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United States Senate

COMMITTEE ON SMALL BUSINESS

WASHINGTON, DC 20510-6350

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December 18, 2000

The Honorable Carol M. Browner
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Administrator Browner:

The purpose of this letter is to express my continuing displeasure over the U.S. Environmental Protection Agency's (EPA/Agency) failure to comply with the Red Tape Reduction Act (Small Business Regulatory Enforcement Fairness Act or SBREFA) in a way meaningful to small business. The latest example of the Agency's broken approach to fulfilling its obligations toward small business leads me to believe that Congressional oversight hearings may be the only solution capable of communicating to the Agency the importance of small business concerns.

On September 26, 2000, I wrote to you regarding EPA's proposed rule to increase regulation of hydrochlorofluorocarbons (HCFCs) used in the manufacturing of foams and other insulating products (65 Fed Reg. 42653). In following up on the concerns of a small business constituent from Missouri, the Committee on Small Business (Committee) discovered that EPA failed to prepare any small business impact analysis to support this rulemaking. As you are aware, SBREFA requires EPA to make a fact based determination of whether small businesses will be significantly impacted by the Agency's proposed rules. Furthermore, EPA policy guidance calls for Agency outreach to find small businesses impacted by the rule and economic analysis to determine the level of small business impact. EPA appeared to fail to meet any of these requirements on this rule.

In my letter of September 26, I gave you the option of supplying information indicating that the Agency did, in fact, contact and consider the needs of small businesses when drafting the rule. Your Assistant Administrator for Air responded that EPA contacted several manufacturers such as Exxon Mobil, DuPont, Whirlpool, General Electric, Huntsman and Johns Manville. These firms have annual sales revenues of approximately \$200 billion, \$30 billion, \$10 billion, \$120 billion, \$7 billion and \$2 billion respectively. These are not small businesses.

EPA's response that it contacted and considered all the firms it knew about represents a head in the sand approach to regulating which must change. In this case, by limiting its analysis only to products used for insulation, EPA failed to consider entire industries which use the products EPA sought to regulate. In the case of the boat building industry, Coast Guard regulations require most boats under approximately 20 ft. to contain foam for flotation purposes. Industry estimates suggest up to 1,000 small business boat builders which use HCFCs to inject foam into their boat hulls would be affected by this regulation. And yet, the Agency staff contact for the proposed rule was totally unaware that this sector with this many small businesses used the regulated products. EPA cannot continue to impose regulations on the public in ignorance of who it is regulating and what impacts those regulations will have on those firms.

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Even more disturbing is EPA's unwillingness to find out who it will impact with its regulations. EPA did not enlist the assistance of its EPA small business liaisons until after Congressional attention to the rule - long after the Agency drafted and proposed the rule. EPA's own SBREFA guidance states that "it is important that outreach to small entities occur as early as possible in regulation development." The guidance continues, "small entities can often fill gaps in our knowledge and experience." EPA chose to disregard its own SBREFA guidance in this case.

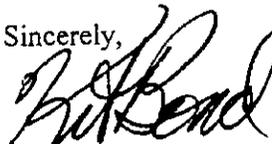
Outreach to small business is easy only if EPA makes the effort. An afternoon's worth of phone calls by the Committee starting with a foam supplier produced a list of different small business industries purchasing and using the regulated products, a list of trade associations representing those affected industries, and initial estimates of the number of affected small businesses in each of the industries. The Committee supplied this information to EPA for its consideration. Perhaps EPA does not want to know who it will impact with its proposed regulation because it disregarded the information in its October 27, 2000, response. EPA claimed these small businesses would not be directly subject to the proposal. This position is especially absurd given that a supplier of the regulated products supplied the information on businesses who will use the regulated products in their manufacturing.

EPA's most basic defense of its actions is its most disappointing. In response to criticism over how it failed to conduct meaningful outreach or sound analysis of the small business impacts of its proposed Lead Toxic Release Inventory rule, EPA stated that its actions were within its "discretion within the law." While this Administration attempted on several occasions to find final refuge within the letter of the law, it is unfortunate that EPA now also resorts to legality regardless of propriety arguments. Small business deserves better. Small business deserves what the law and EPA's own guidance policy promise, early and inclusive participation in EPA rulemaking.

In light of EPA's failure to supply comprehensive and detailed information on the small businesses impacted by its proposed regulation on HCFCs and foam manufacturing, EPA has only one alternative but to discover and assemble this information. While EPA's failure to provide a fact-based certification of no significant impact from its proposal opens the Agency to legal challenge, this Committee intends to exercise its authority in the new Congress to pursue oversight hearings of EPA's Red Tape Reduction Act failures.

EPA is encouraged to mitigate its positions in the mean time. This includes filling gaps in EPA's knowledge of how its proposals may impact small business and to what degree. This includes EPA's use of its own small business organizational resources at the beginning of the regulatory process, not the end. This includes aggressive outreach to small business during a rule's drafting, as intended by statute and EPA policy, not as the Agency is attempting to finalize its rule or deflect criticism. And this includes taking responsibility and correcting individual Agency program offices, which fail to meet their statutory and policy obligations through meaningful outreach, identification and analysis of small business impact. The Committee will be in touch with the Agency regarding the timing and format of the proposed hearings. If you have any questions regarding these issues, please contact Marc Freedman at 224-5175.

Sincerely,



Christopher S. Bond
Chairman