

Office of Advocacy

**Testimony of
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U.S. Small Business Administration

before the

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Home Health Care: Can Small Agencies Survive New Regulations?

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Good Morning, Mr. Chairman, Senator Kerry and members of the Committee. I am Jere Glover, Chief Counsel for Advocacy with the Small Business Administration (SBA). Before proceeding to my testimony, I wish to note that the views expressed here are my own and do not necessarily reflect the views of SBA or the Administration.

Thank you for inviting me to speak to you today. The Office of Advocacy believes that the surety bond and capitalization rule and the Interim Payment System (IPS) rule issued by the Health Care Financing Administration will have a serious impact on small home health agencies (HHAs). Our concern here is the impact on and survivability of legitimate HHAs, which do not engage in fraud and abuse, and the elderly and handicapped clients they serve.

We have spoken and corresponded with many HHAs around the country and have met with industry representatives regarding the inability of small home health care providers to comply with the regulations. I believe that if HCFA had worked with the Office of Advocacy early in the process, some of the current controversy could have been avoided.

The phenomenon of neglecting the concerns of small business and the costs associated with regulations is not new. Recognizing that small business is a major source of competition and economic growth, Congress established a process through the [Regulatory Flexibility Act](#) for agencies to analyze how to design regulations that will help achieve statutory and regulatory goals efficiently without harming or imposing undue burdens on the major source of competition in the nation's economy - small business. America is driven by an economic market that is constantly shifting resources to their best use and retooling old systems to meet new demands. It is a system made for small, fast-changing firms. But public policy often lags behind or favors the old large corporate model. The paradigm of the economic workhorse in America has changed. The dominant

players in today's economy are not the Fortune 500 companies, but emerging and fast growing small businesses.

Advocacy has documented that small firms those driving the current economy are disproportionately burdened by the cost of regulatory compliance. In fact, in research funded by the Office of Advocacy, firms with 20 to 49 employees reported spending nearly 20 cents of every revenue dollar to pay for the paperwork and operating costs attributable to regulations. The very smallest firms, those with one to four employees, seem to spend annually as much as \$32,000 per employee on regulatory compliance. These burdens do not include the cost of the initial capital investments required for compliance.⁽¹⁾ In fact, the burden of compliance is as much as 50 percent more for small businesses than for their larger counterparts.⁽²⁾

Congress and the President recognized this problem and took steps to reduce the burden with enactment of the Regulatory Flexibility Act and the [Small Business Regulatory Enforcement Fairness Act](#). The RFA does not seek preferential treatment for small businesses. Nor does it require exemptions for small entities. Rather, it establishes an analytical process to be followed in determining how public policy issues can best be resolved without erecting barriers to competition. The law seeks a level playing field for small business, not an unfair advantage. It calls for regulations that are "rightsized" - regulations that require small business compliance only to the extent to which small businesses contribute to the problem the regulation is designed to eliminate or control. To this end, the Office of Advocacy is sensitive to the agency's need to balance its obligations under enabling statutory and legislative mandates for reliable health care financing, with general administrative statutory requirements, such as the Administrative Procedures Act and the Regulatory Flexibility Act.

Under the Balanced Budget Act of 1997, HCFA was given a limited time to implement certain anti-fraud rules to strengthen the Medicare program. Having acknowledged this, Advocacy contends that HCFA nevertheless had time to meet equally important mandates under the [Regulatory Flexibility Act](#). In the case of surety bonds, the agency published a final rule that did not reflect an understanding of the economics of the bond market. Specifically, HCFA failed to recognize that bonds are unattainable for many small home health care agencies under the parameters set in the regulation. This fact would have been uncovered if the agency had complied with the Regulatory Flexibility Act, seeking input from small entities. Ironically and importantly, if the agency had complied with the RFA, it potentially could have published a timely, workable rule with the help of the industry.

As you know, the Office of Advocacy has the important responsibility of encouraging compliance with the Regulatory Flexibility Act and reporting to Congress on agency compliance. In recent years, we have seen the regulatory development process evolve, and are witnessing some improvements in agency compliance with the law for several reasons. First, the amendments to the RFA contained in the Small Business Regulatory Enforcement Fairness Act of 1996 strengthened the role of small businesses and the Chief Counsel in the rulemaking process by allowing judicial review of agency compliance with the RFA. By giving small businesses new tools to pursue enforcement, the law put agencies on notice that Congress and the Administration were serious about compliance

Second, the Office of Advocacy has focused on early compliance, rather than *ex post facto* fixes, as in this case. We have made concerted efforts to hold seminars for and work with hundreds of small business associations and their legal counsels to encourage early involvement in the rulemaking process. Discussions have focused on how to evaluate agencies' compliance; what the appropriate standard of review should be for

RFA issues; and judicial review. Over one thousand agency personnel-general counsels, economists, regulators, and agency heads-have met with Advocacy staff to learn the requirements of the RFA. Advocacy has also become involved in the regulatory development process much earlier and has identified small businesses with which agencies should work before a rule is published. Advocacy has also provided statistics and research on regulated industries to both agencies and trade associations and has counseled them on how to do credible economic regulatory analyses. We have also worked closely with the Office of Management and Budget reviewing rules to assess compliance with the RFA. In 1997, Advocacy worked to minimize the impact of nearly 60 regulations affecting small businesses using these avenues.

Finally and significantly, several recent court decisions, including one in which the Office of Advocacy filed its first *amicus curiae* brief, have ruled against federal agencies for failure to comply with the [Regulatory Flexibility Act](#). As a result, Advocacy expects increased agency efforts to comply with the law and to seriously consider the comments of small businesses and the Office of Advocacy during the development of regulatory proposals.

Some explanation of my reference to Advocacy's *amicus curiae* brief is needed here. On January 7, 1998, as the Chief Counsel for Advocacy, I exercised our statutory right to file an *amicus curiae* brief with the court in an appeal from an agency rule. This is the first instance of Advocacy using its longstanding authority. Advocacy supported a challenge filed by small mining interests against the Bureau of Land Management, Department of the Interior, to a bonding requirement regulation. On May 13, the U.S. District Court for the District of Columbia ruled in favor of the Northwest Mining Association, ordering the agency to comply with the RFA. In an earlier case, [Southern Offshore Fishing Association et al. v. William M. Daley](#), the court remanded a rule that reduced fishing quotas by as much as 50 percent, ordering the National Marine Fisheries Service to prepare a proper regulatory flexibility analysis. In this case, the court referenced Advocacy's comments, which criticized the Service for failing to perform a meaningful regulatory flexibility analysis. Advocacy's authority to file *amicus curiae* briefs, combined with notice of our probable intent to file in regulatory appeals, has encouraged agencies and the Department of Justice to work with the Office of Advocacy to resolve RFA issues. For instance, in *Southern Offshore Fishing Association*, Advocacy persuaded the Department of Justice to amend its brief to support the standard of review Advocacy believes should be applied to RFA issues.

During these appellate processes, Advocacy has continued to exchange information with small business trade associations, attorneys working with affected industries, and other federal agencies. Working with and educating both small businesses and the agencies will ultimately result in a systematic change in regulatory development. Compliance with the Regulatory Flexibility Act will become the rule, and not the exception.

HCFA Compliance with the Regulatory Flexibility Act

In this new environment, Advocacy would have preferred to work early with HCFA on the regulations at issue here, not only to identify small businesses and trade associations with which HCFA should have consulted, but also to provide statistical data on the composition of the industry, using Advocacy's business data base on the number and sizes of firms. Advocacy could have recommended the economic and cost factors HCFA should consider in developing a proposal-factors that would normally be included in a regulatory flexibility analysis-and possibly suggest less burdensome regulatory alternatives that would achieve HCFA's public policy objectives without unduly burdening small entities. Because the rules were published in final form without meaningful opportunity for public comment, none of the safeguards established by the Administrative

Procedures Act and the Regulatory Flexibility Act came into play; thus there was no evidence of any consideration of the impact of the rules on small businesses and no record of the agency's analytical processes leading to the final rule.

Once both of these rules were published, the Office of Advocacy formally petitioned HCFA to amend the final rules, to remove provisions not contemplated by Congress, and to do [final regulatory flexibility analyses](#). Advocacy also petitioned for changes in other provisions specific to each rule. Advocacy advised HCFA that appropriate APA procedures were not followed in either rulemaking and that the impact on small businesses would be tremendous. Advocacy worked extensively with numerous small business trade associations, including The Surety Association of America, The American Federation of Home Health Agencies, the National Association for Home Care, and the Home Care Association of America, assessing the economic impact of the rule on commercial and non-profit small home health care agencies. Finally, Advocacy spoke with many individual home health care agency representatives, who expressed great frustration at the fact that they were being forced to close their doors because of the combined impact of these and other regulations being implemented by HCFA. Several of these agencies indicated that they had received accolades in the past from HCFA representatives for running efficient businesses. All expressed dismay at the fact that they had done everything right in the past, but in one way or another would suffer terrible financial losses or could go out of business.

Advocacy was not in a position to investigate the validity of these specific allegations, but became convinced that a problem did indeed exist with the rules, given the tenor and nature of the issues raised and the information provided by the industry.

In assessing HCFA's compliance with the Regulatory Flexibility Act, the Office of Advocacy found numerous problems with the rulemakings. With regard to the [surety bond and capitalization rule](#), Advocacy commented as follows:

- the rule was published as a final rule on January 5 (about five months after the Balanced Budget Act was passed) without notice or opportunity for public comment;
- the final rule went beyond limited provisions in the Balanced Budget Act of 1997 (which only required a "\$50,000 or comparable" surety bond) enacted August 5, 1997;
- no regulatory flexibility analysis was provided or referred to in the final notice;
- significant economic burdens on small business were not acknowledged or addressed;
- the agency set an unrealistic deadline of February 27 for home health agencies to comply; but
- the agency nevertheless extended the compliance deadline for 60 days, but only near to the time or after the original deadline had passed.

The same pattern occurred in the [IPS](#) rulemaking. Advocacy observed that:

- the rule was published as a final rule on March 31 (about eight months after the Balanced Budget Act was passed) without notice or opportunity for public comment;
- the final rule went beyond Congress' intent to deter fraud and abuse and, instead, included provisions that create inequitable treatment of HHAs that provide similar services;
- the agency claimed it did not do a regulatory flexibility analysis on the grounds that the Balanced Budget Act of 1997 did not allow for small business exemptions; and

- there was no evidence that significant economic burdens on small businesses (with fallout on their clients) were in fact considered.

Without a comment period before publishing the final rules, HCFA deprived itself of valuable information on the impact of its rules on the industry and beneficiaries of the Medicare program. Moreover, there is no record that can be scrutinized to determine if the rules are workable or enforceable or if they may be creating greater problems than the issue HCFA is trying to address.

HCFA Surety Bond and Capitalization Rule

The preamble in the surety bond rule contains language such as:

"Because of the scope of this rule, all [home health agencies] will be affected, but we do not expect that effect to be significant."

"We expect to have a 'significant impact' on an unknown number of small entities, effectively preventing some from repeating their past aberrant billing activities [but, t]he majority of HHAs will not be significantly affected by this rule."

On the contrary, Advocacy data indicate that a majority of home health agencies are small and that they dominate the industry. Therefore, the rule clearly affects a "significant number of small entities."

Furthermore, the rule requires home health agencies to provide a surety bond of the greater of \$50,000 or 15 percent of their annual Medicare payments and minimum capitalization requirements. Bonding was intended to prevent "aberrant" billing practices. However, the agency did not provide information on whether small entities were more or less likely to be engaged in fraud or on the relevance of its capitalization formula to deterring fraud. It only concluded that a financially sound provider would already be properly capitalized. Nor did the agency provide information to help determine whether their formula is appropriate for different-sized entities, even the smallest. "Adequate capitalization" is relative and is based on a number of factors like varying overhead costs, location, profit margins, competition in the area, etc. In addition, what is determined to be "adequate capitalization" could be a barrier to market entry for new home health agencies and a deterrent to competition between large and small firms. Finally, there was no discussion of the compliance costs and their relevance to the industry's revenues or viability.

The agency has agreed to delay the effective date of the rule until early next year per an agreement with Senator Bond who had, on June 10, introduced a resolution to veto the regulation. However, Advocacy is of the view that the rule should be remanded, revised, and published only after the agency has complied with the [Regulatory Flexibility Act](#) and provided an opportunity for public comment. The Office of Advocacy stands ready to serve the agency in assisting with this objective.

HCFA Interim Payment System Rule

The IPS regulation is very complicated. Therefore, rather than focusing on the technical aspects of the rule, Advocacy's petition of June 14 focused on major procedural issues. While the agency acknowledged that there would likely be a significant impact, there was no analysis of alternatives as required by the RFA. The agency claimed that, because the Balanced Budget Act did not explicitly allow for exceptions for small businesses, the agency need not consider alternatives. The agency seemed to be unaware that its unique

interpretation of the Balanced Budget Act requirements was, in fact, an alternative and therefore required a factual basis of support under the RFA.

For instance, under HCFA's interpretation, the definition of a "new provider" was expanded, and then HCFA based the reimbursement rate for new providers on national (rather than regional) cost data . The agency essentially built an inequitable system under which new providers would be paid much less than older providers. Also, the agency indicated that HHAs would modify their behavior in order to reduce the adverse effects of the regulations on their allowable costs, thus reducing their regulatory cost burden by 65 percent. However, the agency provided no information as to the factual basis for the 65 percent cost reduction figure.

Conclusion

These regulations are a matter of serious and ongoing concern at the Office of Advocacy, primarily, although not exclusively, for the procedural deficiencies involved-deficiencies that undermine the integrity of the federal rulemaking process. The Administrative Procedures Act and the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act, establish the analytical framework agencies are to follow to ensure that rules are rational, based on sound analysis as to the nature and scope of a problem and its causes, and that agencies are creative in devising regulatory solutions that achieve public policy objectives without harming competition or the various publics the agencies serve. We urge all regulatory agencies, and particularly HCFA, to work with us in the future to try to avoid the types of procedural and substantive errors that I have summarized here today and addressed in greater detail in my communications with HCFA. This working relationship is critical to assure compliance with the Regulatory Flexibility Act and to minimize unnecessary adverse impacts on small home health agencies. Thank you, and I welcome any questions from the Committee.

ENDNOTES

1. *A Survey of Regulatory Burdens, Report to the U.S. Small Business Administration*, Thomas D. Hopkins and Diversified Research, Inc., June 1995.

2. *The Changing Burden of Regulation, Paperwork, and Tax Compliance on Small Business: A Report to Congress*, U.S. SBA Office of Advocacy, October 1995.

* Last Modified: 6/18/01