers who operate cranes and derricks.
OSHA	2008	Occupational Exposure to Beryllium (Beryllium Panel)	This rule limits worker exposure to beryllium, a metal associated with lung cancer and other serious health risks.
OSHA	2009	Occupational Exposure to Diacetyl and Food Flavorings Containing Diacetyl (Diacetyl Panel)	This rule would have protected workers from lung hazards associated with exposure to diacetyl, the chemical that gives butter its taste. OSHA has since decided not to proceed with a rule.
CFPB	2012	Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z) (TILA-RESPA Panel)	This rule replaces four older mortgage disclosure forms with two newer forms to make it easier for consumers to understand their mortgage payments, boosting industry compliance with disclosure requirements.
CFPB	2012	Mortgage Servicing Rules under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z) (Mortgage Servicing Panel)	These two rules require mortgage servicers to provide borrowers clear and timely information about changes to their mortgages.
CFPB	2012	Loan Originator Compensation Requirements under the Truth in Lending Act (TILA) (LO Comp Panel)	This rule requires loan originators to meet certain qualifications and sets restrictions on the compensation they can receive from home loans.

FINDINGS

A. Agencies Engaged in Extensive Outreach Prior to the Panel Process

For all rules selected for review, each of the three agencies engaged in extensive outreach to industry groups, trade associations, and other interested members of the business community prior to deciding whether to convene a small business review panel. Extensive outreach with stakeholders at this early stage of the development process means that businesses and other private-sector stakeholders have an advance opportunity to voice their concerns with the agency and potentially shape the rule under development before the regular notice-and-comment process.

Given this early outreach, unless the panel process results in new input from small entity representatives not previously consulted, the panel process is redundant and slows the rulemaking process for no discernable reason. This drains agency resources and delays critical safeguards from moving forward.

Organizing and implementing these panels involves a significant expenditure of agency staff time and resources. EPA typically takes between four and 10 months to complete the panel process, lengthening the time it takes to issue rules.¹⁵ Moreover, EPA's director of regulatory management noted that the agency can probably get the same information through its outreach efforts or during the notice-and-comment period.¹⁶ According to OSHA officials, the agency conducts its panels on a 120-day cycle, adding four months to the traditional rulemaking process.¹⁷ CFPB's Director, Richard Cordray, explained in written testimony to the House Committee on Small Business that the review panel process "involves a substantial commitment of time and resources from all three participating agencies, as well as the individual small entity representatives. We are finding that the panel process requires a minimum of three to four months of intensive work to complete, including preparation time."¹⁸

Recommendation: When agencies convene small business review panels, they should ensure they are receiving input from a broad spectrum of verified small entities beyond those with whom it consulted during its early outreach efforts. This will allow for a broader set of small business voices to participate in the rulemaking process.

¹⁵ EPA SBREFA GUIDANCE, *supra* note 11, at 57.

¹⁶ Janis Reyes, *Implementing the RFA*, SMALL BUS. ADVOC., Oct.-Nov. 2010, at 10, 10, available at http://www.sba.gov/sites/default/files/advocacy/The%20Small%20Business%20Advocate%20-%20October_November%202010.pdf.

¹⁷ Interview with Officials at OSHA, in Washington, DC (Feb. 7, 2014).

¹⁸ *Know Before You Regulate: The Impact of CFPB Regulations on Small Business*, Hearing Before the H. Comm. On Small Bus., 112th Cong. 21 (2012) (statement of Richard Cordray, Director, Consumer Financial Protection Bureau).

B. Trade Associations Were Heavily Involved in Identifying Small Business Representatives

Agency outreach is critical to ensuring that the small entities selected to advise a panel represent a diverse group of small businesses likely to be affected by the rule under development. However, we found that EPA and OSHA and the Office of Advocacy relied heavily on trade associations to find individuals to advise the panels.¹⁹ The Office of Advocacy even encouraged representatives from these trade associations to nominate themselves.²⁰

The Small Business Regulatory Enforcement Fairness Act does not require the source of small entity representative nominations to be identified in the panel report, so the information available is incomplete and anecdotal.

In the 20 panels we reviewed, we found that several trade association nominees were representatives, board members, lawyers, or consultants of the trade association and did not independently own or operate a small entity likely to be affected by the rule under development.²¹

“Several trade association nominees were representatives, board members, lawyers, or consultants of the trade association and did not independently own or operate a small entity likely to be affected by the rule under development.”

19 **EPA C&D Effluents Panel:** FINAL PANEL REPORT OF THE SBREFA SMALL BUSINESS ADVOCACY REVIEW PANEL ON EPA’S PLANNED PROPOSED RULE FOR EFFLUENT LIMITATION GUIDELINES AND STANDARDS FOR THE CONSTRUCTION AND DEVELOPMENT INDUSTRY 14 (2001); **EPA CWIS Panel:** FINAL REPORT OF THE SMALL BUSINESS ADVOCACY REVIEW PANEL ON EPA’S PLANNED PROPOSED RULE FOR COOLING WATER INTAKE STRUCTURES AT SECTION 316(B) PHASE III FACILITIES 15 (2004) (listing several trade associations EPA contacted to identify potential small entity representatives, including the American Chemistry Council, Synthetic Organic Chemical Manufacturers Association, National Petrochemical and Refiners Association, and American Petroleum Institute, among others); **OSHA Electric Power Panel:** E-mail from Charles Maresca, Office of Advocacy, to Anita Drummond, Associated Builders & Contractors et al. (Feb. 11, 2003) (“I will need the names of small entity representatives by this Friday. . . . OSHA has already been in touch with NECA and NUCA, among others.”); **OSHA Silica Panel:** E-mail from Joe Casper, Brick Indus. Ass’n, to Kathleen Martinez, U.S. Dep’t of Lab. (Aug. 21, 2003) (“Kathleen, Thanks for all your help so far in facilitating brick industry involvement in the SBREFA panel on silica. I am seeking up to 10 names that I can provide.”); **EPA Boiler MACT Panel:** Letter from Thomas Sullivan, Office of Advocacy, to Alexander Cristofaro, U.S. Env’tl. Prot. Agency (Sept. 25, 2008) (concurring with EPA’s list of potential small entity representatives (SERs) and recommending as additional SERs Timothy Hunt, American Forest and Paper Association, Robert Bessette, Council of Industrial Boiler Owners, and Bill Perdue, American Home Furnishings Alliance); **EPA Formaldehyde Panel:** E-mail from Kevin Bromberg, Office of Advocacy, to Dick Titus, Kitchen Cabinet Mfrs. Ass’n (Oct. 27, 2010) (“Dick – we need you as a SER in this proceeding – who else can you recommend? Please get names into EPA by November 2, and copy me. This is not limited to small business owners. It can be trade association people and regulatory experts, including engineering consultants and lawyers. We did not write this document with EPA, limiting SERs to ‘self-nominations.’”); *see also infra* Appendices B-C.

20 **EPA Tier 3 Panel:** E-mail from Kevin Bromberg, Office of Advocacy, to Doug Greenhaus, Nat’l Auto. Dealers Ass’n et al. (May 12, 2011) (“Doug - please do not step down in favor of a member – you need to be a full participant.”); **OSHA Hex Chrome Panel:** E-mail from Charles Maresca, Office of Advocacy, to Tom Harman, Nat’l Ready Mixed Concrete Ass’n (Jan. 30, 2004) (“Kathy Martinez will be calling for the names and contact information of possible Small Entity Representatives for the Hex Chrome Panel. You should give her your own name and contact info, too.”).

21 **OSHA Diacetyl Panel:** E-mail from Rasma Zvaners, Am. Bakers Ass’n (ABA) to Bruce Lundegren, Office of Advocacy (Apr. 27, 2009) (“Was there an opportunity for Theresa Cogswell to participate on the Panel as ABA will be contracting her services to represent ABA?? As a second option is there an opportunity for myself to sit on the panel?”).

For OSHA's panel to review a rule limiting occupational exposure to hexavalent chromium, the Chrome Coalition, an industry group that intervened in a lawsuit²² brought by Public Citizen to compel OSHA to issue the rule, nominated 14 small entity representatives to participate on the panel.²³ One nominee was Joel Barnhart, chairman of the Chrome Coalition and vice president of Technical at Elementis Chromium. J. Lawrence Robinson, president of the Color Pigments Manufacturers Association,²⁴ an industry trade association that also intervened in the citizen lawsuit, was another nominee, even though he was not connected to a small business potentially affected by the rule. An attorney representing the Chrome Coalition asked the Office of Advocacy to join a call with OSHA and these two nominees "to make the case to OSHA that Joel and Larry should be" small business advisors.²⁵ When OSHA attempted to exclude these two nominees from advising the panel, the Chrome Coalition threatened to sue the agency.²⁶

“When OSHA attempted to exclude two chrome industry nominees from advising the panel on limiting occupational exposure to hexavalent chromium, the Chrome Coalition threatened to sue the agency.”

Trade associations submitted nominations for representatives from businesses that did not qualify as small entities eligible to advise the panel.²⁷ We found evidence that small businesses complained to the Office of Advocacy that certain trade associations do not represent their small business members.²⁸

EPA does the best job of reaching out directly to small businesses – it posts an informal notice on its website notifying interested parties about upcoming panels and soliciting self-nominations for small entity

22 Pub. Citizen Health Research Grp. v. Chao, 314 F.3d 143 (3d Cir. 2002).

23 Fax letter from Kathryn M. McMahon-Lohrer, Collier Shannon Scott, PLLC, to Charles Maresca, Office of Advocacy, Cathy Martinez, U.S. Dep't of Lab. & Robert Burt, U.S. Dep't of Lab. (Feb. 9, 2004).

24 See *infra* note 107 and accompanying text (describing the Color Pigments Manufacturers Association); see also Fax letter from J. Lawrence Robinson, Color Pigments Mfrs. Ass'n (CPMA), to Robert Burt, Occupational Safety & Health Admin. (Feb. 9, 2004) ("Although we have been able to identify individuals in some of these sectors to serve as possible SERs, it has been difficult to identify individuals with expertise and the necessary available resources for all of them. I understand that some Panels in the past have used trade association representatives, and I am suggesting that you consider that as a source of additional input for this particular Panel since our one association, CPMA is so deeply involved with approximately one quarter of the industry sectors that would be impacted by a revised Chrome Standard.")

25 E-mail from Kathryn McMahon, Collier Shannon Scott, PLLC, to Charles Maresca, Office of Advocacy (Feb. 19, 2004).

26 E-mail from Kathryn McMahon, Collier Shannon Scott, PLLC, to Charles Maresca, Office of Advocacy (Mar. 5, 2004) ("[I] was just instructed by the Coalition to write a letter informing OSHA/SBA/OMB that we believe the letter and spirit of the SBREFA process are being violated by the failure to include Larry/Joel as SERs and that we will file a challenge to the rule on this basis. . . . If I can get something worked out before then, we can avoid the litigation threats (which they are serious about and have already researched). I have called Bob to let him know where we stand. If there is anything you can do (and I know you have already done alot [sic]) to help get this SER decision made, I would very much appreciate it.")

27 E.g., **EPA Utility MACT Panel**: E-mail from Mary Johnson, U.S. Env'tl. Prot. Agency, to Theresa Pugh, Am. Pub. Power Ass'n (APPA) et al. (Nov. 4, 2010) ("We are in the process of narrowing the list of potential SERs for the Utility NESHAP outreach and in looking over APPA's list of potential SERs, it appears that some of the entities may not qualify as being 'small' by SBA's definitions . . .").

28 E-mail from Jeremy Bethancourt, LeBlanc Building Co., Inc., to Bruce Lundegren, Office of Advocacy (Apr. 14, 2011) ("We were a member of the NAHB through our local affiliation but have since decided not to renew with them because it did not appear to us and many of our peers that they were truly representing the interests of small businesses or the true interests of those subcontractors who work for builders..."). The National Association of Homebuilders nominated multiple small entity representatives for OSHA review panels.

representatives.²⁹ The Office of Advocacy e-mails a notice to its subscribers with EPA's request for self-nominations.³⁰ EPA could improve its outreach by publishing panel notices in trade publications, as well as in the *Federal Register*, and asking the Office of Advocacy to post requests on its website.

OSHA and CFPB do not normally solicit self-nominations or consistently post notices about upcoming panels on their websites, although both agencies will consider self-nominations they receive from small entities that contact them directly.³¹ However, for OSHA's upcoming panel on hazardous exposures to infectious diseases, the agency has solicited self-nominations in its bimonthly newsletter.³²

Most small businesses do not know about small business review panels, are not encouraged to participate in the process, and do not have an easy way of accessing information about forthcoming panels when they are interested in getting involved.

"Without our own diligence to be included in the Office of Advocacy process, the American Sustainable Business Council and our network of organizations and businesses would have no idea these panels were taking place," said David Levine, president and CEO of the American Sustainable Business Council. "I can say with a high degree of certainty that very few if any of the 200,000 businesses that make up the Council have ever been included in SBAR outreach. We must ensure that the broad business community is participating in this work."

Recommendation: Agencies should have a consistent process for directly reaching out to potential small entity representatives and permitting self-nominations. The agencies should have a standardized procedure for soliciting self-nominations and make the announcements of panels easily accessible in a centralized location on their websites. To broaden their reach, the agencies should publish the announcements in relevant trade publications, as well as in the *Federal Register*, and request that the Office of Advocacy post announcements on its website.

"I can say with a high degree of certainty that very few if any of the 200,000 businesses that make up the Council have ever been included in [review panel] outreach. We must ensure that the broad business community is participating in this work."

- David Levine, president and CEO of the American Sustainable Business Council

29 *E.g.*, News Release, U.S. Env'tl. Prot. Agency, Small Business Panel to Reconsider Regulatory Exemptions for Insect Repellents (Nov. 9, 2009), available at <http://1.usa.gov/1pVYi08> ("This action is the first time EPA has invited small businesses to self-nominate for participation in the panel process."); News Release, U.S. Env'tl. Prot. Agency, EPA Seeks Small Entity Participation on Upcoming Medium- and Heavy-Duty Greenhouse Gas Emissions Standards (Apr. 2, 2014), available at <http://yosemite.epa.gov/opa/admpress.nsf/596e17d7cac720848525781f0043629e/004d06c9e520aeba85257cae005e42f7!OpenDocument>.

30 Interview with Officials at EPA, in Washington, DC (Feb. 24, 2014).

31 See *infra* Appendices C-D.

32 OSHA to Convene Small Business Review Panel on Infectious Diseases, OSHA TAKES, June 16, 2014, <http://www.osha.gov/as/opa/quicktakes/qt061614.html#12>.

C. Failure to Verify Small Entity Representatives' Eligibility Undermines the Purpose of Review Panels

All three agencies lack formal procedures for verifying that potential small entity representatives are eligible to participate in the small business review panel process and do not require potential small entity representatives to submit signed verification letters certifying that they are small businesses. The agencies' failure to formally and consistently verify eligibility opened up the selection process to improper influence by trade associations and their big business members.

EPA, OSHA, and CFPB do contact potential small business representatives to confirm their small entity status and their willingness to participate in the panel process, but none of the agencies has a formal policy of verifying eligibility. EPA may also look at the entities' websites, receipts, and number of employees to verify whether they meet small business size standards, but there is no signed verification requirement.³³ CFPB's additional verification steps involve checking financial reports for depository institutions or asking the entity about its revenue if it is a non-depository institution for which financial reports are unavailable.³⁴ OSHA's usual practice is to send a letter or e-mail to the potential representatives asking them to explain how they meet the definition of a small entity, but staff report that they do not require potential small entities to certify their eligibility.³⁵

Additionally, the agencies lack clear criteria for defining trade association eligibility. EPA permits trade association representatives to act as small entity representatives, provided they "exclusively or at least primarily represent potentially regulated small entities."³⁶ EPA's guidance suggests, "To avoid the appearance of conflict of interest, you should apply a general 'reasonable person' rule, that is, ask yourself if a 'reasonable person' would conclude that this potential representative is capable of truly representing only the interests of small entities."³⁷

The selection of small entity representatives to advise EPA's Boiler MACT Panel illustrates how the agency's guidance has failed to guard against participation by large industry-dominated trade associations. For this panel, Office of Advocacy recommended that EPA select representatives from the American Forest and Paper Association (only 29 percent of its members were small businesses), Council of Industrial Boiler Owners (only 18 percent of members were small businesses), and American Home Furnishings Alliance (some members were importers, not manufacturers) to participate as small business representatives. In response to a request from EPA for additional information on how these trade associations qualify as small entity representatives, Advocacy

³³ EPA SBREFA GUIDANCE, *supra* note 11, at 59; Interview with Officials at EPA, in Washington, DC (Feb. 24, 2014).

³⁴ CFPB SBREFA GUIDANCE, *supra* note 11; Interview with Officials at CFPB, in Washington, DC (Feb. 19, 2014).

³⁵ Interview with Officials at OSHA, in Washington, DC (Feb. 7, 2014).

³⁶ EPA SBREFA GUIDANCE, *supra* note 11, at 58.

³⁷ *Id.*

replied that one of the reasons it recommended these representatives was because they were familiar with small business concerns and had helped in the past.³⁸

These trade associations clearly did not meet the eligibility criteria in EPA's guidance. Nevertheless, the agency accepted the representatives from the American Forest and Paper Association and American Home Furnishings Alliance for the panel, and allowed the same representative from the Alliance to advise its Formaldehyde Panel. Although EPA did not select the representative from the Council of Industrial Boiler Owners, he was still able to attend EPA's informal outreach meeting and submit comments to the panel. He also participated on two previous small business review panels.

For EPA's Section 126 Petitions Panel, the agency invited multiple representatives and lobbyists for the National Federation of Independent Business (NFIB) to attend a pre-panel outreach meeting with potential small entity representatives and ultimately selected one of those representatives to advise the panel.³⁹ NFIB does not represent small businesses.⁴⁰ Even officials at the Office of Advocacy recognize this fact, noting in an e-mail, "Since when does NFIB represent small business? I mean, really."⁴¹ But the Office of Advocacy official who oversees OSHA panels acknowledged he uses NFIB to identify potential small entity representatives.⁴²

OSHA's written policy is to permit trade associations to serve as small entity representatives if they are "primarily made up of small businesses."⁴³ Because CFPB has no written policy on whether trade associations can participate as small entity representatives, it has no eligibility definition in place, and thus, no verification policy.

Recommendation: To ensure agencies are hearing from actual small entities affected by a rule, each agency should adopt a formal policy for verifying that small entity representatives satisfy the eligibility requirements for participating on a panel. At minimum, the agencies should provide the eligibility criteria in writing to all potential representatives and require that they certify in writing their compliance with the criteria. Failure to do so should disqualify the potential small entity from advising the panel unless the agency can independently verify that the person meets the definition and provides its reasoning for this determination in the panel report.

38 E-mail from Nicole Owens, U.S. Envtl. Prot. Agency, to Thomas Sullivan, Office of Advocacy et al. (Oct. 10, 2008) ("Before making a final decision, EPA requests information on how the individuals/organizations SBA recommended adding meet the criteria of a small entity representative. 1. Tim Hunt . . . AF&TA [sic] reports that only 25 of 85 (or 29 percent) of its members are small business. 2. Robert Bessette . . . CIBO maintains that approximately 17 or 18 percent of it [sic] members are small businesses. . . . 3. Bill Perdue . . . While 75 percent of the members of AHFA are small entities, an unspecified number of these entities are importers, rather than manufacturers."); E-mail from Keith Holman, Office of Advocacy, to Nicole Owens, U.S. Envtl. Prot. Agency et al. (Oct. 10, 2008).

39 See FINAL REPORT OF THE SBREFA SMALL BUSINESS ADVOCACY REVIEW PANEL ON EPA'S PLANNED PROPOSED RULE FOR RESPONDING TO PETITIONS UNDER SECTION 126 OF THE CLEAN AIR ACT 6-7, attachment A, 10-11, 27-28 (1998).

40 See Ctr. for Media & Democracy, *National Federation of Independent Business*, SOURCE WATCH, [http://sourcewatch.org/index.php?title=National Federation of Independent Business](http://sourcewatch.org/index.php?title=National_Federation_of_Independent_Business) (last modified July 28, 2014); J.D. Harrison, *Nation's Largest Small-Business Group Faces Fresh Skepticism Over New Link to ALEC*, WASH. POST ON SMALL BUS. BLOG (Aug. 7, 2014), http://www.washingtonpost.com/business/on-small-business/nations-largest-small-business-group-faces-fresh-skepticism-over-new-link-to-alec/2014/08/06/15cdd8a8-1d7f-11e4-ab7b-696c295ddfd1_story.html.

41 E-mail from Kevin Bromberg, Office of Advocacy, to Jane Luxton, Pepper Hamilton, LLP (Apr. 18, 2011) (discussing small business trade association representatives that should be on a list of attendees for a meeting with EPA's Deputy Administrator on Apr. 21, 2011).

42 Interview with Officials at SBA Office of Advocacy, in Washington, DC (July 31, 2014).

43 OSHA SBREFA Guidance, *supra* note 11. No specific definition of "primarily" is included in the guidance.

Each agency should provide a clear, unambiguous definition of trade association eligibility to participate as a small entity representative.

D. Trade Associations Were Major Participants in the Panel Process

Since none of the agencies has established clear guidelines on trade association involvement in the panel process, representatives from industry trade associations do participate as small business advisors and some participate on multiple panels. Even if an individual is not chosen as a formal advisor, the trade association representative may participate as a “helper” to the actual advisor(s). This allows trade associations and their big business members an opportunity to voice general industry concerns at an early stage in a rule’s development, and their concerns may conflict with the concerns of actual small businesses.⁴⁴

i. Trade Associations Advised Small Business Review Panels

Our analysis of 20 panels convened since the Small Business Regulatory Enforcement Fairness Act’s enactment in 1996 found industry trade associations represented on most panels, either by a small business member of a trade association or by a trade association representative or attorney for the association.

Table 2 shows the limited data available to us. When we could find more complete information on trade association involvement, the number of trade association representative participants increased. We surmise that trade association involvement may be more prevalent than our numbers indicate. For example, for OSHA’s Cranes and Derricks Panel, the panel report did not identify small entity representative affiliations; however, a comment letter submitted by one representative indicated that over 50 percent of the small entity representatives advising the panel were members of Associated General Contractors.⁴⁵

44 See SIDNEY SHAPIRO & JAMES GOODWIN, CTR. FOR PROGRESSIVE REFORM, WHITE PAPER NO. 1302, DISTORTING THE INTERESTS OF SMALL BUSINESS: HOW THE SMALL BUSINESS ADMINISTRATION OFFICE OF ADVOCACY’S POLITICIZATION OF SMALL BUSINESS CONCERNS UNDERMINES PUBLIC HEALTH AND SAFETY 20 (2013), available at http://www.progressivereform.org/articles/SBA_Office_of_Advocacy_1302.pdf. (“In many cases, weaker regulatory requirements for large firms can actually have the perverse effect of harming small business—rather than helping them Regulatory subsidies for large firms can make it even more difficult for small businesses to remain competitive, inhibiting people’s ability to start these firms and sustain them over the long run.”); Keith W. Holman, *The Regulatory Flexibility Act at 25: Is the Law Achieving its Goal?*, 33 FORDHAM URB. L.J. 1119, 1124 (2006) (“Large companies with full-time regulatory compliance staffs may actually welcome new rules as a means to disadvantage and perhaps eliminate their small business competitors. While trade associations can be helpful to small businesses, many associations are controlled by large companies, leaving small businesses without a clear voice.”).

45 **OSHA Cranes and Derricks Panel:** Letter from Walt Lewicki, Am. Crane & Rigging, to Robert Burt, Occupational Safety & Health Admin. & Bruce Lundegren, Office of Advocacy (Sept. 5, 2006) (“Over 50% of SBREFA’s panel are listed as members of Associated General Contractors, (AGC).”).

Table 2: Number of Small Entity Advisors Selected for Small Business Review Panels, by Type

Agency	Year Panel Ended	Panel/Rule	Total Number of Small Entity Advisors*	Small Entity Advisors Who Were Business Owners and Represented a Trade Association	Advisors Who Represented Only a Trade Association
EPA	1998	Ground Water Panel	23	3 (13.0%)	0 (0%)
EPA	1998	Section 126 Petitions Panel	35	2 (5.7%)	31 (88.6%)
EPA	2000	Lead Paint Panel	20	4 (20.0%)	5 (25.0%)
EPA	2001	C&D Effluents Panel	19	1 (5.3%)	3 (15.8%)
EPA	2004	CWIS Panel	13	3 (23.1%)	0 (0%)
EPA	2008	Total Coliform Panel	13	1 (7.7%)	1 (7.7%)
EPA	2009	Boiler MACT Panel	15	1 (6.7%)	6 (40.0%)
EPA	2011	Utility MACT Panel	19	5 (26.3%)	0 (0%)
EPA	2011	Formaldehyde Panel	17	0 (0%)	6 (35.3%)
EPA	2011	Tier 3 Panel	45	0 (0%)	6 (13.3%)
OSHA	2003	Confined Spaces Panel	8	1 (12.5%)	0 (0%)
OSHA	2003	Electric Power Panel	19	0 (0%)	0 (0%)
OSHA	2003	Silica Panel	28	0 (0%)	0 (0%)
OSHA	2004	Hex Chrome Panel	26	1 (3.8%)	1 (3.8%)
OSHA	2006	Cranes and Derricks Panel	25	0 (0%)	0 (0%)
OSHA	2008	Beryllium Panel	13	0 (0%)	0 (0%)
OSHA	2009	Diacytyl Panel	18	1 (5.6%)	2 (11.1%)
CFPB	2012	TILA-RESPA Panel	16	1 (6.3%)	0 (0%)
CFPB	2012	Mortgage Servicing Panel	16	0 (0%)	0 (0%)
CFPB	2012	LO Comp Panel	17	2 (11.8%)	0 (0%)

* Our total numbers may vary slightly from the total number of advisors noted in the panel reports if the agency miscounted the number of advisors they listed or counted all representatives from a single company as one advisor.

Allowing trade association representatives (e.g., association staff, board members, lawyers, lobbyists, or consultants who are not connected to an established small entity directly affected by a rule) to advise the panel raises several concerns. Do the small entity representatives fairly represent the businesses who will be directly affected by a rule? Are actual small entity representatives less willing to participate and/or raise a different point of view when a representative of their trade association is present?⁴⁶ Do representatives of trade associations have a legitimate role to play in the small business review process?⁴⁷

46 Lanelle Wiggins, RFA/SBREFA Team Leader, U.S. Envtl. Prot. Agency, EPA's Small Business Advocacy Review Panel Process, Presentation at the Administrative Bar Association's Administrative Law Conference (Oct. 25, 2012) (stating that small entity representatives do not always feel they can be as candid when their trade association representative is present).

47 GAO 1998 REPORT, *supra* note 10, at 23 ("Some agency officials told us that they believe it was important for agencies to identify representatives from individual small entities and not to rely solely on representatives from associations. However, SBA's Office of Advocacy officials pointed out that representatives from associations may have more resources and expertise available to participate in the advocacy review panels than do individual small entities.").

Recommendation: Agencies should avoid the use of trade association representatives as designated small business advisors. A trade association representative should only be able to serve as a designated small business advisor to a panel if he or she can verify that the trade association is comprised primarily of small businesses *that are likely to be directly affected by the rule under review*. If an agency selects a representative from a trade association that includes large and small businesses, the agency should require the representative to certify in writing that he or she will restrict his or her comments to issues of concern to the association's small business members.

ii. Professional Small Entity Representatives

Because none of the agencies limit how many panels a small entity may advise, some small entity representatives have become “professional advisors.” Although all three agencies are subject to this problem, EPA has completed far more review panels than either OSHA or CFPB and so presents more evidence that this is a problem. In fact, one “professional” small entity representative, Jeffrey Longworth, a Washington, DC lawyer and former lobbyist, touts his participation on seven EPA panels (we were only able to confirm his role in four of the panels we reviewed).⁴⁸ Longworth even delivered a presentation alongside EPA and Office of Advocacy representatives on the small business review panel process.⁴⁹

Another “professional” small entity representative is Jack Waggener, who presently serves as Senior Principal and Engineering Manager at URS Corporation, an engineering, construction, and technical services organization that operates in roughly 50 countries and employs over 50,000 people.⁵⁰ Waggener previously served as the president of Resource Consultants, Inc., an environmental consulting firm. Throughout his career, Waggener has advised at least eight panels as a consultant for various industry trade associations and businesses.⁵¹ He advised seven EPA panels (six as a small entity representative and one as a “streamlining representative”) and one OSHA panel (as a “helper” for electroplating industry small entity representatives). Other “professional” advisors include representatives of the Council of Industrial Boiler Owners, American Public Power Association, Grocery Manufacturers Association, American Home Furnishings Alliance, National Marine Manufacturers Association, and the National Association of Manufacturers.

Every small entity representative chosen to advise EPA's Section 126 Petitions Panel has gone on to advise another panel. Similarly, for EPA's Ground Water Panel, 19 of the 23 small entity representatives who advised the panel have also advised at least one other small business review panel. While selecting individuals who

⁴⁸ Jeffrey Longworth, Barnes & Thornburg, LLP, Building Successful SBREFA Panels, Presentation at the Administrative Bar Association's Administrative Law Conference (Oct. 25, 2012).

⁴⁹ *Id.* Longworth indicated, “SERs must gain traction with at least one and preferably two of the three panel entities [Regulating Agency, Office of Advocacy, and OIRA]. If you can only influence one, make them committed to defending the issue. Influence the regulating agency and you are likely to be successful.”

⁵⁰ URS CORP., FACT SHEET (2014), available at http://www.urs.com/content/wp-content/uploads/sites/22/2014/06/URS_Fact_Sheet_3Page_0614.pdf.

⁵¹ Waggener has participated in these panels on behalf of Resource Consultants, Inc., National Oil Recyclers Association, Porcelain Enamel Institute, National Aquaculture Association, and URS Corp. (for Associated General Contractors of America, Associated Builders and Contractors, American Shortline and Regional Railroad Association and electroplating entities).

have previously advised panels may make it easier for the agencies to fill panel representative slots, use of these “professional” small entity representatives means genuine small businesses have fewer opportunities to be included.

Recommendation: Agencies should establish policies limiting the ability of small entity representatives to advise multiple panels. Further, agencies should set out criteria stipulating when representatives may and may not advise multiple panels. If a representative from an affected small entity not previously consulted is available to participate on a panel, his or her participation should be given priority.

iii. Small Entity Representative “Helpers” and Non-Small Entity Representative Participants

All three of the agencies permitted non-small entity representative participants, or “helpers,” to attend panel meetings or listen in on teleconferences,⁵² help small entity representatives draft comments,⁵³ and even submit their own comments to the panel.⁵⁴ For example, for EPA’s CWIS Panel, a small entity representative explained that she consulted with a helper from the American Forest and Paper Association in preparing her comments.⁵⁵

None of the agencies normally identifies these “helpers” in its panel reports, although EPA has done so on at least one occasion.⁵⁶ None of the agencies requires the helpers to meet the criteria for being an eligible small entity

52 **EPA CWIS Panel:** FINAL REPORT OF THE SMALL BUSINESS ADVOCACY REVIEW PANEL ON EPA’S PLANNED PROPOSED RULE FOR COOLING WATER INTAKE STRUCTURES AT SECTION 316(B) PHASE III FACILITIES 19 (2004) (listing representatives from the National Petrochemical and Refiners Association, American Forest and Paper Association, and American Public Power Association as “associations supporting small entities” on the panel); **OSHA Electric Power Panel:** E-mail from Kathleen Martinez, U.S. Dep’t of Lab., to Charles Maresca, Office of Advocacy (May 13, 2003) (requesting from the Office of Advocacy “a list of the people from the trade associations who will be attending” and “their names and affiliations” for OSHA’s meeting with SERs); **OSHA Diacetyl Panel:** E-mail from Bruce Lundgren, Office of Advocacy, to Bruce Lundgren, Office of Advocacy, and undisclosed distribution list (May 18, 2009) (“FYI to trade association reps, the SBREFA panel meetings for Diacetyl are being held at OSHA tomorrow . . . They are open to the public on a first-come, first-served basis, but only actual SERs are allowed to call in to the conference call or to speak.”). Other than this e-mail, there is no indication that OSHA opens its panel meetings to the public, and in fact, OSHA’s outreach meetings are held by conference call. Further, OSHA representatives told Center for Effective Government staff that they would accommodate in-person attendees, but in-person attendees are uncommon. Interview with Officials at OSHA, in Washington, DC (Feb. 7, 2014). **CFPB Mortgage Servicing Panel:** E-mail from Rachel Ross, Consumer Fin. Prot. Bureau, to Shagufta Ahmed, Office of Mgmt. & Budget et al. (Apr. 23, 2012) (“Please remember that each Small Entity Representative is permitted one guest, and only the small entity representative may speak during the meeting.”).

53 **EPA CWIS Panel:** Letter from David Borland, Dover Mun. Light Plant, to Alexander Cristofaro, U.S. Env’tl Prot. Agency (Apr. 13, 2004) (“The comments were supplied to Dover Light & Power as a member of American Public Power Association (APPA) and I would like to include them as an addendum to my previously submitted comments.”); E-mail from Mike Pearlstein, Associated Builders & Contractors, to Charles Maresca, Office of Advocacy (May 19, 2003) (“Okay, well, I’m sending this document (tidied up, of course) to my SERs. I don’t think they’re going to want to digest much more anyhow. They’re [sic] going to try to get as close to the deadline as possible.”); **OSHA Diacetyl Panel:** E-mail from Lawrence Halprin, Keller & Heckman, LLP, to Bruce Lundgren, Office of Advocacy (May 19, 2009) (sending on the day of OSHA’s SER outreach meeting some “possible discussion points for SBREFA SER Meetings on Diacetyl”).

54 **OSHA Silica Panel:** Letter from Henry Chajet, Patton Boggs, LLP et al., to Kathleen Martinez, U.S. Dep’t of Lab. (Nov. 25, 2003) (submitting comments “which reflect concerns raised by a number of small entity representatives, including TPI Arcade, Inc., which have approved our submission on their behalf”); **CFPB LO Comp Panel:** Compare E-mail from Jennifer Smith, Office of Advocacy, to Marc Savitt, Nat’l Ass’n of Indep. Hous. Prof’ls (NAIHP) (June 12, 2012) (“Only the SERs can submit comments during the SBREFA process. NAIHP can submit comments during the comment period for the NPRM for the LO comp rule.”), with Letter from Marc Savitt, NAIHP, Brian Benjamin, N.J. Ass’n of Prof’l Mortg. Originators, Carol Gardner, Ill. Ass’n of Mortg. Prof’ls, Marty Lough, Wash. Ass’n of Mortg. Prof’ls & Maryann Pino, N.Y. Ass’n of Mortg. Brokers (June 4, 2012) (submitting a joint comment letter, although Carol Gardner was the only actual SER selected to advise this panel).

55 **EPA CWIS Panel:** E-mail from Eveleen Muehlethaler, Port Townsend Paper Corp., to Alexander Cristofaro, U.S. Env’tl. Prot. Agency (Mar. 30, 2004) (submitting written comments to the panel).

56 FINAL PANEL REPORT OF SMALL BUSINESS ADVOCACY REVIEW PANEL ON EPA’S RULEMAKING FOR HAZARDOUS AIR POLLUTANTS FROM COAL- AND OIL-FIRED ELECTRIC UTILITY STEAM GENERATING UNITS 17-18 (2011) (listing the representatives from National Rural Electric Cooperative Association, American Public Power Association, Edison Electric Institute, Hunton and Williams, LLP, and J.E. Chicanowicz, Inc., who participated “as viewers/technical backup that augmented the SERs and provided comment but did not act as SERs”).

representative. Moreover, the small entity representatives do not have to identify an assigned helper; rather, the helpers can simply let the representatives know that they are available to help.⁵⁷

Allowing helpers and other non-small entity representatives to participate on panels creates the potential for trade associations and their big business members to inappropriately interfere with the panel process without ever being identified in the materials or the panel report. For example, during one EPA panel, a representative of the American Forest and Paper Association contacted all the small entity advisors and set a meeting to talk about the panel ahead of attending the agency outreach meeting.⁵⁸ Then, this trade association representative sent around notes about the call and assigned issue areas to each of the small entity advisors.⁵⁹ The same association representative set up a second “debriefing” after the panel outreach meeting.⁶⁰ EPA did not report any of this activity in its panel report.

“During one EPA panel, a representative of the American Forest and Paper Association contacted all the small entity advisors and set a meeting to talk about the panel ahead of attending the agency outreach meeting. Then, this association representative sent around notes about the call and assigned issue areas to each of the small entity advisors. The same association representative set up a second ‘debriefing’ after the panel outreach meeting. EPA did not report any of this activity in its panel report.”

In anticipation of OSHA’s Silica Panel, the Brick Industry Association (responsible for multiple small entity representative nominations) asked the Office of Advocacy for advice on how trade associations should strategize to

57 **OSHA Electric Power Panel:** E-mail from Charles Maresca, Office of Advocacy, to Anita Drummond, Associated Builders & Contractors, Jonathan Glazier, Nat’l Rural Electric Coop. Ass’n, Charles Maresca, Office of Advocacy, Dave Potts, Nat’l Elec. Contractors Ass’n & John Masarick, Indep. Elec. Contractors, Inc. (Apr. 23, 2003) (“[Y]ou should call your members who are on the panel. Let them know you are there for them, etc. Do I need to make an inspirational speech here? I am attaching a list; call me if you need their phone numbers and email addresses.”). *But see* Interview with Officials at SBA Office of Advocacy, in Washington, DC (July 31, 2014) (indicating that it is problematic if current practice permits “helpers” absent a request from a SER).

58 **EPA Boiler MACT Panel:** E-mail from Tim Hunt, Am. Forest & Paper Ass’n, to Jeff Brediger, Orrville Utils. et al. (Feb. 5, 2009) (“I thought it would be helpful if we talked amongst ourselves before the Boiler GACT/MACT meeting/call next Thursday, February 10th with EPA. . . . I’ve looked over the material a bit and identified a number of concerns . . .”).

59 **EPA Boiler MACT Panel:** E-mail from Tim Hunt, Am. Forest & Paper Ass’n, to Jeff Brediger, Orrville Utils. et al. (Feb. 9, 2009) (“To fellow SERs – here is my attempt to capture what we talked about on today’s call plus breaking down the issues we identified, assigning them to various participants (I took the first item), and then jotted down a few points to get things going. Please let me know if you are comfortable with ‘your assignment’ or would like to cover something different or in addition to what you have next to your name. feel [sic] free to redline the document and send back edits to everyone.”).

60 **EPA Boiler MACT Panel:** E-mail from Tim Hunt, Am. Forest & Paper Ass’n, to Andy Nelson et al. (Feb. 23, 2009) (“Eveleen and I have put together these draft comments to EPA on the boiler MACT and GACT. . . . Most of it is restating points that came up at the 2/10 meeting but well worth repeating or saying with more emphasis. . . . Let us know if we say anything that creates a major heartburn. . . . If folks think a quick conference call would be useful, I’d be glad to set it up tomorrow morning at 10 or 11 AM since we didn’t do any debrief from the 2/10 meeting. Please let me know.”).

use the panel process most effectively.⁶¹ Additionally, representatives from the National Industrial Sand Association agreed to assist its two small entity representative nominees “in a staff capacity their work for the panel.”⁶²

Another trade association representative for Mason Contractors Association of America asked the Office of Advocacy if he would get copies of the panel materials provided to small entity representatives “so [he] can do all the work for [his] nominees?”⁶³ This same representative participated during OSHA’s outreach meeting, which was held over two days with a one-day break in between. During the break, the trade group representative sent an e-mail to several small entity representatives and non-small entity representative participants, noting the issues that should be the focus during the second day of the meeting.⁶⁴

Prior to the deadline for submitting comments to CFPB’s LO Comp Panel, a non-small entity representative, the president of the National Association of Independent Housing Professionals, sent an e-mail to “All SERs and other Housing Professionals” with suggested alternatives to the rule.⁶⁵ The e-mail states, “Please feel free to use this language, or modify it in to [sic] your own words for your individual comment letters. However, be sure that it portrays the same message. Moreover, please send it to everyone you know in the housing industry (mortgage brokers, mortgage bankers, originators, real estate agents, etc[.]) and ask that they also submit comment letters supporting this exemption.”⁶⁶

61 E-mail from Joe Casper, Brick Indus. Ass’n, to Charles Maresca, Office of Advocacy (Oct. 6, 2003) (“[I]f we have two substantial areas in which we want to emphatically convey our views, does it make sense for one of our members to pose one argument and a second member to pose a second argument? More simply put: in the past, when you’ve witnessed various trade associations having effectively used the SBREFA panel process, were there any specific actions they took that ended up with the effect of those associations having been particularly persuasive?”).

62 E-mail from Bob Glenn, Nat’l Indus. Sand Ass’n, to Kathleen Martinez, U.S. Dep’t of Lab. et al. (Oct. 24, 2003) (“In preparing comments on the standard and framing answers to the issues you pose; [sic] it would be helpful if we could obtain in electronic format the documents that were included as enclosures in Mr. Burt’s letter of October 14, 2003. . . . In addition we would like to receive the package sent to the construction industry SERs and the full analytic report that the PIFRA summarizes.”).

63 E-mail from M.J. Marshall, Mason Contractors Ass’n of Am., to Charles Maresca, Office of Advocacy (Sept. 5, 2003).

64 E-mail from M.J. Marshall, Mason Contractors Ass’n of Am., to Jeff Ollier, Ollier Masonry Inc. et al. (Nov. 11, 2003).

65 E-mail from Marc Savitt, Nat’l Ass’n of Indep. Hous. Prof’ls (NAIHP), to Marc Savitt, NAIHP (June 7, 2012).

66 *Id.*

Table 3. Number of Non-Small Entity Participants Involved with Each Panel

Agency	Panel/Rule	Number of Non-Small Entity “Helpers” and Other Participants
EPA	Ground Water Panel	1
EPA	Section 126 Petitions Panel	6
EPA	Lead Paint Panel	3
EPA	C&D Effluents Panel	5
EPA	CWIS Panel	4
EPA	Total Coliform Panel	0
EPA	Boiler MACT Panel	6
EPA	Utility MACT Panel	6
EPA	Formaldehyde Panel	2
EPA	Tier 3 Panel	4
OSHA	Confined Spaces Panel	2
OSHA	Electric Power Panel	5
OSHA	Silica Panel	16
OSHA	Hex Chrome Panel	5
OSHA	Cranes and Derricks Panel	0
OSHA	Beryllium Panel	1
OSHA	Diacetyl Panel	7
CFPB	TILA-RESPA Panel	3
CFPB	Mortgage Servicing Panel	0
CFPB	LO Comp Panel	13

Recommendation: Agencies should formalize policies that significantly limit the role of “helpers” and other unofficial participants in the panel process. Agencies should only allow helpers to participate in the panel process upon receiving a written request from a small entity representative and should prohibit helpers from acting on behalf of small entity representatives by proxy, such as writing comment letters. Additionally, the agencies should clearly identify all helpers or unofficial participants, the small entity representatives with which they are affiliated, and any input they provided to the panel in any representative identification list made available to the public and in the final panel report.

iv. Office of Advocacy Encouraged Trade Association Participation

The Office of Advocacy actively encouraged trade associations to participate in the small business review panel process, in some instances even going so far as to suggest that a trade association participate instead of one of its small entity members.⁶⁷ Furthermore, the Office of Advocacy encouraged trade associations and their large

⁶⁷ **EPA Tier 3 Panel:** E-mail from Kevin Bromberg, Office of Advocacy, to Doug Greenhaus, Nat’l Auto. Dealers Ass’n et al. (May 12, 2011) (“Doug - please do not step down in favor of a member – you need to be a full participant.”); **OSHA Hex Chrome Panel:** E-mail from Charles Maresca, Office of Advocacy, to Tom Harman, Nat’l Ready Mixed Concrete Ass’n (Jan. 30, 2004) (“Kathy Martinez will be calling for the names and contact information of possible Small Entity Representatives for the Hex Chrome Panel. You should give her your own name and contact info, too.”).

industry members to serve as “helpers”⁶⁸ and encouraged these helpers to assist small entity representatives at panel outreach meetings and with preparing comments to submit to the panel.⁶⁹

For CFPB’s first small business review panel, the Office of Advocacy encouraged the agency to allow helpers to attend the meeting and provide assistance to their small entity members who were advising the panel. A letter from Advocacy, responding to the agency’s list of potential small entity representatives, states, “[S]ome of the SERs are members of trade associations such as, but not limited to, the Independent Community Bankers of America, the National Association of Mortgage Brokers, the National Association of Independent Housing Professionals, the American Land Title Association, and the American Bankers Association. Advocacy has found that also allowing additional representatives of the trade associations to attend the . . . meetings as observers and provide technical assistance to their members has proven beneficial to the overall process.”⁷⁰

For OSHA’s Confined Spaces Panel, a representative of the Associated General Contractors of America notified the Office of Advocacy that he was “working with our 3 members of the confined space SBREFA to complete our written comments by tomorrow.”⁷¹ The Office of Advocacy replied, “Make sure your three members submit individual comments. Even if they say exactly the same thing, it will carry more weight.”⁷²

Following OSHA’s Diacetyl Panel, Advocacy sent an e-mail to a long list of trade associations thanking them for their “help in identifying the SERs and assisting them in their review of the rule and preparation of comments to the panel.”⁷³

For EPA’s Utility MACT Panel, Advocacy even encouraged trade association involvement when the association itself recognized it does not represent small entities. An e-mail from the Office of Advocacy to the Edison

68 For EPA’s Utility MACT panel, the Office of Advocacy sought to have an ineligible small entity representative participate as a helper. After an EPA official explained that the individual would not be considered, a representative from American Public Power Association reached out to the Office of Advocacy staff and asked Advocacy to ask EPA to select the person. The Office of Advocacy replied by e-mail: “First of all Jeff Bridger can be a ‘helper’ to any one or more SERs, so he should attend the SER meeting and review SER documents. This can be arranged after the SER designations.” E-mail from Kevin Bromberg, Office of Advocacy, to Theresa Pugh, Am. Pub. Power Ass’n (APPA) & Jeff Brediger, Orrville Utils. et al. (Oct. 20, 2010). A subsequent e-mail from the Office of Advocacy states, “Theresa - remember all your larger members can serve as ‘helpers’ who can attend and help (they don’t need to be SERs), so all the help is appreciated.” E-mail from Kevin Bromberg, Office of Advocacy, to Theresa Pugh, APPA & David Rostker, Office of Advocacy (Nov. 4, 2010); **OSHA Electric Power Panel:** E-mail from Charles Maresca, Office of Advocacy, to Jonathan Glazier, Nat’l Rural Electric Coop. Ass’n et al. (Apr. 23, 2003) (“Please please please call your members who are SERs. Those that I have talked to are very willing to do all the work, but they are unfamiliar with the process and will need your assurances that we’re all in this together. I’d be happy to talk to them myself, if you think I need to.”) (attaching SER packets that were being sent to several trade association representatives whose members were selected to participate as advisors to the panel).

69 **OSHA Confined Spaces Panel:** E-mail from Charles Maresca, Office of Advocacy, to Robert Matuga, Nat’l Ass’n of Homebuilders (Aug. 18, 2003) (“I promised him that you would work with him to spot issues (which means I am going to nominate you to be a helper, so you can get the same packet he gets.”); **OSHA Electric Power Panel:** E-mail from Charles Maresca, Office of Advocacy, to John Masarick, Indep. Elec. Contractors Inc. (Feb. 26, 2003) (“[W]ould you consider serving as a helper? Panels can have these non-SER types who can serve as industry experts; they sometimes do all the work, in fact, but don’t speak during the teleconferences. That way, you can have access to the information as soon as it is provided to the official SERs. then [sic] you can bring in any input from any other members, if you think it would be helpful, and you could be consulting with Charlie and Chuck.”).

70 Letter from Winslow Sargeant, Office of Advocacy, to Kelly Cochran, Consumer Fin. Prot. Bureau (Feb. 17, 2012) (responding to the agency’s formal notification that a small business review panel will be convened).

71 E-mail from Edward Pachico, Associated Gen. Contractors of Am., to Charles Maresca, Office of Advocacy et al. (Oct. 23, 2003).

72 E-mail from Charles Maresca, Office of Advocacy, to Edward Pachico, Associated Gen. Contractors of Am. (Oct. 23, 2003).

73 E-mail from Bruce Lundegren, Office of Advocacy, to John Hallagan, Flavor & Extract Mfrs. Ass’n, Alison Bodor, Nat’l Confectioners Ass’n, Alan Kaiser, Nat’l Coffee Ass’n & Nancy Rachman, Grocery Mfrs. Ass’n et al. (July 10, 2009).

Electric Institute (EEI) and several other industry representatives sought information about the rule’s potential impact on small utilities ahead of the upcoming review panel.⁷⁴ The EEI representative replied, “Obviously, none of our members are considered a ‘small business.’”⁷⁵ Yet, in a subsequent response, Advocacy further suggested EEI participate in the panel process: “Well, I have potentially good news for you. The SBREFA process allows us to have large business or any other type of informal ‘helpers’ to advise us and the small entity reps on the rulemaking. . . . I think your expertise may be mutually advantageous if the SERs or I call upon you folks to share your expertise.”⁷⁶ Notably, EPA approved the representative from Edison Electric Institute to serve as a helper on this panel, despite his own admission that the association did not represent small business.

Recommendation: The Office of Advocacy should cease its practice of recommending trade association representatives as potential small entity advisors to the agencies and should instead recommend representatives of actual small entities. When the Office of Advocacy is aware of potential small entity representative “helpers” for a panel, the Office should forward the helper’s name and contact information to the regulating agency, just as the Office currently recommends potential small entity representatives to the agency. The regulating agency should make the final determination on whether a trade association may participate as a helper.

“An e-mail from the Office of Advocacy to the Edison Electric Institute (EEI) and several other industry representatives sought information about the [clean air] rule’s potential impact on small utilities ahead of the upcoming review panel. The EEI representative replied, ‘Obviously, none of our members are considered a “small business.”’ Yet, in a subsequent response, Advocacy further suggested EEI participate in the panel process.”

E. Office of Advocacy Met with Trade Associations and Small Entity Representatives Prior to Panel Convenings and Developed Content for their Comments

The Office of Advocacy held three types of meetings with external parties before or during the panel process: (1) roundtables, (2) small entity representative outreach meetings, and (3) informal meetings with representatives. Information regarding the content of these meetings (e.g., transcripts) is not available. Because discussions at these meetings often touched on small business review panels, and these meetings often occurred prior

⁷⁴ E-mail from Kevin Bromberg, Office of Advocacy, to Douglas Green, Venable, LLP, Theresa Pugh, Am. Pub. Power Ass’n & Thomas Grahame (Oct. 6, 2010).

⁷⁵ E-mail from Michael Rossler, Edison Electric Inst., to Kevin Bromberg, Office of Advocacy et al. (Oct. 7, 2010).

⁷⁶ E-mail from Kevin Bromberg, Office of Advocacy, to Michael Rossler, Edison Electric Inst. et al. (Oct. 7, 2010).

to or concurrently with those panels, they raise serious questions about the Office of Advocacy's role. If Advocacy divulged panel information that the agencies had not made public or if it relied on the discussion or recommendations that resulted from these meetings to form its position on the rules, then Advocacy may be improperly using its position on the review panel. Certainly, it cannot not claim to be objectively reviewing information from small businesses if Advocacy helps shape the comments the panel receives.

Roundtables: The Office of Advocacy hosts regular roundtables on regulatory activities with industry groups, at which SBREFA panels are a reoccurring subject of discussion.⁷⁷ A 2013 Center for Effective Government report raised concerns with the closed-door nature of these meetings and the appearance that these roundtables drive Advocacy's positions on many issues.⁷⁸ A recent investigative report by the Government Accountability Office (GAO) reinforced our concerns, finding that the Office of Advocacy fails to document activities surrounding its roundtables: "Information gathered from the roundtables is used to inform Advocacy's positions on issues related to small businesses and in comment letters, but Advocacy's guidance contains no policies to document roundtable discussions."⁷⁹ GAO also confirmed the Office of Advocacy's failure to publicize roundtable agendas or presentations. As a result, GAO concluded that "Advocacy cannot demonstrate that it is always fully meeting its mission to foster two-way communication between small businesses and federal policymakers."⁸⁰ These same concerns apply to Office of Advocacy's involvement in the SBREFA process.

Pre-Panel Outreach Meetings with Small Entity Representatives: Another potential concern is the Office of Advocacy's common practice of hosting pre-panel meetings with small entity representatives. Officials claim these meetings are intended to inform small entity representatives about the Office of Advocacy's role in the process and to provide them with an overview of the review panel process (although the latter topic would be duplicative of the information provided by the agency).⁸¹ Small entity representative "helpers" may also attend these meetings.⁸²

77 E-mail from Charles Maresca, Office of Advocacy, to Charles Maresca, Office of Advocacy, and undisclosed distribution list (Oct. 21, 2003) ("We have tentatively set Friday, November 14 as the date of our next OSHA roundtable. We will be giving a status report on current SBREFA panels."). The Office of Advocacy has also used roundtables as a way of identifying potential small entity representatives for EPA's Formaldehyde Panel. Letter from Winslow Sargeant, Office of Advocacy, to Alexander Cristofaro, U.S. Eno. Prot. Agency (Dec. 2, 2010) ("I recommend the addition of Laurie Holmes of the American Wood Council. I may also recommend additional participants based on interest expressed at the Small Business Environmental Roundtable, scheduled for December 10.").

78 RANDY RABINOWITZ ET AL., CTR. FOR EFFECTIVE GOV'T, SMALL BUSINESSES, PUBLIC HEALTH, AND SCIENTIFIC INTEGRITY: WHOSE INTERESTS DOES THE OFFICE OF ADVOCACY AT THE SMALL BUSINESS ADMINISTRATION SERVE? (2013), available at <http://foreffectivegov.org/files/regs/office-of-advocacy-report.pdf>.

79 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-14-525, SMALL BUSINESS ADMINISTRATION: OFFICE OF ADVOCACY NEEDS TO IMPROVE CONTROLS OVER RESEARCH, REGULATORY, AND WORKFORCE PLANNING ACTIVITIES 18 (2014), available at <http://www.gao.gov/assets/670/665104.pdf> (finding that the Office of Advocacy has failed to develop and implement procedures necessary to ensure the office is effectively carrying out its mission of representing small businesses before federal agencies).

80 *Id.* at 17.

81 **EPA Utility MACT Panel:** E-mail from David Rostker, Office of Advocacy, to Allen Bonderman, Atl. Mun. Utils. et al. (Nov. 22, 2010) ("I understand that some of you are new to this process and might appreciate an opportunity to talk amongst yourselves in advance of the meeting with EPA on December 2. If you are able, please join me on Monday, 11/29 at 2:00 here at SBA in Washington or via phone to discuss this panel, answer any questions you may have, or identify problems you see coming.").

82 Interview with Officials at SBA Office of Advocacy, in Washington, DC (July 31, 2014).

Although the Office of Advocacy staff said they always invite staff from the rulemaking agency to attend these pre-panel meetings, in some cases, agency staff reported being unaware that Advocacy had convened such gatherings.⁸³ EPA officials we interviewed said they were aware of at least one meeting with small entity representatives held prior to a panel convening that Advocacy did not invite EPA to attend.⁸⁴ OSHA did not find out about Advocacy's pre-panel meetings with potential small entity representatives until relatively recently.⁸⁵ CFPB, however, was aware that the Office of Advocacy hosted these pre-panel meetings for all three of its panels included in our review.⁸⁶ CFPB joined these meetings but did not actively participate in discussions.⁸⁷

Of particular concern is that no transcript of these pre-panel meetings is publicly available to ensure that they did not involve a substantive discussion of the rule under development. The Office of Advocacy told Center for Effective Government staff that these conversations go beyond discussing the office's role in the panel process. Discussion on substantive issues is common, and Advocacy helpers may suggest ways that the small entity representatives could most effectively frame their talking points in comments to the panel.⁸⁸ As with the roundtables, the lack of any record regarding call participants and discussion presents an opportunity for non-small entity representatives to obtain advance information on rules that is not available to the public.⁸⁹

Other Informal Meetings and Communications: We found that the Office of Advocacy also joined informal meetings and communications with small entity representatives and trade association representatives while the review panel process was ongoing.⁹⁰ Prior to EPA officially convening the Tier 3 Panel, the vice president of

83 Office of Advocacy staff told Center for Effective Government staff that they always invite the agencies to these meetings, but our interviews with EPA and OSHA staff indicated that this is not always the case.

84 Interview with Officials at EPA, in Washington, DC (Feb. 24, 2014) (explaining that the agency was aware of one meeting with small entity representatives for EPA's panel on National Emissions Standards for Hazardous Air Pollutants: Brick and Structural Clay Products and Clay Products (commonly referred to as Brick MACT)).

85 Interview with Officials at OSHA, in Washington, DC (Feb. 7, 2014) (explaining that they only found out about the meeting when a small entity representative mentioned it in passing).

86 *E.g.*, **CFPB TILA-RESPA Panel:** E-mail from Jennifer Smith, Office of Advocacy, to Jennifer Smith, Office of Advocacy, and undisclosed distribution list (Feb. 29, 2012) ("The Office of Advocacy recognizes that you may have questions about the SBREFA panel process and your role as a SER. As such, Advocacy will hold a short conference call on Friday, March 2 at 2 pm to answer your questions.").

87 Interview with Officials at CFPB, in Washington, DC (Feb. 19, 2014); *see also, e.g.*, **CFPB TILA-RESPA Panel:** E-mail from Jennifer Smith, Office of Advocacy, to Shagufta Ahmed, Office of Mgmt. & Budget (Mar. 2, 2012) ("We're doing a quick informal conference call at 2 pm to discuss the role of the SER with the SERs, explain Advocacy's role in the process, and to answer any questions that the SERs may have. We are not discussing the substance of the rule. However, the CFPB has asked to listen in. If you would like to listen to the call, you may.").

88 Interview with Officials at SBA Office of Advocacy, in Washington, DC (July 31, 2014); *see also* **OSHA Silica Panel:** E-mail from Charles Maresca, Office of Advocacy, to Chris Scott, TT Barge Inc. et al. (Oct. 28, 2003) ("In order to answer any questions you might have about the Office of Advocacy, or the Small Business Regulatory Enforcement Fairness Act and our role in the SBREFA process, I am setting up a conference call for Thursday morning, October 30, at 10 a.m. Eastern. This will be an INFORMAL conference call to address any concerns you have about the SBREFA process or the information you received from OSHA.") (copying officials from OSHA and OIRA on the e-mail).

89 For example, at Office of Advocacy's pre-panel meeting with small entity representatives regarding CFPB's TILA-RESPA Panel, non-representatives were permitted to participate. E-mail from Jennifer Smith, Office of Advocacy, to Larry Winum, Glenwood State Bank (Feb. 29, 2012) ("I spoke with my director. Your compliance officer may participate in the conference call on Friday for you.").

90 **OSHA Confined Spaces Panel:** E-mail from Charles Maresca, Office of Advocacy, to Charles Maresca, Office of Advocacy, and undisclosed distribution list (Apr. 28, 2003) ("If you have a chance in the next week or two to discuss confined spaces with your members, ask them how they would like to see OSHA write the new rule. Do they think a rule that would look just like the general industry confined spaces rule would work in construction? . . . Do we even need a new rule?"); **CFPB TILA-RESPA Panel:** E-mail from Jim Hyland, Pa. Ave. Grp., to Jennifer Smith, Office of Advocacy (Mar. 22, 2012) ("As I mentioned, I work as outside counsel to the Texas Land Title Association. Would you have time for a conference call on Monday anytime or Tuesday afternoon with Celia Flowers and Janet Minke, who were present at the SBREFA meeting?"); E-mail from Jennifer Smith, Office of Advocacy, to Jim Hyland, Pa. Ave. Grp. (Mar. 22, 2012) ("I am available Tuesday afternoon.").

Gary-Williams Energy Corporation set up a meeting with the Office of Advocacy.⁹¹ An e-mail the vice president sent after the meeting suggests Advocacy may be promoting certain positions, not simply gathering comments: “Thank you so much for that very informative and challenging call yesterday! We all greatly appreciate your insight and advice. You will note that we were unable to incorporate your suggestions in the comments submitted this morning. There simply has not been time to compile additional information, etc. We certainly plan to try to address those concerns, however, as this process moves forward.”⁹²

Similarly, we found that the Office of Advocacy joined meetings of an informal group of construction industry trade associations, called the Construction Association Safety and Health Information Network (CASH-IN) while three OSHA panels were underway (Confined Spaces,⁹³ Silica,⁹⁴ and Hex Chrome⁹⁵). Following the CASH-IN meeting for OSHA’s Confined Spaces Panel, the Associated Builders and Contractors sent an e-mail to the Office of Advocacy with a one-page summary of “the collective view of the CASHIN staff representatives from the construction trade associations”⁹⁶

At the CASH-IN strategy session held on OSHA’s planned rule to limit workers’ exposure to silica, “it was decided that each of the trade associations that had already identified issues that should be further investigated by the SERs would be sent to all the other members so everyone would have a copy of potential issues.”⁹⁷ The e-mail continues, “Then each of us could cut and paste these issues into any of our documents that we will be sending to our members that sit on the SBREFA panel.”

Advocacy staff also offered input on a data request submitted to OSHA, prepared by a trade association for a small entity representative to submit.⁹⁸ Following OSHA’s outreach meeting, Advocacy staff also participated on

91 E-mail from Sally Allen, Gary-Williams Energy Corp. (GWEC), to David Rostker, Office of Advocacy (June 30, 2011) (“David--The small refiner SERs would very much like to visit with you by conference call on July 11 to share some of our ideas on both SBREFA panels and possible flexibilities and to get your good advice on our concerns.”); *see also* E-mail from Sally Allen, GWEC, to David Rostker, Office of Advocacy (July 8, 2011) (“David -- The small refiner SERs are looking forward to visiting with you by phone on Monday about the upcoming SBREFA panels. Attached for your review are the draft comments we have developed together -- thinking that to the extent we can all agree we may have more impact on the panels and rulemakings. Your thoughts on these comments will be very helpful.”).

92 E-mail from Sally Allen, Gary Williams Energy Corp., to David Rostker, Office of Advocacy (July 12, 2011).

93 E-mail from Robert Matuga, Nat’l Ass’n of Homebuilders, to Bruce Lundegren, Office of Advocacy et al. (Sept. 30, 2003) (“We would like to have a CASHIN conference call to discuss the Confined Space SBREFA panel and draft regulatory text for the construction industry confined space standard.”).

94 E-mail from Edward Pachico, Associated Gen. Contractors of Am. (AGC), to Charles Maresca, Office of Advocacy et al. (Oct. 23, 2003) (“What do you see as significant issues for silica SBREFA and should we have a CASH-IN meeting like we did for confined spaces? I found that meeting useful in being able to target some key issues that were not obvious when I read through the written materials. Let me and the other members know if a silica strategy meeting is possible.”); E-mail from Charles Maresca, Office of Advocacy, to Edward Pachico, AGC (Oct. 23, 2003) (“Yes, we should have a CASHIN meeting, and it should include M.J. Marshall of the Mason Contractors Association.”); E-mail from Edward Pachico, AGC, to Yvonne Bowler, Associated Builders & Contractors et al. (Oct. 23, 2003) (“AGC is willing to host a meeting for the silica SBREFA on either Monday or Tuesday October 27th or 28th at any time. . . . It doesn’t give us much time to decide on a date, hold the meeting and get back to any of our members on the SBREFA panel with assistance before the conference call on November 10 and 12.”).

95 E-mail from Robert Matuga, Nat’l Ass’n of Homebuilders (NAHB), to Robert Matuga, NAHB, and undisclosed distribution list (Apr. 2, 2004) (“We would like to hold another CASHIN (construction association safety and health information network) meeting on Tuesday, April 6, 2004 from 10:00AM to Noon.”).

96 E-mail from Yvonne Bowler, Associated Builders & Contractors, to Charles Maresca, Office of Advocacy (Oct. 16, 2003).

97 E-mail from Edward Pachico, Associated Gen. Contractors of Am., to Anita Drummond, Associated Builders & Contractors et al. (Oct. 29, 2003).

98 **OSHA Silica Panel:** E-mail from M.J. Marshall, Mason Contractors Ass’n of Am. (MCAA), to Charles Maresca, Office of Advocacy (Oct. 29, 2003) (“Here’s my proposed list of information I think we need prior to the SBREFA panel discussion. I’d be interested in getting your comments on it.”); E-mail from Charles Maresca, Office of Advocacy, to M.J. Marshall, MCAA (Oct. 29, 2003) (“I think that’s a good start.”).

a conference call with trade association representatives and some small entity representatives to discuss writing comments to submit to the panel.⁹⁹

The day before OSHA held an outreach meeting with small entity representatives for its Hex Chrome Panel, the Office of Advocacy sent the representatives a list of possible alternatives to the rulemaking, which included exempting the construction industry and potentially other industries from the rule, weakening the standard by setting a less stringent permissible exposure limit, and providing a longer compliance period for small businesses.¹⁰⁰

After OSHA's Diacetyl Panel was formally convened, the Office of Advocacy reached out to the General Counsel for the Flavor and Extract Manufacturers Association (who also gave a presentation on diacetyl at Advocacy's roundtable meeting) to request information about naturally occurring diacetyl. The e-mail asked for input prior to the panel and noted, "SERs will need to be able to raise this issue."¹⁰¹ Within a few days, Advocacy received a letter and a series of attachments fulfilling its request for information.¹⁰²

These informal meetings raise serious questions about the Office of Advocacy's communications with third parties. Like the roundtables and pre-panel meetings, if the Office of Advocacy divulged information at these informal meetings not available to the public, or developed its positions based on consensus recommendations developed during these meetings, the Office may have acted improperly. These and other e-mails suggest the Office of Advocacy inappropriately collaborated with these industry representatives in developing the content of comments subsequently submitted to the small business review panel.

“The day before OSHA held an outreach meeting with small entity representatives for its hexavalent chromium panel, the Office of Advocacy sent the representatives a list of possible alternatives to the rulemaking, which included exempting the construction industry and potentially other industries from the rule, weakening the standard by setting a less stringent permissible exposure limit, and providing a longer compliance period for small businesses.”

99 **OSHA Silica Panel:** E-mail from M.J. Marshall, Mason Contractors Ass'n of Am. (MCAA), to Charles Maresca, Office of Advocacy (Nov. 13, 2003) (“We are having a conference call tomorrow at 10 to discuss comments. Are you allowed to participate?”); E-mail from Charles, Maresca, Office of Advocacy, to M.J. Marshall, MCAA (Nov. 13, 2003) (“No reason for me not to, from this end.”).

100 E-mail from Charles Maresca, Office of Advocacy, to Dan Stanton, Deveco et al. (Mar. 15, 2004).

101 E-mail from Bruce Lundgren, Office of Advocacy, to John Hallagan, Flavor & Extract Mfrs. Ass'n (May 8, 2009).

102 E-mail from Christie Gavin, The Roberts Grp., LLC, to Bruce Lundgren, Office of Advocacy et al. (May 13, 2009).

Recommendation: The Office of Advocacy should invite officials from the regulatory agency to attend and participate in all meetings Advocacy hosts with trade associations or small entity representatives to discuss active review panels. To avoid a potential conflict of interest, the Office of Advocacy should be precluded by policy from collaborating with representatives in developing comments submitted to panels.

F. The Public Was Left in The Dark

The public is excluded from the small business review process, giving industry advance access to information about rules under development.

i. EPA and CFPB Withheld Lists of Small Entity Representative Advisors Until a Proposed Rule Was Published

Neither EPA nor CFPB make information about small entity representatives available to the public until the agency releases the panel report, which occurs concurrently with the publication of the proposed rule. Unlike EPA and CFPB, OSHA makes its list of small entity representatives available to the public through the online docket at approximately the same time it shares information that it disseminated to the representatives.¹⁰³ However, if OSHA does not consistently provide a formal notice that this information is in the docket, then the agency has not adequately informed the public that the list is available.¹⁰⁴

As a result, members of the public have no opportunity to review the lists of small entity representatives and thus are unable to raise concerns about the small entity representatives until after the panels conclude, at which point it is too late for the agencies to meaningfully address those concerns. Concerns include whether the small entity representatives really represent small entities likely to be affected by a rule or whether potential conflicts of interest exist among participants.

Recommendation: Agencies should release the names and affiliations of small business advisors *prior* to the panel convening to afford the public an opportunity to raise concerns about diversity of representation or potential conflicts of interest. Agencies should post the information on their websites as well as in the rulemaking docket on the Regulations.gov website, and they should publish a notice in the *Federal Register* that provides a 30-day public comment period.

¹⁰³ Interview with Officials at OSHA, in Washington, DC (Feb. 7, 2014); e.g., OCCUPATIONAL SAFETY & HEALTH ADMIN., OCCUPATIONAL EXPOSURE TO DIACETYL AND FOOD FLAVORINGS CONTAINING DIACETYL SBREFA PACKAGE (2009), available at <http://www.regulations.gov/#!documentDetail;D=OSHA-2008-0046-0074> (posting materials to the docket on Apr. 30, 2009, which is 10 days after the date indicated on the letter to small entity representatives included in the outreach package).

¹⁰⁴ See News Release, Occupational Safety & Health Admin., U.S. Secretary of Labor Hilda L. Solis Announces Convening of Rulemaking Panel on Worker Exposure to Food Flavorings Containing Diacetyl (Apr. 28, 2009), available at https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=17819 (announcing the convening of a small business review panel on May 5, 2009, but not indicating that information about the small entity representatives would be made available in the rulemaking docket on the Regulations.gov website).

ii. The Public Had Limited Access to Panel Documents

EPA does not provide the public with information about rules under development at the same time it gives that information to small entity representatives. OSHA and CFPB share panel materials with the public but do not provide enough information on where to access those materials.

EPA has no procedure for preventing dissemination of panel materials to third parties, which means small entity representatives may share it with their trade associations, other businesses, etc. EPA simply asks the representatives not to share the information; the agency does not even label the documents as confidential.¹⁰⁵ Notably, EPA officials told Center for Effective Government staff that the panel would be most effective if materials were not shared with third parties. EPA staff also said some program officers have complained about information sharing by the small entity representatives. Nevertheless, EPA withholds all of the information shared with small entity representatives from the public until *after* the agency publishes the panel report, which does not occur until it formally publishes the proposed rule (which may be years after the panel has concluded).

EPA's practice of withholding panel materials from the public effectively gives big businesses an early stake in the development of a rule while excluding the public and other interested stakeholders.

Unlike EPA, OSHA makes materials provided to small entity representatives available to the public on the Regulations.gov website at roughly same time it disseminates the materials to the small entity representatives.¹⁰⁶ However, OSHA does not provide adequate notice that the panel materials are available in the online docket.

We also found that OSHA engages in the questionable practice of allowing third parties to review materials prior to sharing them with small entity representatives or making them publicly available. By way of example, a letter to OSHA from a representative of the Color Pigments Manufacturers Association, a trade association that represents pigment companies of varying sizes in the U.S., Mexico, and Canada,¹⁰⁷ revealed the representative was allowed to review an advanced copy of the panel materials for the Hex Chrome Panel. J. Lawrence Robinson, then-president of the association, wrote: "Thank you for providing me with the opportunity to review a preliminary copy of the proposed standard for hexavalent chromium, and the supporting background materials that the Occupational Safety and Health Administration (OSHA) plans to provide to the small entity representatives (SERs) during the SBREFA Panel process. OSHA's goal in providing this material to me and the other 'screeners' in advance of the SBREFA Panel process is to ensure small business the maximum opportunity

¹⁰⁵ Interview with Officials at EPA, in Washington, DC (Feb. 24, 2014).

¹⁰⁶ Interview with Officials at OSHA, in Washington, DC (Feb. 7, 2014); e.g., OCCUPATIONAL SAFETY & HEALTH ADMIN., OCCUPATIONAL EXPOSURE TO DIACETYL AND FOOD FLAVORINGS CONTAINING DIACETYL SBREFA PACKAGE (2009), available at <http://www.regulations.gov/#!documentDetail;D=OSHA-2008-0046-0074>. But see **OSHA Silica Panel**: E-mail from M.J. Marshall, Mason Contractors Ass'n of Am., to Charles Maresca, Office of Advocacy (Oct. 6, 2003) ("I asked OSHA for a copy of the materials and they won't provide them; they will only send them to the SBREFA panel participants. I'll have to get a copy from one of them.")

¹⁰⁷ Color Pigments Mfrs. Ass'n, PIGMENTS.ORG, <http://www.pigments.org/cms> (last visited Aug. 18, 2014).

for effective input during the Panel process.”¹⁰⁸ OSHA then allowed the “screener” to serve as a small entity representative to advise the panel.

CFPB also publicly shares materials provided to small business advisors during the panel process. The agency also posts these materials to its blog and invites the public to submit comments, but it does not consistently make this information available in the online docket at the same time and does not post the list of small business advisors to the panel.¹⁰⁹ CFPB could improve public access to panel materials by making them available on the Regulations.gov website at the same time it disseminates the materials to the advisors, similar to OSHA’s practice.

Recommendation: Agencies should release panel materials to the public at the same time they disseminate those materials to small entity representatives. Agencies should post the panel materials on their websites and in the rulemaking docket on the Regulations.gov website and clearly identify the materials as such. The agencies should publish a notice in the *Federal Register* that provides instructions on accessing these documents and allow the public to submit comments.

iii. Panel Reports on Small Business Concerns May Be Withheld Indefinitely

The policy at EPA and CFPB of withholding panel reports from the public until the agency publishes the proposed rule prevents timely access to critical information about a rule’s development.¹¹⁰ Because EPA also withholds panel materials from the public until it proposes a rule, industry interests (through their involvement in the panel process) have an unfair advantage in accessing information related to rule development. This policy is particularly problematic when the agency does not propose a rule until years after the small business review panel was completed, or worse, if the agency chooses to withdraw the rule entirely.

In 1998, the Government Accountability Office found, “[T]his approach has resulted in several months delay between the issuance of the panels’ final reports and their availability to the public.”¹¹¹ Our review of EPA panels

108 Fax letter from J. Lawrence Robinson, Color Pigments Mfrs. Ass’n, to Charles Maresca, Office of Advocacy & Robert Burt, Occupational Safety & Health Admin. et al. (Feb. 5, 2004).

109 Interview with Officials at CFPB, in Washington, DC (Feb. 19, 2014). For example, for CFPB’s first small business review panel on the integration of TILA and RESPA mortgage disclosure requirements, CFPB posted links to the outreach materials on its online blog and solicited comments from interested parties about the proposals under consideration. **CFPB TILA-RESPA Panel:** News Release, Consumer Fin. Prot. Bureau, CFPB Convenes Small Business Panel for Know before You Owe Mortgage Disclosures (Feb. 21, 2012), available at <http://www.consumerfinance.gov/newsroom/consumer-financial-protection-bureau-convenes-small-business-panel-for-know-before-you-owe-mortgage-disclosures/>; CFPB Mortgage Disclosure Team, *SBREFA, Small Providers, and Mortgage Disclosure*, CFPB.Gov (Feb. 21, 2014), <http://www.consumerfinance.gov/blog/sbrefa-small-providers-and-mortgage-disclosure/>; **CFPB Mortgage Servicing Panel:** News Release, Consumer Fin. Prot. Bureau, CFPB Outlines Borrower-Friendly Approach to Mortgage Servicing (Apr. 9, 2012), available at <http://www.consumerfinance.gov/newsroom/consumer-financial-protection-bureau-outlines-borrower-friendly-approach-to-mortgage-servicing/>; **CFPB LO Comp Panel:** News Release, Consumer Fin. Prot. Bureau, CFPB Considers Rules to Simplify Mortgage Points and Fees (May 9, 2012), available at <http://www.consumerfinance.gov/newsroom/consumer-financial-protection-bureau-considers-rules-to-simplify-mortgage-points-and-fees/>.

110 EPA SBREFA GUIDANCE, *supra* note 11; CFPB SBREFA GUIDANCE, *supra* note 11.

111 GAO 1998 REPORT, *supra* note 10, at 12-13 (“OSHA’s panel issued its final report to the Assistant Secretary for Occupational Safety and Health on November 12, 1996, and OSHA made the report publicly available on December 10, 1996—10 months before the draft rule was published as a proposed rule. . . . However, the EPA panels decided that they would make the final reports available to the public by placing them in the public rulemaking docket only when the related proposed rules were published in the *Federal Register*. This determination appears to be consistent with SBREFA’s procedural requirements and congressional intent. However, this approach has resulted in several months delay between the issuance of the panels’ final reports and their availability to the public.”) (citation omitted).

suggests a delay of several months can grow to several years. On average, the delay between the panel end date and the date EPA makes panel reports available to the public is 604 days (1.65 years), but it can stretch much longer.¹¹²

For example, EPA's Lead Paint Panel ended on March 3, 2000, but the agency did not publish the panel report until Jan. 10, 2006, 2,139 days after it completed the report. In another instance, EPA's Total Coliform Panel ended in March 2008, but the agency withheld the panel report for 835 days, finally posting it to the docket in July 2010. For the Ground Water Panel, EPA did not publish the report until 701 days after the panel ended.

CFPB is a relatively new agency and has had to operate on tight statutory timelines, and the delay between the panel end date and panel report posting date has not been as lengthy as at EPA. On average, CFPB made panel reports public 60 days after the panels concluded.

Furthermore, neither agency publishes the complete panel reports (with all appendices) in a centralized location on its website. EPA has a webpage devoted to review panels and includes links to the executive summary, panel report, and other related documents; however, the panel reports are missing all appendices and attachments. CFPB does not provide a webpage where it maintains a list of review panels or relevant materials. The Office of Advocacy has a webpage listing CFPB panels, but it does not currently have links to the panel reports posted to that page.¹¹³

Although OSHA publishes its panel reports once a panel concludes, it also does not provide a website where it lists all review panels or present links to relevant information. Instead, the agency redirects website visitors to the Office of Advocacy's website, where the list is outdated and incomplete.¹¹⁴

Recommendation: Agencies should publish panel reports as soon as they are completed and submitted to the agency head. Agencies should also develop policies and consistent procedures for publishing complete panel reports on the Regulations.gov website with all appendices and materials used to inform the panel members or small entity representatives attached. Agencies should also maintain centralized webpages with information about all past and upcoming panels, including all information related to those panels.

G. The Impact of the Panel Process on Proposed and Final Rules

Because of trade association influence on panels, input specific to genuine small businesses may not be reflected in the advice agencies receive about a rule's potential impacts on small businesses. The small entity

112 All specific delay calculations by Center for Effective Government staff.

113 Office of Advocacy, *CFPB SBREFA Panels*, U.S. SMALL BUS. ADMIN., <http://www.sba.gov/category/advocacy-navigation-structure/cfpb-sbrefa-panels> (last visited Aug. 25, 2014).

114 Office of Advocacy, *OSHA SBREFA Panels*, U.S. SMALL BUS. ADMIN., <http://www.sba.gov/category/advocacy-navigation-structure/regulatory-affairs/small-business-statutes/sbrefa/osha-sbrefa-panels> (last visited Aug. 25, 2014).

advisors typically raise small business-specific issues during panel meetings and in written comments, but trade association representatives participating as small entity representatives or “helpers” often manipulate the conversation to include general, industry-wide issues, rather than concerns specific to small businesses. As a result, panel recommendations, and the proposed and/or final rule, may reflect those general industry concerns.

Consequently, the SBREFA panel process, as it currently operates, is not an effective mechanism for agencies to receive input from and address the potential impacts of a rule on small businesses within affected industries.

i. Small Entity Advisor Comments Were Not Limited to Small Business Impacts

We found that small entity advisor comments often addressed industry-wide concerns, rather than small business-specific issues, especially when trade association representatives and the association’s big business members participated in the panel process.¹¹⁵

For example, for EPA’s Total Coliform Panel, small entity representatives commented that a requirement for public water systems to notify the state and the public of violations “is ineffective, confusing, and leads to unnecessary public distrust of the water system, because total coliforms do not themselves represent a health risk and the notification usually comes well after the incident occurred and water quality has returned to normal.”¹¹⁶ This issue is as likely to be a concern of large water systems as well as small ones, but EPA limited the public notification requirement in the proposed and final rule.¹¹⁷

OSHA officials told us that small entity representative comments often parallel general industry comments received during the notice-and-comment period.¹¹⁸ For example, small entity representatives frequently ask OSHA to exempt their individual business or their whole industry from a rule, although OSHA does not often grant such exemptions. While the Regulatory Flexibility Act envisions exemptions to a rule, in part or in whole, to help reduce potential economic impacts on small entities, small entity representatives often ask for more

115 **EPA CWIS Panel:** FINAL REPORT OF THE SMALL BUSINESS ADVOCACY REVIEW PANEL ON EPA’S PLANNED PROPOSED RULE FOR COOLING WATER INTAKE STRUCTURES AT SECTION 316(B) PHASE III FACILITIES 28 (2004) (“Dover Light and Power provided comments from its industry trade association, the American Public Power Association (APPA), recommending that implementation of the Phase III rule be delayed until 2010 in order to allow more time for implementation of the Phase II to be substantially completed.”); Letter from Eveleen Muehlethaler, Port Townsend Paper Corp., to Alexander Cristofaro, U.S. Evtl. Prot. Agency (Mar. 30, 2004) (“While I am writing these comments from the perspective of a small business, the alternatives proposed within these comments could be applied more generally to all Phase III facilities since, on the whole, these facilities’ cooling water intake structures have not been identified as causing adverse environmental impacts.”); **OSHA Electric Power Panel:** E-mail from Chuck Woodings, Anderson & Wood Construction Co. Inc., to John Masarick, Indep. Elec. Contractors Ass’n et al. (May 19, 2003) (“Attached are my comments on the OSHA rewrite. John, thank you for this opportunity and I hope that I have represented the IEC well in this process. . . . I felt that some of the people [sic] were really considering the impact on the whole industry whereas there were others who were looking out for their own interest only. I guess that is normal.”).

116 FINAL REPORT OF THE SMALL BUSINESS ADVOCACY REVIEW PANEL ON EPA PLANNED REVISIONS TO PUBLIC WATER SYSTEM REQUIREMENTS: REVISIONS TO THE TOTAL COLIFORM MONITORING AND ANALYTICAL REQUIREMENTS AND CONSIDERATION OF DISTRIBUTION SYSTEM ISSUES 22-23 (2008).

117 National Primary Drinking Water Regulations: Revisions to the Total Coliform Rule, 75 Fed. Reg. 40,926 (proposed July 14, 2010); 75 Fed. Reg. 10,270 (Feb. 13, 2013).

118 Interview with Officials at OSHA, in Washington, DC (Feb. 7, 2014).

industry-wide exemptions.¹¹⁹ After reviewing the way the participants are selected and comments generated, this should not be surprising.

CFPB officials told us that the agency provides an hour at the end of its outreach meetings for the small entity representatives to provide general commentary on any issue they wish to address. The agency only summarizes the substantive discussions during this hour in the panel report. Exemptions are regularly requested during this period, and those requests are generally regarded as potential alternatives to the rule. CFPB will sometimes grant such exemptions.

“While the Regulatory Flexibility Act envisions exemptions to a rule, in part or in whole, to help reduce potential economic impacts on small entities, small entity representatives often ask for more industry-wide exemptions. After reviewing the way the participants are selected and comments generated, this should not be surprising.”

The comments of the small business advisors often touch on issues far beyond the four main issue areas contemplated by the Regulatory Flexibility Act.¹²⁰ EPA, OSHA, and CFPB all indicated that the most helpful information they receive from small entity representatives addresses compliance concerns and regulatory alternatives that can reduce the potential economic impacts on small businesses subject to the rule.¹²¹ While small entity representatives address compliance costs during most, if not all, panels, they also ask whether the agency has the authority to regulate and often challenge the technical science underlying a rule, topics inconsistent with the content envisioned for the small business review process.

119 **OSHA Hex Chrome Panel:** FINAL REPORT OF THE SMALL BUSINESS ADVOCACY REVIEW PANEL ON THE DRAFT OSHA STANDARDS FOR HEXAVALENT CHROMIUM 32 (2004) (“Several SERs raised concerns about various industries covered under the scope of the standard (e.g., construction and maritime) and raised questions as to whether there was scientific evidence to support the coverage of these industries under the proposed CR(VI) standard. . . . The Panel recommends that OSHA consider and solicit comments on selective exemption of some industries from the proposed standard, especially those industries whose inclusion is not supported by the industry-specific data or in which inhalation exposure to Cr(VI) is minimal.”); **OSHA Beryllium Panel:** FINAL REPORT OF THE SMALL BUSINESS ADVOCACY REVIEW PANEL ON THE OSHA DRAFT PROPOSED STANDARD FOR OCCUPATIONAL EXPOSURE TO BERYLLIUM 7 (2008) (“Many SERs supported exemptions of their industry for various reasons: significant costs of the standard and potentially upsetting events or conditions among employees, customers, and the market for their products. Alternatively, some proposed that OSHA regulate high- and low-exposure industries differently, or regulate by the content of beryllium in the materials that are processed.”).

120 The four issues contemplated by the Small Business Regulatory Enforcement Fairness Act (SBREFA), in accordance with the Regulatory Flexibility Act (RFA), are: (1) the number of small entities affected by the rule; (2) the anticipated compliance requirements; (3) overlapping, duplicative, or conflicting federal rules; and (4) regulatory alternatives that could minimize the impact while accomplishing the agency’s statutory objective. Although SBREFA does not require an agency to take into consideration comments on topics beyond the four issue areas required by the RFA or even to implement any recommendations offered by the panel, EPA, OSHA, and CFPB choose to consider these comments in their review.

121 Interview with Officials at OSHA, in Washington, DC (Feb. 7, 2014); Interview with Officials at CFPB, in Washington, DC (Feb. 19, 2014); Interview with Officials at EPA, in Washington, DC (Feb. 24, 2014).

In at least five EPA panels, small entity representatives challenged data the agency relied on to justify taking action, stated that EPA did not provide sufficient data, or claimed the data was inaccurate.¹²² For example, for EPA's Lead Paint Panel, some representatives commented that the rule should cover all homes built prior to 1978 since they are most likely to contain lead-based paint, but others felt that EPA should tailor the rule to specific types of housing. The Office of Advocacy and Office of Information and Regulatory Affairs (OIRA) commented that the rule should only apply broadly to homes built prior to 1960 and cited studies on the frequency of lead paint prior to 1960. The panel adopted the recommendation that the rule should cover all housing built prior to 1978, noting that the 1960 alternative would not adequately address the public health concerns associated with lead-based paint.

Center for Effective Government staff observed similar comments by small entity advisors to OSHA panels. During at least four panels, representatives commented on whether OSHA had adequately explained the need for the rule and how the rule would address that need.¹²³

“While small entity representatives address compliance costs during most, if not all, panels, they also ask whether the agency has the authority to regulate and often challenge the technical science underlying a rule, topics inconsistent with the content envisioned for the small business review process.”

122 **EPA Ground Water Panel:** FINAL REPORT OF THE SBREFA SMALL BUSINESS ADVOCACY REVIEW PANEL ON EPA'S PLANNED PROPOSED RULE FOR NATIONAL PRIMARY DRINKING WATER REGULATIONS: GROUND WATER 24 (1998) (indicating that some SERs raised concern “that the study data presented by EPA may significantly overstate the extent of ground water fecal contamination nationally”); **EPA Lead Paint Panel:** FINAL REPORT OF THE SMALL BUSINESS ADVOCACY REVIEW PANEL ON EPA'S LEAD-BASED PAINT; CERTIFICATION AND TRAINING; RENOVATION AND REMODELING REQUIREMENTS 50 (2000) (“Ms. Daniels reports that the NAHB believes that EPA lacks the scientific record to proceed with a rulemaking to require certification and training for renovators performing work on pre-1978 housing.”); **EPA C&D Effluents Panel:** FINAL REPORT OF THE SBREFA SMALL BUSINESS ADVOCACY REVIEW PANEL ON EPA'S PLANNED PROPOSED RULE FOR EFFLUENT LIMITATION GUIDELINES AND STANDARDS FOR THE CONSTRUCTION AND DEVELOPMENT INDUSTRY 24-25, 37-39 (2001) (calling into question EPA's environmental assessment); **EPA Utility MACT Panel:** FINAL REPORT OF THE SMALL BUSINESS ADVOCACY REVIEW PANEL ON EPA'S RULEMAKING FOR HAZARDOUS AIR POLLUTANTS FROM COAL- AND OIL-FIRED ELECTRIC UTILITY STEAM GENERATING UNITS 37 (2011) (“SERs indicated that they were not provided descriptions of significant alternatives to the proposed rule, differing compliance or reporting requirements or timetables that take into account the resources available to small entities.”); **EPA Formaldehyde Panel:** Letter from Rob Gross, Gross Veneer Sales, Inc., to Tracey Westfield, U.S. Env'tl. Prot. Agency (Jan. 20, 2011) (“I thought the EPA responded correctly and admirably when the Sierra Club and other similar organizations petitioned for the EPA to adopt the California formaldehyde standard as the national standard. The EPA responded that they could not move to effectively ban panels made with formaldehyde unless there was some actual proof that formaldehyde is detrimental to human health. That proof doesn't exist. . . . The only study that I am aware of concerning formaldehyde was performed on lab rats. . . . [Y]ou should bend over backward to ensure that those of us in the plywood industry will be able to sell what we have invested in and to get that investment back.”) (commenting primarily on EPA's proposed sell-through provision).

123 **OSHA Silica Panel:** E-mail from Jim Sharpe, Nat'l Sand Stone & Gravel Ass'n, to Charles Maresca, Office of Advocacy (Nov. 25, 2003) (attaching a summary of comments made by small entity representatives from the construction industry at OSHA's outreach meeting, which states “OSHA will have to do a much better job of making its case in support of this comprehensive rule before the industry will be willing to accept it. A starting point would be for the Agency to share with stakeholders the studies it relies upon to make its case”); **OSHA Hex Chrome Panel:** FINAL REPORT OF THE SMALL BUSINESS ADVOCACY REVIEW PANEL ON THE DRAFT OSHA STANDARDS FOR HEXAVALENT CHROMIUM 7 (2004) (“Several SERs questioned OSHA's preliminary determination that occupational exposures to Cr(VI) pose a significant risk of lung cancer. Some SERs expressed doubt that OSHA's predicted levels of excess lung cancer risk are realistic, based on the frequency of lung cancer they have observed among Cr(VI)-exposed workers in their employ and their knowledge of lung cancer rates in the general population.”); **OSHA Beryllium Panel:** FINAL REPORT OF THE SMALL BUSINESS ADVOCACY REVIEW PANEL ON THE OSHA DRAFT PROPOSED STANDARD FOR OCCUPATIONAL EXPOSURE TO BERYLLIUM 7 (2008) (“A number of SERs said that OSHA lacked evidence of beryllium disease in their industry, or even exposure. . . . They suggested that OSHA should prove the existence of the hazard in each industry prior to regulating.”); **OSHA Electric Power Panel:** Electric Power Generation, Transmission, and Distribution; Electrical Protective Equipment, 70 Fed. Reg. 34,822, 34,925 tbl. V-22 (proposed June 15, 2005) (“Many SERs questioned whether the new revisions to 29 CFR 1910.269 would in fact save any lives or prevent any accidents.”).

For each of the panels on OSHA chemical rules included in our review, we found comments arguing that exposure to the chemical does not pose a significant risk to worker health, despite OSHA citing the Centers for Disease Control and Prevention, the National Institute for Occupational Safety and Health, or other science-based agencies that the chemical is hazardous to workers.¹²⁴

For instance, in OSHA's Hex Chrome Panel, several small entity representatives questioned whether exposure to hexavalent chromium actually causes cancer in workers.¹²⁵

For OSHA's Silica Panel, several representatives submitted comments suggesting that the agency did not need to update the existing permissible exposure limit for the substance and felt that the incidence of silicosis is related more to facilities that are out of compliance with the current standard. Small entity representatives requested OSHA provide them with additional data on the matter,¹²⁶ and they recommended the agency focus more on compliance assistance and enforcement of the existing standard instead of proposing a new standard. OSHA responded that it "believes that a standard would be the most effective means to protect workers from exposure to silica."¹²⁷

Across all three agencies, we found that trade associations were involved in drafting and submitting comments for their small business members.¹²⁸ On some panels, small entity representatives submitted trade association comments as attachments to their own comments.¹²⁹ Trade associations often worked with their small business

124 **OSHA Beryllium Panel:** FINAL REPORT OF THE SMALL BUSINESS ADVOCACY REVIEW PANEL ON THE OSHA DRAFT PROPOSED STANDARD FOR OCCUPATIONAL EXPOSURE TO BERYLLIUM 25 (2008) ("One SER questioned the appropriateness of identifying beryllium as a carcinogen, which would require appropriate labels on products. The SER said that concern about beryllium causing cancer is an artifact of twenty years ago when exposures were ten times as high as today."); **OSHA Diacetyl Panel:** Letter from Theresa Cogswell, BakerCogs, Inc., to U.S. Dep't of Lab. (May 28, 2009) (attaching comments from Nancy Rachman, Grocery Mfrs. Ass'n, to Theresa Cogswell, BakerCogs, Inc., which state, "The occurrence of the cluster of lung obstruction cases among workers at microwave popcorn plants identified in the year 2000, and the initial absence of a responsible regulatory response, have led to a situation in which the political demand for action on this issue is ahead of the science needed to responsibly develop an appropriate standard. The science is beginning to catch up, but the data currently in OSHA's hands is inadequate to support the adoption of a comprehensive standard of the type contemplated by the draft distributed to the SERs"). Similar questions also arose during OSHA's panels on occupational exposure to hexavalent chromium and crystalline silica.

125 FINAL REPORT OF THE SMALL BUSINESS ADVOCACY REVIEW PANEL ON THE DRAFT OSHA STANDARDS FOR HEXAVALENT CHROMIUM 7 (2004) ("Several SERs questioned OSHA's preliminary determination that occupational exposures to Cr(VI) pose a significant risk of lung cancer. Some SERs expressed doubt that OSHA's predicted levels of excess lung cancer risk are realistic, based on the frequency of lung cancer they have observed among Cr(VI)-exposed workers in their employ and their knowledge of lung cancer rates in the general population.").

126 E-mail from Bob Glenn, Nat'l Indus. Sand Ass'n (NISA), to Lee Cole, C.E.D. Enterprises, Inc. et al. (Nov. 19, 2003) (providing one of NISA's small business members who is a SER on the panel a letter for him to submit to OSHA asking for a long list of materials to prepare comments for the panel).

127 Occupational Exposure to Respirable Crystalline Silica, 78 Fed. Reg. 56,274, 56, 429 tbl. VIII—33 (proposed Sept. 12, 2013).

128 See *supra* Part D(iii).

129 **EPA CWIS Panel:** FINAL REPORT OF THE SMALL BUSINESS ADVOCACY REVIEW PANEL ON EPA'S PLANNED PROPOSED RULE FOR COOLING WATER INTAKE STRUCTURES AT SECTION 316(B) PHASE III FACILITIES 28 (2004) ("Dover Light and Power provided comments from its industry trade association, the American Public Power Association (APPA), recommending that implementation of the Phase III rule be delayed until 2010 in order to allow more time for implementation of the Phase II to be substantially completed."); see also *supra* note 53.

members and other small entity representatives and industry associations to submit joint comment letters.¹³⁰ For other panels, trade associations and other non-small entity representatives submitted separate comments to the agency, even when the agency discouraged individual comments from third parties.¹³¹

For example, prior to submitting written comments to OSHA's Silica Panel, trade association representatives collaborated on specific issues of focus. An e-mail from a representative of Mason Contractors Association of America to several other small entity representatives and non-small entity representative participants states:

As I mentioned at the outset of the call, I think it's very important that we coordinate written comments of the panel members as well as those we, as trade associations, submit individually through them. . . . We obviously need to provide SBA and OMB with as much ammunition as possible so they can go back to OSHA and question the feasibility and practicality of their draft proposed standard for silica exposure. We must make certain that all comments focus on one key fact: that OSHA's standard will undermine the occupational and economic stability of the construction industry. . . . [W]e must all assemble whatever data we have which refutes their documentation of exposure (and mortality rates) at each of the three levels.¹³²

Due to trade associations influencing small entity advisors' comments, agencies may not be hearing many small business concerns or suggestions for addressing impacts of a proposed rule on small businesses specifically.

Recommendation: Agencies should avoid using trade associations as small entity representatives in place of actual small businesses unless they can verify that the majority of a trade association's membership is comprised primarily of small businesses likely to be affected by the rule under review. To the extent an agency permits small entity representative "helpers" to participate in the panel process, the representative(s) affiliated with a helper should be required to identify co-authors (or "helpers") of comments to the panel. Helpers and unofficial participants should not be able to submit individual comments to the panel unless the

130 **EPA Tier 3 Panel:** E-mail from Sally Allen, Gary-Williams Energy Corporation, to David Rostker, Office of Advocacy (July 8, 2011) ("David -- The small refiner SERs are looking forward to visiting with you by phone on Monday about the upcoming SBREFA panels. Attached for your review are the draft comments we have developed together -- thinking that to the extent we can all agree we may have more impact on the panels and rulemakings. Your thoughts on these comments will be very helpful."); **OSHA Diacetyl Panel:** Letter from Charles Schroeder, Dairy Chem, Inc. & Clay Detlefsen, Int'l Dairy Foods Ass'n, to Kathleen Martinez, Occupational Safety & Health Admin. (May 29, 2008) (submitting a joint comment letter from SER Charles Schroeder and Non-SER Clay Detlefsen); **CFPB LO Comp Panel:** Letter from Marc Savitt, Nat'l Ass'n of Indep. Hous. Prof'ls, Brian Benjamin, N.J. Ass'n of Prof'l Mortg. Originators, Carol Gardner, Ill. Ass'n of Mortg. Prof'ls, Marty Lough, Wash. Ass'n of Mortg. Prof'ls & Maryann Pino, N.Y. Ass'n of Mortg. Brokers (June 4, 2012) (submitting joint comments to the panel although the only actual SER selected to advise the panel was Carol Gardner).

131 **OSHA Hex Chrome Panel:** E-mail from Tom Carter, Portland Cement Ass'n, to Charles Maresca, Office of Advocacy (Mar. 26, 2004) (sending transmittal letter for Portland Cement Association's comments, which were separately mailed to EPA and Office of Advocacy; Carter was not an advisor to this panel, but he submitted comments after the formal outreach meeting with advisors); **CFPB TILA-RESPA Panel:** E-mail from Mark Bennett, Ohio Land Title Ass'n, to Jennifer Smith, Office of Advocacy (Mar. 2, 2012) ("Can you let me know the best way that the Ohio Land Title Association can submit comments regarding the small business review given Ohio does not have a representative on the panel. I appreciate any help you can offer."); E-mail from Mark Bennett, Ohio Land Title Ass'n, to Jennifer Smith, Office of Advocacy (Apr. 3, 2012) ("Please find attached the comments from the Ohio Land Title Association as to the effects the new disclosure documents will have on small business entities.").

132 E-mail from M.J. Marshall, Mason Contractors Ass'n of Am., to Robert Matuga, Nat'l Ass'n of Homebuilders et al. (Nov. 14, 2003) (outlining each representative's assigned issue area).

agency permits *all* interested parties, including the public, to submit comments. The agency should solicit such comments through a formal notice published in the *Federal Register*. The agency should identify all comments it receives in an appendix to the panel report and post the comments in the rulemaking docket on the Regulations.gov website.

ii. Agencies Changed Rules Based on Recommendations That Were Not Small Business-Specific

In several instances, agencies adopted small entity representative and panel recommendations and changed a rule, even when those recommendations were not limited to small business impacts and exceeded the scope of issues the panel laid out for representatives to consider. In our judgment, at least eight of the rules covered by the panels we reviewed were weakened by the regulating agency as a result of the panel process. In every case, the review process delayed publication of the rule.

When EPA met with small entity representatives for its panel on strengthening emissions limits on motor vehicles under its Tier 3 standards, the agency was considering “an average sulfur standard of 10 parts per million (ppm) for refiners and importers to take effect beginning in 2017, with a refinery gate cap of 20 ppm and a downstream cap of 25 ppm to take effect beginning in 2020.”¹³³ The rule would generate immediate benefits to public health by reducing air emissions linked to respiratory and other damaging health effects.

However, based on potential small entity impacts addressed during the panel process and comments received during the traditional notice-and-comment period, EPA chose to retain the Tier 2 refinery gate cap of 80 ppm and downstream cap of 95 ppm. It also provided an extended time period for small entities to comply with the new average sulfur standard, reducing the benefits of the rule.¹³⁴

OSHA’s final rule to limit occupational exposure to hexavalent chromium was significantly weaker than the proposed rule after small business review panel input.¹³⁵ OSHA acknowledged that panel comments contributed to the decision to raise the permissible exposure limit¹³⁶ from the proposed 1 microgram per cubic meter of air to 5 micrograms per cubic meter of air in the final rule and allowed performance-oriented standards as a regulatory alternative to compliance.¹³⁷ The final rule also allowed industry exemptions if certain conditions are met.

133 FINAL REPORT OF THE SMALL BUSINESS ADVOCACY REVIEW PANEL ON EPA’S PLANNED PROPOSED RULE ON CONTROL OF AIR POLLUTION FROM NEW MOTOR VEHICLES: TIER 3 EMISSION AND FUEL STANDARDS 3 (2011).

134 Control of Air Pollution from Motor Vehicles: Tier 3 Motor Vehicle Emission and Fuel Standards, 79 Fed. Reg. 23,414, 23,542-544 (Apr. 28, 2014).

135 See GARY D. BASS ET AL., ADVANCING THE PUBLIC INTEREST THROUGH REGULATORY REFORM: RECOMMENDATIONS FOR PRESIDENT-ELECT OBAMA AND THE 111TH CONGRESS 57 (2008), available at <http://www.foreffectivegov.org/files/regulatoryreformrecs.pdf>.

136 A permissible exposure limit (PEL) is a limit on the amount or concentration of a substance to which a worker can be exposed, based on an eight-hour time weighted average exposure. See *Permissible Exposure Limits (PELs)*, *Occupational Safety & Health Administration*, U.S. DEP’T OF LAB., <https://www.osha.gov/dsg/topics/pel/index.html> (last reviewed Oct. 30, 2006).

137 Occupational Exposure to Hexavalent Chromium, 71 Fed. Reg. 10,100, 10,103-04, 10,311-25, tbl. VIII-14 (Feb. 28, 2006).

CFPB exempted small businesses from one of its rules to the detriment of consumers. Its mortgage servicing rules seek to ensure consumers receive adequate disclosures about mortgage obligations and information on options that would minimize their potential losses in the event they are unable to meet those obligations. When CFPB began to develop these rules, the agency considered requiring servicers to promptly communicate with a borrower whose loan becomes delinquent and provide that borrower with information about options for avoiding foreclosure. The Bureau also proposed prohibiting mortgage servicers from moving forward on a foreclosure sale if the delinquent borrower submitted an application for loss mitigation, except in certain limited circumstances.

During the review panel process, small entity representatives commented that small servicers commonly contact borrowers early in the foreclosure process and communicate with delinquent borrowers much earlier than necessary. They felt they could negotiate loss mitigation and foreclosure proceedings concurrently. Based on these comments and the panel's recommendation, CFPB sought comment on the proposed rule on excluding small servicers from these requirements. In the final rule, CFPB provided an exemption to small servicers, defined as those servicing 5,000 or fewer mortgages, noting that the agency was persuaded "that the small servicers are generally achieving the goals of the discretionary rulemakings to protect delinquent borrowers."¹³⁸ This reduced protections for homeowners whose mortgages are held by small servicers.

By incorporating comments and panel recommendations that were not limited to specific small business concerns, agencies effectively gave big businesses a new avenue to lobby regulators on rules before they were even written.¹³⁹

Recommendation: Agencies should screen comments and panel recommendations and only make changes to a rule that specifically address direct impacts on small businesses subject to the rule *without undermining the protections provided by the rule*. If the agency is considering changes that would weaken a rule in response to a recommendation, the agency should solicit comments on such changes from the public.

¹³⁸ Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10,696, 10,720 (Feb. 14, 2013).

¹³⁹ See sources cited at *supra* note 44.

RECOMMENDATIONS: RECLAIMING THE VOICE OF SMALL BUSINESS

Big business and trade association influence over the small business review panels makes the current process ineffective in achieving SBREFA's objective of ensuring that agencies hear from and consider small business concerns early on in the development of new regulations. Trade associations, their lobbyists, and their big business members are manipulating the small business review process to insert industry-wide complaints into the early stages of rule development. These actors already have a disproportionate voice in the rulemaking process, and the agencies and offices responsible for hosting review panels should not allow them to manipulate a system intended to ensure small businesses have a meaningful opportunity to share their concerns with agencies developing new standards and safeguards.

If small businesses are to have a real say in how rules are developed, agencies must take steps to ensure that industry trade groups and their big business members do not manipulate the process.

To expand and deepen input from actual small businesses, minimize opportunities for large industry capture, ensure the integrity of public protections, and enhance public access to rulemaking information, we recommend the following:

- Agencies should screen the panel recommendations and the comments of small business advisors and only consider changes to a rule that specifically address the impacts on small businesses subject to the rule. If the agency is considering changes that would weaken a rule in response to a recommendation, the agency should solicit comments on such changes from the public.
- Each agency should develop written eligibility criteria that define who qualifies as a small entity representative, and each nominee should certify in writing that he or she meets the criteria.
- Agencies should avoid the use of trade association representatives as designated small business advisors. A trade association representative should only be able to serve as a designated small business advisor to a panel if he or she can verify that the trade association is comprised primarily of small businesses *that are likely to be directly affected by the rule under review*. If an agency selects a representative from a trade association that includes large and small businesses, the agency should require the representative to certify in writing that he or she will restrict his or her comments to issues of concern to the association's small business members.

- Agencies should establish policies that limit the role of “helpers” to small entity advisors as well other unofficial participants and make their role transparent. A designated small business advisor who wants a helper should provide a written request to the agency for assistance, so the agency can track those helpers advising small business representatives. The helpers and unofficial participants in the panel process should be required to identify any comments to the panel they drafted or co-authored, and their input should be noted in the final report. If a panel accepts comments from any party other than a designated small business advisor, it should also accept comments from the general public.
- The Office of Advocacy should help agencies identify qualified small business owners to advise the panels instead of recommending trade association representatives as advisors.
- The small business representatives that the review panels consult should reflect the diversity and richness of the millions of small businesses currently operating in the U.S. Agencies should permit and encourage small business owners to self-nominate for review panels and widely publicize opportunities to participate in an easily accessible location on their websites, in relevant trade publications, and in the *Federal Register*.
- Since the Office of Advocacy serves as a panel member that reviews input and comments submitted by small business advisors, helpers, and other unofficial participants, it should be precluded from collaborating in the development of comments submitted to the panel to avoid a conflict of interest.
- Agencies should publicly post the names and affiliations of proposed small business representative advisors at least one month prior to the panel convening, so the public and other small business associations have the opportunity to examine the list for potential conflicts of interest.

These recommendations would help to ensure that the three agencies required to convene small business review panels receive substantive advice from actual small businesses likely to be directly affected by a rule under development.

The Government Accountability Office (GAO) should perform a review of agency practices and the Office of Advocacy’s role in the review panel process to determine if the process is effective in achieving the law’s objectives. Congress should also exercise oversight authority over this process to ensure that actual small businesses are represented on review panels and that changes to rules are limited to specifically addressing the impacts on small businesses subject to the rules.

APPENDIX A: BACKGROUND

The Regulatory Flexibility Act

In 1980, Congress passed and President Jimmy Carter signed into law the Regulatory Flexibility Act¹⁴⁰ in response to growing concerns about the impact of federal regulations on small entities.¹⁴¹ To address these concerns, the act requires agencies to consider the potential impacts of a rulemaking on small entities.¹⁴²

The law defines a small entity as a for-profit enterprise or nonprofit organization that is independently owned and operated and is not dominant in its field of operation, or a small governmental jurisdiction (*e.g.*, a city, county, town, or school district) with a population under 50,000. In addition to meeting the statutory definition, an enterprise must satisfy the Small Business Administration's (SBA) size standards. These complex standards, which SBA bases on the North American Industry Classification System (NAICS),¹⁴³ vary by industry, setting forth the maximum number of employees, dollar volume of business, net worth, net income, or a combination of these variables that a for-profit enterprise must fall below to qualify as small.¹⁴⁴

Under the act, agencies must prepare a regulatory flexibility analysis for proposed and final rules unless the agency certifies that the rule will not have “a significant economic impact on a substantial number of small entities.”¹⁴⁵ The law does not define the terms “significant economic impact” or “substantial number of small entities,” leaving it to the agencies to determine when the requirements apply.¹⁴⁶

The Regulatory Flexibility Act tasks the Office of Advocacy, an independent office within the Small Business Administration, with oversight authority over federal agencies' compliance and with providing guidance to rulemaking agencies about the concerns of small entities.¹⁴⁷

According to the Office of Advocacy's Regulatory Flexibility Act compliance guide for agencies, “[W]hat is ‘significant’ will vary depending on the economics of the industry or sector to be regulated.”¹⁴⁸ The guidance

140 Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified as amended at 5 U.S.C. §§ 601-612 (2012)).

141 GAO 1998 REPORT, *supra* note 10.

142 5 U.S.C. § 601(6) (2012).

143 NAICS Codes, U.S. SMALL BUS. ADMIN., <http://www.sba.gov/content/north-american-industry-classification-system-codes-and-small-business-size-standards> (last visited Aug. 25, 2014).

144 15 U.S.C. § 632(a) (2012); *see also* *Small Business Size Standards*, U.S. SMALL BUS. ADMIN., <http://www.sba.gov/content/what-are-small-business-size-standards> (last visited Aug. 25, 2014).

145 5 U.S.C. § 605(b) (2012). It is possible for an agency to certify that a final rule will not impose a significant economic impact on a substantial number of small entities, and therefore not prepare a final regulatory flexibility analysis, even if the agency believed that the proposed rule would have a significant economic impact on a substantial number of small entities.

146 *See* SMALL BUS. ADMIN. OFFICE OF ADVOCACY, A GUIDE FOR GOVERNMENT AGENCIES: HOW TO COMPLY WITH THE REGULATORY FLEXIBILITY ACT 11-24 (2012) [hereinafter OFFICE OF ADVOCACY RFA GUIDANCE], available at http://www.sba.gov/sites/default/files/rfaguide_0512_0.pdf (discussing the legislative history, court decisions, and agency guidance that should inform how agencies define these terms).

147 5 U.S.C. §§ 601-612 (2012).

148 *Id.* at 18.

also notes, “Significance should not be viewed in absolute terms, but should be seen as relative to the size of the business, the size of the competitor’s business, and the impact the regulation has on larger competitors.”¹⁴⁹ Additionally, the law’s legislative history indicates that agencies should define the term broadly.¹⁵⁰

The definition of “substantial number” is more straightforward but is nevertheless reserved to agency discretion. The Office of Advocacy’s guidance provides, “In some instances, a very small number of small businesses who would experience a significant economic impact can represent the entire universe of affected small businesses. However, if a very small number of small businesses represents a small fraction of the universe of affected small businesses, the agency can conclude that the number is not substantial.”¹⁵¹

Some agencies like the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA) have issued their own guidance for defining a significant economic impact.¹⁵² The Consumer Financial Protection Bureau (CFPB) has not written any publicly available guidance on defining either of these terms.

Courts have also addressed when the Regulatory Flexibility Act requires agencies to prepare a regulatory flexibility analysis. Multiple decisions make clear that an agency need only prepare such an analysis when it determines that the rule will have a significant economic impact on a substantial number of small entities that will be subject to the rule.¹⁵³ In other words, unless the agency finds *direct* significant economic impacts, such as compliance costs, no analysis is required. In *Cement Kiln Recycling Coalition v. EPA*, the court explained, “[T]o require an agency to assess the impact on all of the nation’s small businesses possibly affected by a rule would be to convert every rulemaking process into a massive exercise in economic modeling, an approach we have already rejected.”¹⁵⁴

When an agency finds that a draft rule may have a significant economic impact on a substantial number of small entities, it must publish an initial regulatory flexibility analysis in the *Federal Register* at the same time as the proposed rule. Similarly, the agency must publish the final regulatory flexibility analysis along with the final rule in the *Federal Register*.

These analyses must describe the agency’s justification for the rule, the objective and legal basis for the rule, the type and estimated number of small entities subject to the rule, the rule’s reporting, recordkeeping, and compliance requirements, all duplicative, overlapping, or conflicting federal rules already in existence, and

149 *Id.*

150 *Id.* at 20.

151 *Id.* at 21.

152 EPA SBREFA GUIDANCE, *supra* note 11; OSHA SBREFA GUIDANCE, *supra* note 11.

153 See OFFICE OF ADVOCACY RFA GUIDANCE, *supra* note 146, at 64-68 (discussing case law indicating that agencies need not consider the indirect effects of its rules in deciding whether to prepare regulatory flexibility analyses, such as *Mid-Tex Electric Coop., Inc. v. FERC*, 773 F.2d 327, 341-42 (D.C. Cir. 1985) and *Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855, 869 (D.C. Cir. 2001)).

154 *Id.* at 66 (quoting *Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855, 869 (D.C. Cir. 2001)).

the potential regulatory alternatives.¹⁵⁵ Alternatives may include setting different compliance or reporting requirements or timetables for small entities, using performance standards rather than design standards, or exempting small entities from certain provisions of the rule or from the entire rule.¹⁵⁶ However, no analysis is required for either the proposed or the final rule if the agency certifies that the rule will not have “a significant economic impact on a substantial number of small entities.”¹⁵⁷

The Small Business Regulatory Enforcement Fairness Act and Subsequent Regulatory Flexibility Act Amendments

Over the decade and a half after the Regulatory Flexibility Act’s enactment, concerns about the impact of regulations on businesses continued to escalate, ultimately leading to proposals to strengthen the law. In 1995, the White House Conference on Small Business reviewed the law and proposed recommendations for addressing its perceived weaknesses.¹⁵⁸ Among its recommendations, the Conference suggested providing small businesses an opportunity to voice concerns during the regulatory process.¹⁵⁹ Later that same year, the Small Business Administration’s Office of Advocacy issued a report estimating the total costs of regulations in 1995 and finding that rules impose a higher cost per employee on smaller firms than on larger ones.¹⁶⁰ In response to these concerns, in 1996, as part of the Contract with America Advancement Act, Congress passed and President Clinton signed the Small Business Regulatory Enforcement Fairness Act¹⁶¹ (SBREFA), adding several new requirements to the Regulatory Flexibility Act.

Subtitle D of SBREFA tasks OSHA and EPA with consulting small businesses during the development of regulations to receive input on their potential concerns. In 2010, as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act, CFPB was added to the list of agencies responsible for performing small business outreach activities.¹⁶²

155 5 U.S.C. § 603(b)-(c) (2012). Additionally, 5 U.S.C. § 603(d) requires CFPB to include in its regulatory flexibility analyses information about the rule’s potential impact on the cost of credit for small businesses.

156 5 U.S.C. § 603(c) (2012).

157 5 U.S.C. § 605(b) (2012).

158 White House Conference on Small Business Authorization Act, Pub. L. No. 101-409, 104 Stat. 885 (1990) (current version at 15 U.S.C. § 631 note (2012)); *see also* SMALL BUS. ADMIN. OFFICE OF ADVOCACY, THE ANNUAL REPORT ON SMALL BUSINESS AND COMPETITION, *reprinted in* THE STATE OF SMALL BUSINESS: A REPORT OF THE PRESIDENT: 1996, at 9, 43-84 (1997), *available at* <http://www.sba.gov/sites/default/files/files/stateofsb1996.pdf>; Kathryn Tobias, *The History of The Regulatory Flexibility Act*, SMALL BUS. ADVOC., Oct.-Nov. 2010, at 11, 13, *available at* http://www.sba.gov/sites/default/files/advocacy/The%20Small%20Business%20Advocate%20-%20October_November%202010.pdf.

159 *E.g.*, SMALL BUS. ADMIN. OFFICE OF ADVOCACY, *supra* note 158, at 61-64, app. 2.2 (providing the Conference’s recommendations on Regulation and Paperwork); *see also* Tobias, *supra* note 158.

160 THOMAS D. HOPKINS, PROFILES OF REGULATORY COSTS: REPORT TO THE U.S. SMALL BUSINESS ADMINISTRATION (1995), *available at* <http://www.sba.gov/sites/default/files/files/rs1995hoptot.pdf>; *see also* Tobias, *supra* note 158. *But see* OFFICE OF INFO. & REGULATORY AFFAIRS, OFFICE OF MGMT. & BUDGET, REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF FEDERAL REGULATIONS ch. 2, pt. 3 (1997), *available at* http://www.whitehouse.gov/omb/inforeg_chap2#oetcr (discussing multiple flaws with Hopkins studies on the total cost of regulation prepared in 1991, 1992, 1995, and 1996).

161 Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 857 (codified in scattered sections of 5 U.S.C., 15 U.S.C., and 28 U.S.C.).

162 Consumer Financial Protection Act of 2010, Pub. L. No. 111-203, tit. X, sec. 1100G(a), § 609(d), 124 Stat. 1955, 2112-13 (codified as amended at 5 U.S.C. § 609(d) (2012)).

If an agency cannot certify that a regulation under development will not pose a significant economic impact on a substantial number of small entities, it must host a Small Business Advocacy Review (SBAR) panel prior to issuing a proposed rule. An agency certification of no significant economic impact is subject to judicial review, so agencies may choose to have a review panel to avoid a legal challenge later.¹⁶³

Executive Order (E.O.) 13272¹⁶⁴ and the Small Business Jobs Act of 2010¹⁶⁵ also task agencies and the Office of Advocacy with certain responsibilities related to the Regulatory Flexibility Act. E.O. 13272, issued by President George W. Bush in 2002, requires the Office of Advocacy to notify and train federal agencies on Regulatory Flexibility Act compliance and submit an annual report to OIRA. Agencies are required to develop and make available procedures for determining whether a regulatory action may have a “significant economic impact on a substantial number of small entities.” Agencies must also advise the Office of Advocacy of any draft rules that meet these criteria and must take into consideration and respond to regulatory comments submitted by the Office. The Small Business Jobs Act of 2010 codified the portion of E.O. 13272 that requires agencies to respond to comments submitted by the Chief Counsel for the Office of Advocacy.¹⁶⁶

Overview of the Small Business Advocacy Review Panel Process

The Small Business Advocacy Review panel process is intended to ensure the agencies receive and consider input on their rules’ potential impacts from small entities likely to be directly affected by the rule. Panel members include officials from the regulating agency, the Office of Information and Regulatory Affairs (OIRA), and the Chief Counsel for the Office of Advocacy.¹⁶⁷ Small business owners, small government officials, and representatives of small nonprofit organizations (collectively referred to as small entity representatives (SERs)) likely to be affected by a proposed rule are selected to advise the panel on ways the agency could reduce impacts to small businesses while still achieving the agency’s regulatory objective.

Once an agency determines that it must convene a review panel, it must formally notify the Office of Advocacy. Typically, the agency’s formal notification letter will include, among other things, a list of potential small entity representatives that the agency has identified. The Small Business Regulatory Enforcement Fairness Act (SBREFA) requires the Chief Counsel for the Office of Advocacy to respond to the agency’s formal notification letter within 15 days.

163 5 U.S.C. § 611 (2012); *see also* SHAPIRO & GOODWIN, *supra* note 44.

164 Exec. Order No. 13,272, 3 C.F.R. 247 (2003), [available at http://www.foreffectivegov.org/files/regs/library/eo13272.pdf](http://www.foreffectivegov.org/files/regs/library/eo13272.pdf).

165 Small Business Jobs Act of 2010, Pub. L. No. 111-240, 124 Stat. 2504 (codified in scattered sections of 5 U.S.C., 10 U.S.C., 12 U.S.C., 15 U.S.C., 26 U.S.C., 41 U.S.C., and 42 U.S.C.).

166 Small Business Jobs Act of 2010, Pub. L. No. 111-240, sec. 1601, § 604(a), 124 Stat. 2504, 2551 (codified as amended at 5 U.S.C. § 604(a)(3) (2012)).

167 5 U.S.C. § 609(b)(3) (2012).

The response letter may identify additional small entity representatives, although the rulemaking agency ultimately decides who is chosen to advise a review panel. Sometimes, the identification and selection process occurs jointly. The agencies and the Office of Advocacy often work with industry trade associations to help identify potential SERs, and information regarding who nominated a representative is not publicly available.

In deciding when to convene a panel, the agency must balance the stage of rule development, the information available to share with small entity representatives, and the statutory obligation to complete the panel within 60 days. While the agency will want to convene the panel early in the rulemaking process to get advice and recommendations prior to writing the rule, the agency must be able to provide representatives with enough information to provide meaningful feedback. The law does not specify a minimum amount of information that agencies are required to provide to small entity representatives. At the same time, the agency does not want to provide so much information that it will be difficult for representatives chosen to advise the panel to review and comment on the materials during the outreach meeting or within the one to two weeks typically provided for them to submit written comments.

Once the panel is convened, the law tasks the panel with reviewing materials prepared by the agency to address four main issues: (1) the number of small entities impacted; (2) the anticipated compliance requirements; (3) overlapping, duplicative, or conflicting federal rules; and (4) regulatory alternatives that could minimize the impact while accomplishing the agency's statutory objectives.

Each agency has a unique panel structure. The agencies vary on meeting format (in-person meetings or teleconferences), who may participate at the small entity representative outreach meeting, and how much time representatives are given to submit written comments and recommendations to the agency after panel outreach meetings.¹⁶⁸

At the conclusion of the panel, the panel drafts a report compiling small entity representative comments and the panel's recommendations based on those comments for the agency to consider when drafting the proposed rule. The agency is required to make the panel report available to the public no later than when it issues a notice of proposed rulemaking.

It is important to note that the conclusion of the review panel process does not conclude the role played by the Office of Advocacy, OIRA, or the small entity representatives chosen to advise the panel. Once the regulating agency drafts the proposed rule (complete with any revisions based on the panel recommendations), the agency must send the rule to OIRA for review.¹⁶⁹ Additionally, small businesses, including those that participated

¹⁶⁸ More detail on each agency's panel process is included in Appendices B-D.

¹⁶⁹ Because CFPB is an independent agency and not subject to Executive Order 12866, the agency is not required to submit rules to the Office of Information and Regulatory Affairs for review.

as small entity representatives during the panel process, and all other interested members of the public may participate in the regular notice-and-comment process.

If the regulating agency finds that the final rule may have a significant economic impact on a substantial number of small entities, the agency must prepare a final regulatory flexibility analysis. This analysis includes information similar to the initial analysis and summarizes the comments the agency received from interested members of the public during the notice-and-comment process, as well as the changes, if any, the agency made to the final rule in response to those comments.

Further, for final rules requiring a final regulatory flexibility analysis, the agency must publish a compliance guide for small entities. Once the agency finalizes a rule, small businesses have an opportunity to challenge the rulemaking through the law's judicial review provisions. Small businesses that assert they would be adversely affected by the rule or that the agency failed to comply with the Regulatory Flexibility Act can challenge the agency in court. The Chief Counsel for Advocacy may also choose to participate in the court challenge by filing an *amicus* brief.

GAO Review of the Small Business Regulatory Enforcement Fairness Act

Two years after the Small Business Regulatory Enforcement Fairness Act's enactment, the General Accounting Office (now the Government Accountability Office (GAO)) evaluated the small business review panel process.¹⁷⁰ GAO's assessment of the panel process was limited in scope because EPA had only convened four panels, and OSHA had only convened one. At the time of GAO's evaluation, each agency had only proposed one rule and had not finalized any rules for which a review panel was required.

Due to the limited amount of information available, GAO largely focused on EPA's and OSHA's procedures for implementing the panel process and offered recommendations for the agencies to consider to improve the procedural aspects of the panel process, rather than assessing whether the agencies adequately incorporated small entity representative concerns into the final rule.

The GAO report included recommendations from small entity representatives on ways to improve the panel process, focusing primarily on: (1) providing representatives more time to review panel materials and to provide input to the agencies; (2) ensuring an adequate mix of representatives from the small entities that could be affected by the rule; (3) enhancing the methods the panels used to gather comments; and (4) improving the background materials provided by the regulatory agencies.

¹⁷⁰ See generally GAO 1998 REPORT, *supra* note 141.

APPENDIX B. EPA'S SMALL BUSINESS REVIEW PANEL POLICIES AND PROCEDURES

Early Outreach to Stakeholders

EPA's guidance on complying with the Regulatory Flexibility Act provides, "The goal of small entity outreach is to ensure promulgation of a rule that is tailored to achieve a specific environmental goal while taking into account the particular concerns of small entities."¹⁷¹ EPA seeks to begin its outreach to stakeholders as early as possible in the development of a rule, typically before or simultaneously with making a preliminary determination on whether the rule may impose a significant economic impact on a substantial number of small entities.¹⁷²

Center for Effective Government staff found that, for all 12 rules covered by the 10 EPA panels¹⁷³ selected for review, EPA's outreach to stakeholders was far more extensive than simply reaching out to small entities likely to be affected by a rule under development. For at least eight rules, EPA also hosted meetings with industry and/or the public related to the rule's development before formally publishing a proposed rule.¹⁷⁴ For at least three rules, EPA published an advanced notice of proposed rulemaking or similar draft text and solicited comments from the public and industry.¹⁷⁵ For at least three rules, EPA convened an advisory panel, attended technical discussions or workshops, or participated in ad hoc working groups during the development stage.¹⁷⁶

¹⁷¹ EPA SBREFA GUIDANCE, *supra* note 11.

¹⁷² *Id.* If the preliminary assessment indicates that the rule may have such an impact on small entities, the agency will move ahead with preparing an initial regulatory flexibility analysis and convening a Small Business Advocacy Review panel. *Id.* at iii fig. 1, 9-10.

¹⁷³ EPA's Formaldehyde Panel covered two rules: Formaldehyde Emissions Standards for Composite Wood Products and the Third-Party Certification Framework for the Formaldehyde Standards for Composite Wood Products. EPA's Boiler MACT Panel also covered two rules: National Emissions Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters, and National Emissions Standards for Hazardous Air Pollutants for Area Sources: Industrial, Commercial, and Institutional Boilers.

¹⁷⁴ National Primary Drinking Water Regulations: Ground Water Rule, 65 Fed. Reg. 30,194, 30,202-03 (proposed May 10, 2000); Lead; Renovation, Repair, and Painting Program, 71 Fed. Reg. 1588, 1597 (proposed Jan. 10, 2006); Effluent Limitation Guidelines and New Source Performance Standards for the Construction and Development Category, 67 Fed. Reg. 42,644, 42,652 (proposed June 24, 2002); National Pollutant Discharge Elimination System—Final Regulations to Establish Requirements for Cooling Water Intake Structures at Phase III Facilities, 69 Fed. Reg. 68,444, 68,451-52 (proposed Nov. 24, 2004); National Emissions Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters, 75 Fed. Reg. 32,006, 32,044 (proposed June 4, 2010); National Primary Drinking Water Regulations: Revisions to the Total Coliform Rule, 75 Fed. Reg. 40,926, 40,928 (proposed July 14, 2010); Formaldehyde Emissions Standards for Composite Wood Products, 78 Fed. Reg. 34,820, 34,824 (proposed June 10, 2013); Control of Air Pollution from Motor Vehicles: Tier 3 Motor Vehicle Emission and Fuel Standards, 78 Fed. Reg. 29, 816, 29,816, 29,993 (proposed May 21, 2013).

¹⁷⁵ National Primary Drinking Water Rule Regulations: Ground Water Rule, 65 Fed. Reg. 30,194, 30,303 (proposed May 10, 2000) (discussing a preliminary draft preamble made available to the public on EPA's website on Feb. 3, 1999); Advance Notice of Proposed Rulemaking, Findings of Significant Contribution and Rulemaking on Section 126 Petitions for Purposes of Reducing Interstate Ozone Transport, 63 Fed. Reg. 24,058 (Apr. 30, 1998); Advance Notice of Proposed Rulemaking on Formaldehyde Emissions from Pressed Wood Products, 73 Fed. Reg. 73,260 (proposed Dec. 3, 2008).

¹⁷⁶ National Primary Drinking Water Regulations: Ground Water Rule, 65 Fed. Reg. 30,194, 30,202-03 (proposed May 10, 2010); National Pollutant Discharge Elimination System—Final Regulations to Establish Requirements for Cooling Water Intake Structures at Phase III Facilities, 69 Fed. Reg. 68,444, 68,451-52 (proposed Nov. 24, 2004); National Primary Drinking Water Regulations: Revisions to the Total Coliform Rule, 75 Fed. Reg. 40,926, 40,928 (proposed July 14, 2010).

Additionally, for all 12 rules, EPA's early outreach began long before the agency ever contemplated hosting a Small Business Advocacy Review panel (for some rules, before the Small Business Regulatory Enforcement Fairness Act (SBREFA) even became law). In at least two instances, EPA engaged in outreach to stakeholders for over a decade before convening a review panel.¹⁷⁷

Identifying Small Entity Representatives (SERs)

Once EPA determines that it may need to convene a small business review panel, the agency begins identifying potential small entity representatives (SERs) to advise the panel.¹⁷⁸ Potential SERs are selected in consultation with EPA's Small Business Advocacy Chair and the Office of Advocacy. Although not required by SBREFA, EPA sends a preliminary, informal notification to the Office of Advocacy so that the office has time to become familiar with the rule and to begin to identify potential SERs.¹⁷⁹

EPA may identify potential SERs from among its broader stakeholder lists by choosing "those representatives of *small* entities likely to be *directly* subject to [EPA's] regulation."¹⁸⁰ EPA also seeks to reach small businesses directly by posting an informal notice on its website notifying interested parties about upcoming panels and soliciting self-nominations.¹⁸¹ Additionally, EPA posts easy-to-find information about SBREFA, past panels, and potential future panels on its website. The Office of Advocacy assists by e-mailing to its subscribers a notice informing them of EPA's request for self-nominations.¹⁸²

Once EPA makes a final determination that it will need to convene an SBAR panel, EPA sends a formal notification to the Office of Advocacy, which includes a preliminary list of potential small entity representatives.¹⁸³ The Chief Counsel for the Office of Advocacy then has 15 days to review the list of potential SERs and recommend additional SERs for the agency to consider. Once EPA receives Office of Advocacy's response, EPA's Small Business Advocacy Chair formalizes the selection of SERs.¹⁸⁴

177 National Primary Drinking Water Regulations: Ground Water Rule, 65 Fed. Reg. 30,194, 30,202-03 (proposed May 10, 2010); National Emissions Standards for Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units, 76 Fed. Reg. 24,976, 24,980-86 (proposed May 3, 2011).

178 EPA SBREFA GUIDANCE, *supra* note 11, at 58-59.

179 *Id.* at 59-60.

180 *Id.* at 58.

181 News Release, U.S. Env'tl. Prot. Agency, Small Business Panel to Reconsider Regulatory Exemptions for Insect Repellents (Nov. 9, 2009), *available at* <http://1.usa.gov/1pVYi08> ("This action is the first time EPA has invited small businesses to self-nominate for participation in the panel process."); News Release, U.S. Env'tl. Prot. Agency, EPA Seeks Small Entity Participation on Upcoming Medium- and Heavy-Duty Greenhouse Gas Emissions Standards (Apr. 2, 2014), *available at* <http://yosemite.epa.gov/opa/admpress.nsf/596e17d7cac720848525781f0043629e/004d06c9e520aeba85257cae005e42f7?OpenDocument>.

182 Interview with Officials at EPA, in Washington, DC (Feb. 24, 2014).

183 EPA SBREFA GUIDANCE, *supra* note 11, at 60-61.

184 *Id.* at 61.

Our analysis of 10 EPA panels found that the agency and the Office of Advocacy often reached out to industry trade associations to help identify potential SERs.¹⁸⁵

Verifying Small Entity Representative Eligibility

EPA defines an eligible small entity as a representative of a small business, organization, or governmental jurisdiction that is likely to be directly subject to the rule under development.

However, EPA's procedure for verifying eligibility is simply to "contact them to confirm their small entity status and ask if they would agree to serve as a small entity representative for [the] Panel, if so requested."¹⁸⁶ EPA may also look at the entity's website, receipts, and number of employees,¹⁸⁷ but there is no signed verification requirement.

According to EPA's guidance, "EPA prefers that SERs be owner-operators of small businesses, small organizations, or small government officials potentially subject to the rule."¹⁸⁸ However, EPA also permits trade association representatives, on a case-by-case basis, to serve as SERs, provided they "exclusively or at least primarily represent potentially regulated small entities."¹⁸⁹ EPA's guidance suggests, "To avoid the appearance of conflict of interest, you should apply a general 'reasonable person' rule, that is, ask yourself if a 'reasonable person' would conclude that this potential representative is capable of truly representing only the interests of small entities."¹⁹⁰

EPA believes that one advantage to allowing trade association representatives to serve as SERs is that they can offer professional expertise that small entities do not necessarily possess.¹⁹¹ But EPA has no formal criteria to consider in making its case-by-case decisions or for determining whether a trade association does in fact primarily represent actual small businesses likely to be affected by the rule.¹⁹² Instead, the agency informally (via phone call or e-mail) asks a trade association representative to certify that it is representing its small entity members.¹⁹³

185 **EPA Lead Paint Panel:** Letter from Jere Glover, Office of Advocacy, to Thomas Kelly, U.S. Env'tl. Prot. Agency (Sept. 23, 1999) ("We agree to the EPA list and have added several trade association representatives who were actively involved in representing their small business members in the phase I proposal for this rulemaking."); **EPA Utility MACT Panel:** E-mail from Robert Wayland, U.S. Env'tl. Prot. Agency, to Theresa Pugh, Am. Pub. Power Ass'n et al. (Oct. 5, 2010) ("As you're aware, we're getting geared-up for the March 2011 proposal date for the Utility MACT, and one of the concerns we have is triggering a SBREFA panel on this rulemaking. . . . To this end, I was hoping you could provide me a couple of your member companies/ names in different geographic regions . . . which would be considered small entities.").

186 EPA SBREFA GUIDANCE, *supra* note 11, at 59.

187 Interview with Officials at EPA, in Washington, DC (Feb. 24, 2014).

188 EPA SBREFA GUIDANCE, *supra* note 11, at 58.

189 *Id.*

190 *Id.*

191 Interview with Officials at EPA, in Washington, DC (Feb. 24, 2014).

192 *Id.* EPA officials explained to the Center for Effective Government that small businesses may wish to be represented before the federal government by the trade associations of which they are members and pay dues, and the agency does not wish to deny small entities this representation by prohibiting trade association representatives from participating as SERs. However, EPA did not identify any criteria it uses for making its decision or for verifying that the trade associations permitted to participate in the process primarily represents small businesses.

193 *Id.* In fact, for EPA's panel on its Formaldehyde Emissions from Pressed Wood Products rule, EPA permitted trade association representatives to participate as SERs and to attend the pre-panel outreach meeting before confirming their eligibility because the deadline for selecting SERs had passed. E-mail from Tracey Westfield, U.S. Env'tl. Prot. Agency, to Brigid Shea, Int'l Wood Prods. Ass'n & Matt Wald, Recreation Vehicle Indus. Ass'n (Jan. 3, 2011) ("Please keep in mind that we still have to confirm your associations' eligibility to be SERs. We're just doing things a little out of order. Therefore, if after the 01/06 meeting it becomes apparent that one or both of your trade associations are ineligible to continue participating as SERs, we will notify you that we'll have to remove you from participation in the Panel. I'm not saying that it's likely to happen, but I wanted to let you know of your conditional inclusion in the Panel until such time that EPA can perform its due diligence."). Ultimately, EPA permitted both people to participate as SERs on the panel.

Small Entity Representatives and Other Non-SER Participants in the Panel Process

EPA does not have a policy that limits how many panels a small entity may advise as a SER. EPA also does not prohibit non-SERs from participating in outreach meetings as “helpers” to SERs throughout the panel process. Moreover, EPA does not require helpers to meet the elements of an eligible SER or require SERs to identify an assigned helper; rather the helpers can simply let the SERs know that they are available to help.

Despite potentially not meeting small business criteria, these non-SER helpers may attend any meetings/teleconferences with SERs at any point in the panel process. EPA permits helpers to speak at the meetings, but according to officials, the agency tries not to let them dominate the conversation.¹⁹⁴ EPA allows helpers to assist SERs with preparing comments, and asks for written comments developed by helpers to be in the best interest of the entity they are helping.¹⁹⁵ EPA also does not consistently identify helpers and affiliated SERs in panel materials or in the final panel report, although the agency has included such information in at least one panel report.¹⁹⁶

Panel Materials and Publication of Panel Report

Before EPA formally convenes a panel, the agency hosts an initial pre-panel meeting with potential SERs. In preparation for this initial meeting, EPA typically explains to SERs the SBAR panel process and the role SERs play in the process, provides the SERs with information about the rule under development, including any draft text available, and solicits input on issues relating to the regulatory flexibility analysis.¹⁹⁷ EPA incorporates input from the SERs in drafting a convening document that it shares with all panel members.¹⁹⁸ EPA may also host a meeting with the panel members before the panel officially convenes.

Once the panel formally convenes, the panel members meet to review panel documents and host at least one meeting with SERs to hear their input on the rule under development.¹⁹⁹ In advance of the meeting, the panel sends the SERs additional information about the rule and potential alternatives under consideration and requests written comments from the SERs on the issues related to the regulatory flexibility analysis and other issues

¹⁹⁴ Interview with Officials at EPA, in Washington, DC (Feb. 24, 2014).

¹⁹⁵ *Id.*

¹⁹⁶ FINAL PANEL REPORT OF SMALL BUSINESS ADVOCACY REVIEW PANEL ON EPA'S RULEMAKING FOR HAZARDOUS AIR POLLUTANTS FROM COAL- AND OIL-FIRED ELECTRIC UTILITY STEAM GENERATING UNITS 17-18 (2011) (listing the representatives from National Rural Electric Cooperative Association, American Public Power Association, Edison Electric Institute, Hunton and Williams, LLP, and J.E. Chicanowicz, Inc., who participated “as viewers/technical backup that augmented the SERs and provided comment but did not act as SERs”).

¹⁹⁷ EPA SBREFA GUIDANCE, *supra* note 11, at 61-62.

¹⁹⁸ *Id.* at 62-63.

¹⁹⁹ *Id.* at 64-66.

specifically identified by the panel.²⁰⁰ After the meetings with SERs, the panel members review SER input and develop recommendations for EPA to consider as it moves forward with developing the rule.²⁰¹ The program office developing the rule drafts a panel report that must be signed by all panel members and submitted to EPA's administrator within 60 days of the panel convening date.²⁰²

EPA does not publicize information about SERs, panel materials shared with SERs, or the final panel report until it publishes a notice of proposed rulemaking, which may be months or even years after the panel concludes.²⁰³ EPA's rationale for withholding the panel report and materials is that they are deliberative documents and releasing them prior to proposing the rule would allow stakeholders, lawmakers, and others to use the panel report as a lobbying tool in an attempt to influence EPA's internal proposal development process.²⁰⁴

Small Entity Representative Comments

EPA typically allows SERs to submit comments within two weeks after an outreach meeting.²⁰⁵ The agency has extended the deadline on occasion, but because the deadline is included in the statutory 60-day window for completing the panel, EPA has little ability to extend the deadline by more than a few days.

Although EPA does not necessarily encourage trade associations to submit their own comments, the agency asks that they submit comments through their member SERs.²⁰⁶ Based on the Center for Effective Government's review of 10 EPA panels, the agency received trade association comments submitted as attachments to SER comments and submitted as joint letters from the trade association and SERs. EPA also received comments submitted by trade associations and other non-SER entities independently. The agency did not exclude those comments, and according to EPA officials, the agency's practice is to consider all comments it receives equally, including those submitted by non-SERs independently or through a member SER.²⁰⁷

Agency Changes to Rules

The Regulatory Flexibility Act requires EPA "to consider the Panel Report in selecting proposed regulatory options to address small entity concerns, and where appropriate, to modify the proposed rule, the initial regulatory flexibility analysis or the decision on whether an initial regulatory flexibility analysis is required."²⁰⁸

200 *Id.* at 66.

201 *Id.* at 66-67.

202 *Id.* at 57.

203 Based on our review of EPA panels, on average, the delay between the panel end date and the date EPA made panel reports available to the public is 604 days (1.65 years). The main report discusses this delay in more detail.

204 Interview with Officials at EPA, in Washington, DC (Feb. 24, 2014).

205 *Id.*

206 *Id.*

207 *Id.*

208 EPA SBREFA GUIDANCE, *supra* note 11, at 67.

EPA generally accepts all consensus recommendations issued by the panel, “whether as modifications to the regulatory proposal, or as issues to be discussed in the preamble.”²⁰⁹

Based on our review of 10 EPA panels, EPA sometimes weakened the rule on the basis of SER and panel recommendations, rather than limiting its revisions to those that would mitigate small business impacts without lowering the level of protection provided by the rule.

For example, for EPA’s final rule addressing lead-based paint hazards during renovation, repair, and painting of certain facilities, the agency chose not to require workers to receive training from an accredited trainer prior to performing renovations. Instead, workers need only receive “on-the-job” training on the work practice requirements from a certified renovator. To make matters worse, the rule does not require the certified renovator to stay at the site during the renovation. Dismissing concerns raised by “the majority of commenters” on the proposal that EPA had not identified what qualified as adequate on-the-job training (OJT), EPA explained that “the OJT required will vary widely from project to project. . . .” EPA cites as the basis for its decision “industry concerns raised during the SBREFA panel process regarding high employee turnover rates within the industry and the potential for high training costs if all workers were required to be certified.”²¹⁰

After EPA’s SBAR panel for its rule on effluent limits and guidelines for the construction and development industry (C&D Effluents Panel), EPA decided to withdraw its rule. During the panel, SERs commented that the numerical standards for effluent guidelines would not achieve the results EPA sought and would be costly and too complicated for small businesses. The panel agreed with SERs that numerical effluent standards were not the best means for achieving EPA’s intended goal and recommended EPA consider a variety of individual alternatives for best management practices to reduce the costs on small entities. After proposing a rule in 2002,²¹¹ EPA withdrew the rule in 2004 based on the reasons provided by SERs and the panel.²¹² After EPA reissued a proposal in 2008,²¹³ and finalized the rule in 2009,²¹⁴ the Office of Advocacy requested the agency reconsider the final rule.²¹⁵

Following the SBAR panel review of EPA’s rulemaking to establish pollution discharge requirements for Cooling Water Intake Structures, EPA decided to change the rule’s application threshold, thereby exempting all small

209 *Id.*

210 Lead; Renovation, Repair, and Painting Program, 73 Fed. Reg. 21,692, 21,720-21 (Apr. 22, 2008).

211 Effluent Limitation Guidelines and New Source Performance Standards for the Construction and Development Category, 67 Fed. Reg. 42,644 (proposed June 24, 2002).

212 Effluent Limitation Guidelines and New Source Performance Standards for the Construction and Development Category, 69 Fed. Reg. 22,472, 22,477-81 (withdrawal of proposed rule Apr. 26, 2004).

213 Effluent Limitation Guidelines and New Source Performance Standards for the Construction and Development Category, 73 Fed. Reg. 72,562 (proposed Nov. 28, 2008).

214 Effluent Limitation Guidelines and New Source Performance Standards for the Construction and Development Category, 74 Fed. Reg. 62,996 (Dec. 1, 2009).

215 Letter from Susan Walthall, Office of Advocacy et al., to Lisa Jackson, U.S. Evtl. Prot. Agency (Apr. 20, 2010), available at http://archive.sba.gov/advo/laws/comments/epa10_0420.pdf.

entities and several large entities from the national categorical requirements.²¹⁶ As a result of the change, EPA was able to certify that the proposed and final rule would not impose a significant economic burden on a substantial number of small entities.²¹⁷

For EPA's Ground Water rule, the agency adopted SER and panel recommendations to give states flexibility to address potential problems in small systems. As a result, in the proposed and final rule, EPA chose not to require systems to conduct hydrogeologic sensitivity assessments, and instead, to "allow States flexibility to work within existing programs and define and identify significant deficiencies."²¹⁸

216 National Pollution Discharge Elimination System—Proposed Regulations to Establish Requirements for Cooling Water Intake Structures at Phase III Facilities, 69 Fed. Reg. 68,444, 68,538 (proposed Nov. 24, 2004).

217 *Id.* at 68,537; 71 Fed. Reg. 35,006, 35,036 (June 16, 2006).

218 National Primary Drinking Water Regulations: Ground Water Rule, 65 Fed. Reg. 30,194, 30,254 (proposed May 10, 2000).

APPENDIX C. OSHA'S SMALL BUSINESS REVIEW PANEL POLICIES AND PROCEDURES

Early Outreach to Stakeholders

According to the Department of Labor's guidance on complying with the Regulatory Flexibility Act, "Agencies should attempt to interact with small entities early in the rulemaking process to help ensure that the eventual final rule will meet its objectives while minimizing adverse effects on small entities. Early and continued interaction with small entities will help agencies identify and resolve important issues and obtain information useful to the development of the rule."²¹⁹

Although the agency's guidance does not provide details on when it should begin outreach, Center for Effective Government staff found that OSHA engaged in outreach activities early in the development stage prior to convening a panel for all seven rules selected for review. The agency solicited comments from the public and industry for at least five rules by publishing a notice of intent to develop a rule, a draft rule, or requesting information on a rule under development.²²⁰ Prior to convening a panel, OSHA also hosted stakeholder meetings for four rules²²¹ and consulted with an advisory panel, planning committee, or negotiated rulemaking committee for at least five rules.²²² Additionally, in at least three instances, OSHA engaged in pre-panel outreach to stakeholders for nearly a decade.²²³

219 OSHA SBREFA GUIDANCE, *supra* note 11.

220 Confined Spaces in Construction, 72 Fed. Reg. 67,352, 67,352-53 (proposed Nov. 28, 2007) (discussing the Advanced Notice of Proposed Rulemaking, 45 Fed. Reg. 19,266 (Mar. 25, 1980)); Occupational Exposure to Respirable Crystalline Silica, 78 Fed. Reg. 56,274, 56,292-93 (proposed Sept. 12, 2013) (discussing the Advance Notice of Proposed Rulemaking, 39 Fed. Reg. 44,771 (Dec. 27, 1974)); Request for Information, Occupational Exposure to Hexavalent Chromium, 67 Fed. Reg. 54,389 (Aug. 22, 2002); Occupational Exposure to Beryllium; Request for Information, 67 Fed. Reg. 70,707 (Nov. 26, 2002); Advance Notice of Proposed Rulemaking, Occupational Exposure to Diacetyl and Food Flavorings Containing Diacetyl, 74 Fed. Reg. 3938 (Jan. 21, 2009).

221 Confined Spaces in Construction, 72 Fed. Reg. 67,352, 67,352-54 (proposed Nov. 28, 2007); Occupational Exposure to Respirable Crystalline Silica, 78 Fed. Reg. 56,274, 56,292-94 (proposed Sept. 12, 2013); Advance Notice of Proposed Rulemaking, Occupational Exposure to Diacetyl and Food Flavorings Containing Diacetyl, 74 Fed. Reg. 3938, 3938-39 (Jan. 21, 2009); FINAL PANEL REPORT OF THE SMALL BUSINESS ADVOCACY REVIEW PANEL ON THE DRAFT OSHA STANDARD FOR ELECTRIC POWER GENERATION, TRANSMISSION, AND DISTRIBUTION 6 (2003).

222 Occupational Exposure to Hexavalent Chromium, 69 Fed. Reg. 59,306, 59,313-14 (proposed Oct. 4, 2004); Confined Spaces in Construction, 72 Fed. Reg. 67,352, 67,352-54 (proposed Nov. 28, 2007); Electric Power Generation, Transmission, and Distribution; Electrical Protective Equipment, 70 Fed. Reg. 34,822, 34,825-26 (proposed June 15, 2005); Occupational Exposure to Respirable Crystalline Silica, 78 Fed. Reg. 56,274, 56,292-94 (proposed Sept. 12, 2013); Cranes and Derricks in Construction, 73 Fed. Reg. 59,714, 59,714-19 (proposed Oct. 9, 2008).

223 Confined Spaces in Construction, 72 Fed. Reg. 67,352, 67,352-54 (proposed Nov. 28, 2007); Cranes and Derricks in Construction, 73 Fed. Reg. 59,714, 59,714-19 (proposed Oct. 9, 2008); Occupational Exposure to Respirable Crystalline Silica, 78 Fed. Reg. 56,274, 56,292-94 (proposed Sept. 12, 2013).

Identifying Small Entity Representatives (SERs)

Once OSHA determines that it may need to convene an SBAR panel, the agency begins identifying potential small entity representatives (SERs) to advise the panel.²²⁴ OSHA first identifies potential SERs independently, and then consults with the Office of Advocacy to identify additional nominees.²²⁵

OSHA's guidance does not provide any information about how the agency should seek to identify potential SERs; however, agency officials told Center for Effective Government staff that it seeks to identify SERs through its Small Business Consultation Program.²²⁶ OSHA neither solicits self-nominations²²⁷ nor posts notices about upcoming panels on its website.²²⁸ However, the agency will consider nominations it receives from small entities that contact OSHA directly about serving on a panel.²²⁹ Notably, for OSHA's upcoming panel on hazardous exposures to infectious diseases, the agency has solicited self-nominations in its bimonthly newsletter.²³⁰

OSHA provides a formal notice to the Office of Advocacy at least 60 days before a panel is projected to convene.²³¹ The formal notification includes information about the rule and its impacts on small entities, as well as a list of potential small entity representatives, and any other important materials the agency has already developed on the rule. Between 15-30 days after OSHA provides the formal notification to the Office of Advocacy, the Small Business Advocacy Panel Chairperson must host at least one meeting with all panel members. At this meeting, the panel works to develop regulatory alternatives, decide what information is needed to evaluate the alternatives, and consults with the Office of Advocacy about the potential SERs. On the date the panel formally convenes, the Small Business Advocacy Panel Chairperson is responsible for selecting the eligible SERs to advise the panel.

224 OSHA SBREFA GUIDANCE, *supra* note 11.

225 *Id.*; see also **OSHA Confined Spaces Panel**: E-mail from Charles Maresca, Office of Advocacy, to Pete Chaney, Mech. Contractors Ass'n of Am. et al. (Mar. 4, 2003) ("The way OSHA and Advocacy have done this before is that they set out some names, and then we set out some names, and everybody usually gets on, unless there's a reason not to put them all on. One problem came up recently with a small entity representative who was in fact not a small entity. Let's try to avoid that.").

226 Interview with Officials at OSHA, in Washington, DC (Feb. 7, 2014).

227 *Id.*

228 OSHA issued a news release on its advanced notice of proposed rulemaking and small business advocacy review panel for its Ergonomics Program rule but did not provide any details about the panel process or instruct small entities how to participate. News Release, Occupational Safety & Health Admin., OSHA Begins Small Business Review of Ergonomics Proposal; Releases Draft Regulatory Text (Feb. 19, 1999), available at https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=281. OSHA also announced the convening of its panel on a proposal to limit occupational exposure to diacetyl and food flavorings containing diacetyl, but the announcement came only days before the panel convened, after small entity representatives had already been selected. News Release, Occupational Safety & Health Admin., U.S. Secretary of Labor Hilda L. Solis Announces Convening of Rulemaking Panel on Worker Exposure to Food Flavorings Containing Diacetyl (Apr. 28, 2009), available at https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=17819. However, a representative of a small business trade association recently informed Center for Effective Government staff that the Office of Advocacy has recently begun to reach out to them to solicit small entity representatives for OSHA panels. E-mail from Bruce Lundegren, Office of Advocacy, to Bruce Lundegren, Office of Advocacy, and undisclosed distribution list (June 5, 2014) ("I wanted to let you know that . . . OSHA intends to convene a Small Business Advocacy Review (SBAR) panel . . . for its Infectious Diseases rule If you have or represent small business members from the regulated industry who are interested in participating in the panel process as a SER, please contact me or send me their contact information."). Moreover, Office of Advocacy officials told Center for Effective Government staff during an interview that OSHA is also planning to enhance its outreach to potential SERs on future panels. Interview with Officials at SBA Office of Advocacy, in Washington, DC (July 31, 2014).

229 Interview with Officials at OSHA, in Washington, DC (Feb. 7, 2014).

230 *OSHA to Convene Small Business Review Panel on Infectious Diseases*, OSHA TAKES, June 16, 2014, <http://www.osha.gov/as/opa/quicktakes/qt061614.html#12>.

231 OSHA SBREFA GUIDANCE, *supra* note 11.

According to officials at OSHA, which Center for Effective Government staff confirmed in its review of seven OSHA rules, the Office of Advocacy usually reaches out to trade associations to identify SERs.²³² OSHA claims that it only reaches out to trade associations to help identify SERs as a “last resort” if the agency cannot find enough interested potential small entity representatives, although this occurs prior to soliciting names from the Office of Advocacy.²³³ However, when OSHA does contact trade associations, it generally prefers utilizing large, issue-specific trade associations, such as the Society of Chemical Manufacturers Associations and the American Chemistry Council. OSHA officials also recalled at least one occasion where they reached out to the National Federation of Independent Business.²³⁴ OSHA does not typically reach out to small business trade associations like the American Sustainable Business Council, Small Business Majority, or Main Street Alliance.²³⁵

Verifying Small Entity Representative Eligibility

In accordance with the Regulatory Flexibility Act, OSHA defines a small entity as a small business, nonprofit organization, or governmental jurisdiction. OSHA, therefore, permits “only those persons that primarily represent one or more small entities potentially affected by a proposed rule” to serve as SERs.²³⁶ According to OSHA officials, the agency seeks a broad range of potential SERs and prefers to find innovative small entities that have successfully implemented the proposal under development or have tried to address the problem that the rule is intended to correct.²³⁷

However, OSHA’s guidance provides that “SERs may include trade association representatives, attorney’s [sic], and regulatory consultants if the Chairperson finds they meet the criterion for eligibility.”²³⁸ But, in practice, OSHA only allows small businesses – who may also be members of trade associations – to serve as SERs because small businesses can best identify potential small business impacts from a rule.²³⁹ OSHA will only permit a trade association representative not connected to a small entity to participate as a SER if OSHA cannot identify a sufficient number of SERs.²⁴⁰ However, we were unable to identify any OSHA guidance regarding what is considered to be an optimal or minimum number of SERs.

232 Interview with Officials at OSHA, in Washington, DC (Feb. 7, 2014); e.g., **OSHA Confined Spaces Panel**: E-mail from Charles Maresca, Office of Advocacy, to Michael Pearlstein, Associated Builders & Contractors (Feb. 27, 2003) (“I need as many names as you can get. For electric power they took every name I gave them.”); **OSHA Electric Power Panel**: E-mail from Charles Maresca, Office of Advocacy, to Anita Drummond, Associated Builders & Contractors et al. (Feb. 11, 2003) (“I will need the names of small entity representatives by this Friday. . . . OSHA has already been in touch with NECA and NUCA, among others.”).

233 Interview with Officials at OSHA, in Washington, DC (Feb. 7, 2014); see also **OSHA Diacetyl Panel**: E-mail from Bruce Lundgren, Office of Advocacy, to Rasma Zvaners, Am. Bakers Ass’n (Apr. 27, 2009) (“We are discussing this matter with OSHA. The strong preference is to have regulated entities as SERs, and not trade association folks. That said, we do want to ensure that potentially impacted industries are represented on the panel. We are discussing this and will get back to you shortly.”).

234 Interview with Officials at OSHA, in Washington, DC (Feb. 7, 2014).

235 *Id.*

236 OSHA SBREFA GUIDANCE, *supra* note 11.

237 Interview with Officials at OSHA, in Washington, DC (Feb. 7, 2014).

238 OSHA SBREFA GUIDANCE, *supra* note 11.

239 Robert Burt, Occupational Safety & Health Admin., Presentation on Building Successful SBREFA Panels at the Administrative Bar Association’s Administrative Law Conference (Oct. 25, 2012).

240 Interview with Officials at OSHA, in Washington, DC (Feb. 7, 2014).

In cases where a trade association representative has participated as a SER, OSHA has asked the trade SER to represent only the interests of the association's small business members.²⁴¹ However, OSHA tries to avoid trade association SERs because experience has shown that they do not limit their input to the small business issues even when they agree to do so initially.²⁴²

Despite these concerns, OSHA has no formal procedures for verifying whether a small entity meets the eligibility criteria or a trade association primarily represents small businesses. The agency's usual practice is to send a letter or e-mail to the SER asking for an explanation of how it meets the definition of a small entity, but OSHA does not require that they certify their eligibility.²⁴³

Small Entity Representatives and Other Non-SER Participants in the Panel Process

OSHA has no policy regarding whether SERs can participate on multiple panels.²⁴⁴ OSHA also does not prohibit non-SERs from listening in to teleconference meetings as “helpers” to SERs.²⁴⁵ With no formal policy regarding helpers, OSHA does not require them to qualify as eligible SERs. Moreover, the agency does not require the SERs to identify an assigned helper, but allows helpers to simply let SERs know they are available to help if needed.²⁴⁶ Thus, OSHA does not identify helpers and their affiliated SERs in panel materials or in the final panel report.

Panel Materials and Publication of Panel Report

The Department of Labor guidance on SBREFA outlines detailed procedures for preparing and disseminating panel materials and the panel report.

At the first pre-panel meeting with panel members (within 15-30 days of OSHA's formal notification to the Office of Advocacy), the panel members work to develop regulatory alternatives and decide what information is needed to evaluate the alternatives.²⁴⁷ Following the meeting (30-45 days after the formal notification), the Chairperson

²⁴¹ *Id.*

²⁴² *Id.* OSHA indicated that the disadvantage of allowing trade groups to serve as SERs on the panel is that they often become overly involved in the technical aspects of the rule and tend not to represent small business concerns.

²⁴³ *Id.*; see also, e.g., **OSHA Electric Power Panel**: E-mail from Kathleen Martinez, Occupational Safety & Health Admin. (OSHA), to Kathleen Martinez, OSHA, and undisclosed distribution list (Apr. 9, 2003) (“SBREFA Participants: We need to verify additional information regarding your firm. This is to assure that you are a small firm and the SBREFA Panel has obtained a reasonable mix of various kinds of small firms affected by the rule.”); **OSHA Silica Panel**: E-mail from Kathleen Martinez, U.S. Dep’t of Lab., to Anita Drummond, Associated Builders & Contractors (Oct. 28, 2003) (“Could you please send me additional information on the possible SER as in; name, address, phone, type of small business?”).

²⁴⁴ Interview with Officials at OSHA, in Washington, DC (Feb. 7, 2014). With only 10 review panels completed, the problem with “professional” SERs is not as substantial as at EPA.

²⁴⁵ *Id.*

²⁴⁶ **OSHA Electric Power Panel**: E-mail from Charles Maresca, Office of Advocacy, to Mike Pearlstein, Associated Builders & Contractors (Apr. 24, 2003) (“Here is an old list; the two from Maine and the two from Florida are ABC members. I don’t think they have any idea that you are going to help them with this, but I think they will be grateful.”).

²⁴⁷ OSHA SBREFA GUIDANCE, *supra* note 11.

must provide panel members with the alternatives and supporting information that the panel identified during the pre-panel meeting or new information OSHA developed after that meeting.

Between 45-60 days after formal notification, the Chairperson must provide the panel with the materials to be provided to SERs. The panel must approve the packet or request a meeting within seven days of receiving it from the agency. OSHA must provide SERs, at minimum, with an information package that includes a description of the important components of the rule, the regulatory flexibility alternatives, and the impacts of the rule with and without these alternatives.²⁴⁸ According to OSHA officials, the agency typically provides SERs with a binder that includes basic mandatory information as well as supplemental reading materials.²⁴⁹ The binder also typically contains a list of approximately 20-30 questions that SERs can use as a template for comments on the specific issues for which OSHA is seeking advice and recommendations.

Once OSHA receives approval from all members of the panel, the agency provides the packet to SERs.²⁵⁰ SERs are then provided at least 15 days to review the materials before OSHA hosts its teleconference with the SERs, but the meeting must be held within 15 days after the panel has been convened.²⁵¹

To make the process as transparent as possible, at roughly the same time OSHA disseminates panel materials to SERs, the agency makes the information available in the rulemaking docket on the Regulations.gov website.²⁵² However, we also found that OSHA has engaged in the practice of allowing third parties to review materials prior to sharing them with SERs or to making them publicly available online.²⁵³

OSHA generally completes panels within the 60-day deadline and submits the final report to the agency head.²⁵⁴ OSHA's guidance tasks the Standards Directorate with making the panel report available as part of the rulemaking record.²⁵⁵ In practice, the agency publishes the report once the panel concludes (unlike the practice at EPA and CFPB, where the report is withheld until a proposed rule is published).

248 *Id.*

249 Interview with Officials at OSHA, in Washington, DC (Feb. 7, 2014).

250 OSHA SBREFA GUIDANCE, *supra* note 11.

251 *Id.*

252 Interview with Officials at OSHA, in Washington, DC (Feb. 7, 2014); *e.g.*, OCCUPATIONAL SAFETY & HEALTH ADMIN., OCCUPATIONAL EXPOSURE TO DIACETYL AND FOOD FLAVORINGS CONTAINING DIACETYL SBREFA PACKAGE (2009), available at <http://www.regulations.gov/#!documentDetail;D=OSHA-2008-0046-0074> (posting materials to the docket on Apr. 30, 2009, which is 10 days after the date indicated on the letter to small entity representatives included in the package).

253 *E.g.*, Fax letter from J. Lawrence Robinson, Color Pigments Mfrs. Ass'n, to Charles Maresca, Office of Advocacy & Robert Burt, Occupational Safety & Health Admin. et al. (Feb. 5, 2004) ("Thank you for providing me with the opportunity to review a preliminary copy of the proposed standard for hexavalent chromium, and the supporting background materials that the Occupational Safety and Health Administration (OSHA) plans to provide to the small entity representatives (SERs) during the SBREFA Panel process. OSHA's goal in providing this material to me and the other 'screeners' in advance of the SBREFA Panel process is to ensure small business the maximum opportunity for effective input during the Panel process.").

254 OSHA completed its panel reports within the 60-day deadline for all rules included in our analysis.

255 OSHA SBREFA GUIDANCE, *supra* note 11.

Small Entity Representative Comments

OSHA typically provides SERs approximately 1-2 weeks to submit comments after the teleconference.²⁵⁶ According to OSHA officials, comments received sometimes go beyond the issues OSHA has requested small entity representatives to comment on, and commonly request an exemption for an individual entity or the complete industry.²⁵⁷ However, the panel is not legally required under SBREFA to address comments beyond the scope of the standard Regulatory Flexibility Act issues, and OSHA staff indicated that the panel does not usually issue recommendations on comments requesting individual small business exemptions.²⁵⁸

SERs may also submit joint comment letters.²⁵⁹ OSHA does not discount comment letters submitted jointly, but OSHA officials said they did not believe that joint comments were common on past panels.²⁶⁰ Additionally, SERs routinely submit trade association comments as attachments to their comment letters and asks OSHA to consider these comments.²⁶¹ Because OSHA's panel process is open and panel materials are available to the public, OSHA also receives comments from non-SERs through the online docket.²⁶² According to OSHA officials, the agency responds to those comments as it would an SER comment.²⁶³

Agency Changes to Rules

OSHA's guidance on complying with SBREFA tasks the director of the appropriate Standards Directorate and the Associate Solicitor for Occupational Safety and Health with ensuring each panel recommendation receives a response. OSHA's policy is to "accept each recommendation agreed upon by the entire panel, whether as a modification to the rule, or as an issue to be discussed in the preamble, unless further analysis or evidence collected after the Panel completes its work indicates that the recommendation is not practicable, enforceable, protective of worker safety, or consistent with the OSH Act or other relevant statutes."²⁶⁴

In line with this requirement, OSHA responds to panel recommendations in its proposed and final rules by providing a detailed chart that lists each panel recommendation and explains how the agency implemented the recommendation in the rule.

256 *E.g.*, **OSHA Diacetyl Panel**: Letter from Robert Burt, Occupational Safety & Health Admin., to Small Entity Representatives (Apr. 20, 2009), available at <http://www.regulations.gov/#!documentDetail;D=OSHA-2008-0046-0074>.

257 Interview with Officials at OSHA, in Washington, DC (Feb. 7, 2014).

258 *Id.*

259 *Id.*

260 *Id.*

261 Robert Burt, Occupational Safety & Health Admin., Presentation on Building Successful SBREFA Panels at the Administrative Bar Association's Administrative Law Conference (Oct. 25, 2012).

262 Interview with Officials at OSHA, in Washington, DC (Feb. 7, 2014).

263 *Id.*

264 OSHA SBREFA GUIDANCE, *supra* note 11.

Our review of seven OSHA panels revealed that OSHA has weakened worker protections provided by some of its rules based on SER and panel recommendations, rather than limiting changes to those that would mitigate small business impacts without reducing worker protections.

For example, during OSHA's SBAR panel to review its rulemaking on Electric Power Generation, Transmission, and Distribution, many small entity representatives raised concerns about provisions in the draft rule that would have required a host employer to report certain violations to a contract employer, a contract employer to inform the host employer of corrective and preventative measures taken in response to those violations, and a host employer to take note of a contractor's failure to correct violations. SERs felt that these provisions would require host employers to act as OSHA enforcers by forcing them to make observations and decisions about possible OSHA violations, a task for which they are not trained.²⁶⁵

OSHA sought comment on the provisions during the notice-and-comment period for the proposed rule. A union representative provided comments to OSHA explaining that "[t]his requirement is particularly important in the electrical industry where contract employees are potentially exposed to extremely serious hazards. If the host employer who know the worksite's hazards and the potential for harm sees a contract employee exposed to those conditions the host knows to be hazardous, it is unconscionable for the host to walk away."²⁶⁶ Yet, based on concerns raised by SERs, as well as other industry commenters during the notice-and-comment period, OSHA chose to eliminate these requirements from the rule.²⁶⁷

The SBREFA process has also resulted in delays to finalizing critical worker protections. In the case of the review panel on a rule to limit occupational exposure to diacetyl, OSHA has failed to move forward on a proposal despite completing the panel in July 2009. OSHA withdrew an advance notice of proposed rulemaking in early 2003, noting that the reason for doing so was to host a review panel.

²⁶⁵ FINAL REPORT OF THE SMALL BUSINESS ADVOCACY REVIEW PANEL ON THE DRAFT OSHA STANDARD FOR ELECTRIC POWER GENERATION, TRANSMISSION, AND DISTRIBUTION 7-11 (2003).

²⁶⁶ Electric Power Generation, Transmission, and Distribution; Electrical Protective Equipment, 79 Fed. Reg. 20,316, 20,362 (Apr. 11, 2014).

²⁶⁷ *Id.* at 20,363-64.

APPENDIX D. CFPB'S SMALL BUSINESS REVIEW PANEL POLICIES AND PROCEDURES

Early Outreach to Stakeholders

As a recently established agency under the Dodd-Frank Act, CFPB has not yet formalized guidance for complying with the Regulatory Flexibility Act. Thus, the agency has no publicly accessible guidance document that specifies when the agency typically begins outreach to stakeholders for rules under development. Moreover, as a young agency, CFPB's record of stakeholder outreach prior to convening SBAR panels is not as extensive as that of either EPA or OSHA. However, CFPB officials explained to Center for Effective Government staff that the agency's early outreach efforts to stakeholders generally includes collaborating with the Consumer Advisory Board and three Standing Councils: the Community Banks Council, the Credit Unions Council, and the Academic Research Council.²⁶⁸

Moreover, for all four rules covered by the three panels²⁶⁹ included in the Center for Effective Government's review, the panel reports indicate that CFPB engaged in considerable outreach to "consumers, industry members, and representative groups – including small entities and representative organizations . . ."²⁷⁰ CFPB also hosted meetings and roundtables with industry stakeholders in the years prior to convening each of the three panels.²⁷¹ For at least three of the rules subjected to the panel process, CFPB published information about the rule on

268 Interview with Officials at CFPB, in Washington, DC (Feb. 19, 2014); *Advisory Groups*, CFPB.gov, <http://www.consumerfinance.gov/advisory-groups/> (last visited Sept. 8, 2014). At the time of the Center for Effective Government's interview with CFPB, the agency was in the process of establishing the Academic Research Council. CFPB officials explained that this new council would not advise the agency on policy issues as the other two standing councils do.

269 CFPB's Mortgage Servicing Panel covered two rules: Mortgage Servicing Rules under the Real Estate Settlement Procedures Act (Regulation X) and Mortgage Servicing Rules under the Truth in Lending Act (Regulation Z).

270 FINAL REPORT OF THE SMALL BUSINESS REVIEW PANEL ON CFPB'S PROPOSALS UNDER CONSIDERATION FOR INTEGRATION OF TILA AND RESPA MORTGAGE DISCLOSURE REQUIREMENTS 15 (2012) [hereinafter FINAL TILA-RESPA PANEL REPORT]; FINAL REPORT OF THE SMALL BUSINESS REVIEW PANEL ON CFPB'S PROPOSALS UNDER CONSIDERATION FOR MORTGAGE SERVICING RULEMAKING 8, 14 (2012) [hereinafter FINAL MORTGAGE SERVICING PANEL REPORT]; FINAL REPORT OF THE SMALL BUSINESS REVIEW PANEL ON CFPB'S PROPOSALS UNDER CONSIDERATION FOR RESIDENTIAL MORTGAGE LOAN ORIGINATION STANDARDS RULEMAKING 18 (2012) [hereinafter FINAL RESIDENTIAL MORTGAGE LOAN ORIGINATION STANDARDS PANEL REPORT].

271 Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 77 Fed. Reg. 51,116, 51,126-28 (proposed Aug. 23, 2012); FINAL TILA-RESPA PANEL REPORT, *supra* note 270, at 15; 2012 Truth in Lending Act (Regulation Z) Mortgage Servicing, 77 Fed. Reg. 57,318, 57,324-25 (proposed Sept. 17, 2012); 2012 Real Estate Settlement Procedures Act (Regulation X) Mortgage Servicing Proposal, 77 Fed. Reg. 57,200, 57,207 (proposed Sept. 17, 2012); FINAL MORTGAGE SERVICING PANEL REPORT, *supra* note 270, at 8, 14; Truth in Lending Act (Regulation Z); Loan Originator Compensation, 77 Fed. Reg. 55,272, 55,279 (proposed Sept. 7, 2012); FINAL RESIDENTIAL MORTGAGE LOAN ORIGINATION STANDARDS PANEL REPORT, *supra* note 270, at 18.

its website and solicited comments from interested parties before convening an review panel.²⁷² CFPB also conducted one-on-one interviews with consumers and industry representatives for these three rules.²⁷³

Identifying Small Entity Representatives (SERs)

Although CFPB has not developed written guidance on complying with the Regulatory Flexibility Act, the agency has prepared a fact sheet on the small business review panel process, which describes the agency's procedure for identifying small entity representatives (SERs).²⁷⁴ The agency seeks to identify potential SERs independently and in consultation with the Consumer Advisory Board and its two Standing Councils, as well as the Office of Advocacy.²⁷⁵

CFPB seeks to identify "individuals to represent categories of small entities likely to be subject to the requirements of a rule under development."²⁷⁶ The agency first determines the types of small entities likely to be directly affected by the forthcoming rule. CFPB then formulates a list of approximately 15-20 potential individuals who may represent each group with the goal of ensuring there is fair representation on the panel (e.g., a range of markets and geographical areas).²⁷⁷

CFPB does not solicit self-nominations but will consider small entities to participate as SERs when a small entity contacts either the agency or the Office of Advocacy directly.²⁷⁸ CFPB also does not post notices about upcoming panels on its website, although the agency has posted notices to announce a panel's convening (after the agency has already selected SERs to advise the panel).²⁷⁹

CFPB may contact trade associations for assistance identifying SERs if needed.²⁸⁰ However, according to agency officials, trade associations have taken the initiative to contact CFPB directly to recommend SERs for panels,

272 Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 77 Fed. Reg. 51,116, 51,126-28 (proposed Aug. 23, 2012); FINAL TILA-RESPA PANEL REPORT, *supra* note 270, at 15; 2012 Truth in Lending Act (Regulation Z) Mortgage Servicing, 77 Fed. Reg. 57,318, 57,324-25 (proposed Sept. 17, 2012); 2012 Real Estate Settlement Procedures Act (Regulation X) Mortgage Servicing Proposal, 77 Fed. Reg. 57,200, 57, 207 (proposed Sept. 17, 2012); FINAL MORTGAGE SERVICING PANEL REPORT, *supra* note 270, at 8, 14; *see also* *Know Before You Owe Timeline*, CFPB.GOV, <http://www.consumerfinance.gov/knowbeforeyouowe/timeline/> (last visited Sept. 8, 2014) (indicating that the Know Before You Owe prototype loan estimates were posted online on May 18, 2011); News Release, Consumer Fin. Prot. Bureau, CFPB Seeks Input on Draft Monthly Mortgage Statement (Feb. 13, 2012), *available at* <http://www.consumerfinance.gov/newsroom/consumer-financial-protection-bureau-seeks-input-on-draft-monthly-mortgage-statement/>.

273 Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 77 Fed. Reg. 51,116, 51,126-28 (proposed Aug. 23, 2012); FINAL TILA-RESPA PANEL REPORT, *supra* note 270, at 15; 2012 Truth in Lending Act (Regulation Z) Mortgage Servicing, 77 Fed. Reg. 57,318, 57,324-25 (proposed Sept. 17, 2012); 2012 Real Estate Settlement Procedures Act (Regulation X) Mortgage Servicing Proposal, 77 Fed. Reg. 57,200, 57, 207 (proposed Sept. 17, 2012); FINAL MORTGAGE SERVICING PANEL REPORT, *supra* note 270, at 8, 14.

274 CFPB SBREFA GUIDANCE, *supra* note 11.

275 *Id.*; Interview with Officials at CFPB, in Washington, DC (Feb. 19, 2014).

276 CFPB SBREFA GUIDANCE, *supra* note 11.

277 *Id.*; Interview with Officials at CFPB, in Washington, DC (Feb. 19, 2014).

278 *Id.* According to CFPB officials, small entity representatives have independently contacted SBA field offices, and the Office of Advocacy has forwarded those names along to CFPB. CFPB has only received a few direct inquiries from small entities seeking to participate on a panel.

279 *See infra* note 296.

280 Interview with Officials at CFPB, in Washington, DC (Feb. 19, 2014).

and the agency has selected SERs from among those recommended.²⁸¹ CFPB officials have also indicated that the Office of Advocacy does not recommend trade association SERs because the office knows these are not the types of entities CFPB is seeking to advise the panels.²⁸² Yet, our analysis found that the Office of Advocacy reached out to major trade associations to help with identifying SERs for at least one CFPB panel, similar to Advocacy's practice with helping EPA and OSHA identify potential SERs.²⁸³

Verifying Small Entity Representative Eligibility

CFPB follows the Regulatory Flexibility Act's definition of a small entity, which may be a "small business, a small organization, or a small government."²⁸⁴ CFPB selects small entities that are likely to be directly subject to the rule under development as SERs to advise the panel.²⁸⁵

CFPB's written procedures for verifying eligibility are limited to contacting each potential SER for a panel to "confirm small entity status and the representative's willingness and availability to participate in a Panel outreach meeting."²⁸⁶ According to CFPB officials, the agency may take some additional steps to verify SER eligibility, such as checking the call reports of depository institutions or asking the entity about its revenue if it is a non-depository institution (for which call reports are not available).²⁸⁷ However, the agency has no formal certification requirement.²⁸⁸

According to CFPB officials, the agency would only consider permitting a trade association representative to participate as a SER if the agency was unable to find a sufficient number of actual SERs for a panel (although the agency has no formal policy defining what it considers to be "sufficient").²⁸⁹ Because the agency has no written policy regarding trade association representatives participating as SERs, the agency also lacks any eligibility criteria by which to decide whether to permit a trade association representative to participate as a SER.

281 *Id.*

282 *Id.*

283 *E.g., TILA-RESPA Panel:* E-mail from Jennifer Smith, Office of Advocacy, to Ken Markison, Mortg. Bankers Ass'n (Dec. 16, 2011) ("It is my understanding that your organization has some mortgage banks that would qualify as small entities. Can you please send me the names of a couple of your members who you believe would be good SERs?").

284 CFPB SBREFA GUIDANCE, *supra* note 11.

285 *Id.*

286 *Id.*

287 Interview with Officials at CFPB, in Washington, DC (Feb. 19, 2014).

288 *Id.*

289 *Id.*

Small Entity Representatives and Other Non-SER Participants in the Panel Process

CFPB has no policy against SERs advising on multiple panels and may even ask SERs to advise more than once if they previously provided helpful input.²⁹⁰ However, because the agency has only completed four panels to date, it has not yet run into challenges with the same SERs participating on multiple panels.²⁹¹

CFPB also has no formal written policy against SER helpers participating during meetings with SERs, and in practice, the agency allows helpers to attend outreach meetings.²⁹² The only limit the agency imposes on helpers is that each SER may only have one helper, and no helpers may speak during the outreach meeting.²⁹³ CFPB also does not require “helpers” to qualify as eligible SERs or identify the “helpers” in the final panel report.²⁹⁴

Panel Materials and Publication of Panel Report

Prior to the official panel outreach meeting with SERs, CFPB prepares a package of outreach materials for the SERs, which is provided to the Office of Advocacy and the Office of Information and Regulatory Affairs for feedback. The agency then distributes a package of outreach materials to the SERs, which typically includes a list identifying the SERs, information on the background of the rule under development, the regulatory alternatives being considered, information on the economic impacts of the rule and potential alternatives, and questions and issues on which CFPB is seeking input.²⁹⁵

At approximately the same time CFPB disseminates the outreach package to SERs, the agency also posts the outreach materials, except for the list of SERs, on its website and invites the public to submit comments on those materials to the agency.²⁹⁶ Although CFPB generally completes the panel process within the 60 days as required by SBREFA, the agency only publishes the list of SERs in the final panel report, and it does not release the final

290 *Id.*

291 Since the Center for Effective Government began research, CFPB has completed a fourth panel on improving information about potential changes to mortgage information reported under the Home Mortgage Disclosure Act. FINAL REPORT OF THE SMALL BUSINESS REVIEW PANEL ON THE CFPB'S PROPOSALS UNDER CONSIDERATION FOR THE HOME MORTGAGE DISCLOSURE ACT (HMDA) RULEMAKING (2014).

292 Interview with Officials at CFPB, in Washington, DC (Feb. 19, 2014).

293 *Id.*; e.g., **CFPB Mortgage Servicing Panel**: E-mail from Rachel Ross, Consumer Fin. Prot. Bureau, to Shagufta Ahmed, Office of Mgmt. & Budget et al. (Apr. 23, 2012) (“Please remember that each Small Entity Representative is permitted one guest, and only the small entity representative may speak during the meeting.”).

294 Interview with Officials at CFPB, in Washington, DC (Feb. 19, 2014).

295 CFPB SBREFA GUIDANCE, *supra* note 11.

296 Interview with Officials at CFPB, in Washington, DC (Feb. 19, 2014); **CFPB TILA-RESPA Panel**: News Release, Consumer Fin. Prot. Bureau, CFPB Convenes Small Business Panel for Know before You Owe Mortgage Disclosures (Feb. 21, 2012), available at <http://www.consumerfinance.gov/newsroom/consumer-financial-protection-bureau-convenes-small-business-panel-for-know-before-you-owe-mortgage-disclosures/>; CFPB Mortgage Disclosure Team, *SBREFA, Small Providers, and Mortgage Disclosure*, CFPB.Gov (Feb. 21, 2014), <http://www.consumerfinance.gov/blog/sbrefa-small-providers-and-mortgage-disclosure/>; **CFPB Mortgage Servicing Panel**: News Release, Consumer Fin. Prot. Bureau, CFPB Outlines Borrower-Friendly Approach to Mortgage Servicing (Apr. 9, 2012), available at <http://www.consumerfinance.gov/newsroom/consumer-financial-protection-bureau-outlines-borrower-friendly-approach-to-mortgage-servicing/>; **CFPB LO Comp Panel**: News Release, Consumer Fin. Prot. Bureau, CFPB Considers Rules to Simplify Mortgage Points and Fees (May 9, 2012), available at <http://www.consumerfinance.gov/newsroom/consumer-financial-protection-bureau-considers-rules-to-simplify-mortgage-points-and-fees/>.

panel report to the public until it issues the proposed rule under review.²⁹⁷ CFPB's rationale for withholding the completed report is that releasing it earlier could generate public comments that are not useful to the agency given that the panel report addresses regulatory options that may no longer be under consideration.²⁹⁸

Small Entity Representative Comments

Once SERs have had time to review the outreach package, CFPB hosts a day-long outreach meeting with SERs, which they may join in person or by telephone.²⁹⁹ In addition to requesting SER input on standard Regulatory Flexibility Act issues, CFPB allows SERs to provide general commentary on any issue during the end of its day-long outreach meeting.³⁰⁰ Exemptions are regularly requested during this one-hour open comment period, and those requests are generally regarded as potential alternatives to the rule. CFPB's panel reports provide only a summary of substantive discussions from this final hour period.

SERs may submit written comments to the panel for approximately one week following the outreach meeting.³⁰¹ CFPB accepts individual and joint comment letters. Additionally, because CFPB makes materials provided to SERs publicly available and solicits comments from non-SERs, The agency accepts non-SER comments, which may be in the form of individual comments or as an attachment to SER comments. The agency considers all comments it receives equally in developing panel recommendations. However, CFPB considers comments from non-SERs to be outside of the panel process and therefore does not address them or identify them in the panel report.³⁰²

Agency Changes to Rules

CFPB's fact sheet on the review panel process provides that the agency "discusses and considers the Panel's report and the comments and advice provided by small businesses as it prepares the proposed rule."³⁰³

Based on the Center for Effective Government's review of three panels, CFPB exempted small businesses from at least one of its rules to the detriment of consumers whom the rule was intended to protect. For example, CFPB's

297 CFPB SBREFA GUIDANCE, *supra* note 11. Because CFPB is a relatively new agency and has had to operate on tight statutory timelines, the delay between the panel end date and panel posting date are not as lengthy as for many EPA panels. CFPB missed the 60-day deadline by two days for both the TILA-RESPA Panel and the Mortgage Servicing Panel, and by three days for its Residential Mortgage Loan Origination Standards Panel. CFPB has withheld panel reports for an average of 60 days after a panel concluded before publishing the panel on the Regulations.gov website. It is likely that delays between the end of a panel and the publication of the panel reports will grow much longer in the future, especially given the politicization of many CFPB rulemakings.

298 Interview with Officials at CFPB, in Washington, DC (Feb. 19, 2014).

299 CFPB SBREFA GUIDANCE, *supra* note 11; Interview with Officials at CFPB, in Washington, DC (Feb. 19, 2014).

300 CFPB SBREFA GUIDANCE, *supra* note 11; Interview with Officials at CFPB, in Washington, DC (Feb. 19, 2014).

301 Interview with Officials at CFPB, in Washington, DC (Feb. 19, 2014). Small entity representatives were given a short time period to review the documents for CFPB's first three panels because of statutory deadlines; however, CFPB plans to provide more review time on future panels.

302 *Id.*

303 CFPB SBREFA GUIDANCE, *supra* note 11.

mortgage servicing rule under the Real Estate Settlement Procedures Act seeks to ensure consumers receive adequate disclosures about mortgage loan obligations and information on options to mitigate potential losses in the event they are unable to meet those obligations. Additionally, the rules address certain practices among loan servicers related to disclosures, forced-placed insurance, and error resolution. When CFPB began to develop this rule, the Bureau proposed to require that servicers promptly communicate with a borrower whose loan becomes delinquent and provide information about options available for mitigating loss and information about the foreclosure process. The Bureau also sought to prohibit servicers from moving forward on a foreclosure sale once a delinquent borrower has submitted an application for loss mitigation, except in certain limited circumstances.

During the panel process, SERs commented that small servicers commonly contact borrowers early on in the foreclosure process and even communicate with delinquent borrowers much earlier than when it becomes critical for them to have information about the foreclosure process. SERs felt that they could easily conduct loss mitigation and foreclosures concurrently while also communicating with the borrowers. Based on these comments and the panel's recommendation, CFPB sought comment in the proposed rule on whether to exclude from these requirements small servicers. In the final rule, the agency provided the exemption to small servicers, defined as those servicing 5,000 or fewer mortgage loans, noting that the agency was persuaded "that the small servicers are generally achieving the goals of the discretionary rulemakings to protect delinquent borrowers."³⁰⁴ However, this reduces protection to consumers whose mortgages are serviced by small servicers.

³⁰⁴ Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10,696, 10,720 (Feb. 14, 2013).



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