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Report to the Chairman, Subcommittee on Oversight of Government Management, Restructuring, and the District of Columbia, Committee on Governmental Affairs, U.S. Senate

February 2001

REGULATORY REFORM

Implementation of Selected Agencies' Civil Penalty Relief Policies for Small Entities

GAO-01-280

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Abbreviations

DOJ	Department of Justice
DOL	Department of Labor
EPA	Environmental Protection Agency
FCC	Federal Communications Commission
INS	Immigration and Naturalization Service
MSHA	Mine Safety and Health Administration
OMB	Office of Management and Budget
OSHA	Occupational Safety and Health Administration
RFA	Regulatory Flexibility Act
SBREFA	Small Business Regulatory Enforcement Fairness Act

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United States General Accounting Office
Washington, D.C. 20548

February 20, 2001

The Honorable George V. Voinovich
Chairman, Subcommittee on Oversight of Government
Management, Restructuring, and the District of Columbia
Committee on Governmental Affairs
United States Senate

Dear Mr. Chairman:

One of the ways that federal regulatory agencies enforce applicable statutes and regulations is through the imposition of civil monetary penalties for violations of those statutes and regulations. The amounts of the penalties imposed can vary substantially, depending on the limits specified in the applicable statutes or regulations and the degree to which the agencies impose the maximum fines permitted. In 1996, Congress passed the Small Business Regulatory Enforcement Fairness Act (SBREFA) (5 U.S.C. 601 note), which was intended to, among other things, "create a more cooperative regulatory environment among agencies and small businesses that is less punitive and more solution-oriented." Section 223 of SBREFA, entitled "Rights of Small Entities in Enforcement Actions," requires agencies to provide small entities (a small business, a small government, or a small organization) with some form of relief from civil monetary penalties. Specifically, subsection 223(a) of SBREFA required federal agencies regulating the activities of small entities to establish a policy or program by March 29, 1997, for the reduction and, under appropriate circumstances, the waiver of civil penalties by small entities. Subsection 223(c) of the act required agencies to submit a one-time report to four congressional committees by March 29, 1998, on the scope of their programs or policies, the number of enforcement actions against small entities that qualified or failed to qualify for the SBREFA program or policy, and the total amount of penalty reductions and waivers.[1]

You asked us to examine the implementation of section 223 of SBREFA and issues related to civil penalty enforcement in selected agencies.

[1]The four committees to which agencies were required to submit reports are the Senate Committee on Governmental Affairs, the House Committee on the Judiciary, and the House and Senate Committees on Small Business.

Specifically, you asked us to (1) describe the similarities and differences in the selected agencies' policies or programs under subsection 223(a) of the act; (2) determine how many civil penalty enforcement actions each selected agency had initiated against small entities in each fiscal year since SBREFA's enactment, and how many of those actions resulted in some kind of penalty relief (either a waiver or penalty reduction); and (3) determine whether any of the civil penalty enforcement actions that did not result in penalty relief involved paperwork requirements and, if so, why a waiver or penalty reduction was not provided in those cases. We focused our review on five federal agencies that have civil monetary penalty authority, appeared to have developed a large number of rules affecting small entities, and were of interest to the Subcommittee: the Environmental Protection Agency (EPA), the Federal Communications Commission (FCC), the Immigration and Naturalization Service (INS) within the Department of Justice (DOJ), and the Occupational Safety and Health Administration (OSHA) and the Mine Safety and Health Administration (MSHA) within the Department of Labor (DOL).

Results in Brief

The five agencies identified eight penalty reduction and waiver policies as implementing section 223(a) of SBREFA. All of the agencies' policies are within the discretion afforded by SBREFA, but the agencies' policies vary substantially between, and sometimes within, the agencies. Some of their policies are specifically directed at small entities or give small entities special consideration, but others treat small entities the same way they treat large entities. Some of the policies apply to all of the agencies' enforcement actions involving small entities, but others cover only a portion of those actions. For example, two of EPA's section 223 policies apply only to violations that are voluntarily disclosed by a small entity, but do not apply to other agency enforcement actions (which also may result in penalty relief). The agencies' policies also differ regarding how key terms such as "small entity" and "penalty reduction" are defined, how the policies' penalty relief provisions are triggered, and their conditions for and exclusions from penalty relief. The agencies indicated that none of their policies were developed because of SBREFA, and that most of the policies were established before the act took effect. All but two of the policies have been published in the *Federal Register* and/or the *Code of Federal Regulations*.

MSHA was the only one of the five agencies that provided all of the data required by subsection 223(c) of SBREFA in the agencies' 1998 reports to congressional committees. MSHA was also the only agency that was able to

provide us with data for each year since the enactment of SBREFA on the number of enforcement actions against small entities, the number that resulted in penalty relief, and the dollar value of the relief provided. (SBREFA does not currently require agencies to maintain this information.) The other agencies either (1) provided data on the number of inspections of small entities' facilities or the number of small entities that were involved in their section 223 programs (both of which may be different from the number of enforcement actions involving small entities); (2) said they could only provide data on the number of enforcement actions initiated against entities of any size, not just small entities; or (3) provided data that were inconsistent and incomplete.

Because MSHA was the only agency that identified the number of enforcement actions against small entities that did not result in penalty relief, it was also the only agency that identified the number of such actions that involved paperwork requirements. (SBREFA does not currently require agencies to maintain this information.) MSHA indicated that, in each fiscal year since the enactment of SBREFA, less than 9 percent of its enforcement actions without penalty relief involved paperwork requirements. MSHA officials said that most of these actions imposed single $55 fines that were required by regulation or involved more serious violations that could have an impact on the health and safety of employees. OSHA indicated that all of its inspections involving small entities resulted in some form of penalty relief under the agency's section 223 policy. FCC and INS officials said they could not provide data on enforcement actions involving small entities because their agencies do not provide special civil penalty relief based on the size of the regulated entity. EPA officials said the agency's data systems do not distinguish between violations involving paperwork requirements and nonpaperwork requirements.

If Congress wants to strengthen civil penalty relief for small entities, it should consider amending section 223 of SBREFA to require that agencies' policies or programs (1) provide small entities with more penalty relief than other similarly situated entities and (2) cover all of the agencies' civil penalty enforcement actions involving small entities. Also, to facilitate congressional oversight in this area, Congress should consider amending the act to require agencies to maintain data by fiscal year or some other time period on such factors as the number of enforcement actions involving all small entities, the number of enforcement actions that resulted in penalty reductions, and the amount of penalty relief provided. Any such data should clearly indicate how the agencies defined key terms such as "small entity" and "penalty reduction."

Background

Small businesses are a significant part of the nation's economy, accounting (under SBA's definition) for 99 percent of all businesses, about 50 percent of the gross domestic product, and about 53 percent of private industry's workforce. Small governments make up 97 percent of all of the local governments in the United States. However, small businesses and governments can be disproportionately affected by federal agencies' regulatory requirements, and agencies may inadequately consider the impact of those requirements on small entities when the requirements are implemented.[2]

In response to concerns about the effect that federal regulations may have on small entities, Congress passed the Regulatory Flexibility Act (RFA) in 1980 (5 U.S.C. 601-612). The RFA requires federal agencies to analyze the anticipated effects of rules they plan to propose on small entities unless they certify that the rules will not have a "significant economic impact on a substantial number of small entities." We have reported several times on the implementation of the RFA, noting areas in need of improvement.[3]

On March 29, 1996, Congress passed SBREFA to, among other things, strengthen the RFA's protections for small entities and "create a more cooperative regulatory environment among agencies and small businesses that is less punitive and more solution-oriented." Subsection 223(a) of SBREFA directed each federal agency regulating the activities of small entities to establish a policy or program by March 29, 1997, "to provide for the reduction, and under appropriate circumstances for the waiver, of civil penalties for violations of a statutory or regulatory requirement by a small entity." Subsection 223(b) identifies certain "conditions and exclusions" that agencies' policies or program could include (e.g., requiring the small entity to correct the violation within a reasonable period of time and excluding violations that pose serious health, safety, or environmental threats). Although the agencies' policies and programs were required to contain conditions and exclusions (subject to the requirements or limitations in other statutes), agencies were not required to include the

[2]Thomas D. Hopkins, *A Survey of Regulatory Burdens*, June 1995 report to the Small Business Administration; and *Senate Report on the Unfunded Mandate Reform Act of 1995*, Report 104-1, January 11, 1995, Committee on Governmental Affairs.

[3]See, for example, *Regulatory Flexibility Act: Inherent Weaknesses May Limit Its Usefulness for Small Governments* (GAO/HRD-91-61, Jan. 11, 1991); *Regulatory Flexibility Act: Status of Agencies' Compliance* (GAO/GGD-94-105, Apr. 27, 1994); and *Regulatory Flexibility Act: Agencies' Interpretations of Review Requirements Vary* (GAO/GGD-99-55, Apr. 2, 1999).

conditions and exclusions listed in the subsection and were not limited to those listed. Subsection 223(c) required agencies to submit a one-time report to four specific congressional committees by March 29, 1998, on (1) the scope of their programs or policies, (2) the number of enforcement actions against small entities that qualified or failed to qualify for the programs or policies, and (3) the total amount of penalty reductions and waivers.

Comments by the drafters of SBREFA at the time the act was passed underscore the discretion that agencies have in the development and implementation of their section 223 programs and the degree to which agencies can use existing programs to satisfy the act's requirements. Their statement, entitled the "Joint Managers Statement of Legislative History and Congressional Intent," says that "[e]ach agency would have the discretion to condition and limit the policy or program on appropriate conditions," and "it is up to each agency to develop the boundaries of their program and the specific circumstances for providing for a waiver or reduction of penalties."[4] The statement also noted that "[s]ome agencies have already established formal or informal policies or programs that would meet the requirements of this section" and specifically referred to EPA's small business enforcement policy in this regard.

The enactment of SBREFA marked the second time in less than a year that agencies had been encouraged to provide penalty relief to small businesses. In April 1995, President Clinton, by memorandum, directed the heads of 27 departments and agencies to modify the penalties for small businesses in certain situations "to the extent permitted by law."[5] For example, the memorandum said agencies "shall exercise their enforcement discretion to waive the imposition of all or a portion of a penalty when the violation is corrected within a time period appropriate to the violation in question." The memorandum also required each agency to submit a plan to the Director of the Office of Management and Budget (OMB) describing the actions the agency would take and said the plan must provide that the agency will implement the policies on or before July 14, 1995. It also said that the plans should identify how notification of the agencies' policies will be given to frontline workers and small businesses.

[4]Cong. Rec. S3243 (daily ed., Mar. 29, 1996).

[5]The memorandum was directed to the heads of all of the agencies in this study with the exception of FCC, which is an independent regulatory agency.

We have recognized in previous reports that enforcement is an important element of regulatory management and civil penalties are important to agencies' enforcement efforts. For example, in a 1996 report on the Clean Water Act we said "penalties play a key role in environmental enforcement by deterring violators and by ensuring that regulated entities are treated fairly and consistently so that no one gains a competitive advantage by violating environmental regulations."[6] In another report, we said civil monetary penalties "are potentially a strong deterrent" to noncompliance with nursing home regulations, and we also said those penalties "have potential to provide the necessary incentives to ensure continued compliance."[7]

However, some Members of Congress have become concerned about the impact that civil penalties can have on small businesses and other small entities, particularly for infractions that may be relatively minor in nature. During the 105th Congress, the House of Representatives approved legislation that would have required federal regulatory agencies, in certain circumstances, to suspend civil fines on small businesses for first-time paperwork violations so that the small businesses could correct the violations.[8] Similar legislation was introduced in the Senate but was not enacted.[9] In commenting on this proposed legislation, EPA and other agencies indicated that information collection requirements are the foundation of many health and safety statutes, and that violations of those requirements should not automatically be treated as a minor infractions meriting a waiver of civil penalties. In testimony before the Senate Committee on Governmental Affairs, the Administrator of the Office of Information and Regulatory Affairs within OMB said the Clinton administration strongly opposed the Senate bill, noting that "[w]e already have a powerful tool designed to give protection to small business owners"—section 223 of SBREFA. The Administrator said that OMB was not aware of any significant problems with the implementation of section 223. However, he also said that if there are "gaps" in section 223 that need correction, OMB would be willing to help craft an appropriate amendment.

[6] *Water Pollution: Many Violations Have Not Received Appropriate Enforcement Attention* (GAO/RCED-96-23, Mar. 20, 1996).

[7] *Nursing Homes: Additional Steps Needed to Strengthen Enforcement of Federal Quality Standards* (GAO/HEHS-99-46, Mar. 18, 1999).

[8] H.R. 3310, the "Small Business Paperwork Reduction Act Amendments of 1998."

[9] S. 1378, the "Small Business Paperwork Reduction Act Amendments of 1999."

Objectives, Scope, and Methodology

The objectives of our review were to (1) describe the similarities and differences in the selected agencies' policies or programs under subsection 223(a) of SBREFA; (2) determine how many civil penalty enforcement actions each selected agency had initiated against small entities each fiscal year since SBREFA's enactment and how many of those actions resulted in some kind of penalty relief (either a waiver or penalty reduction); and (3) determine whether any of the civil penalty enforcement actions that did not result in penalty relief involved paperwork requirements and, if so, why a waiver or penalty reduction was not provided in those cases.

To identify the agencies included in our review, we examined the October editions of the *Unified Agenda of Federal Regulatory and Deregulatory Actions* for fiscal years 1997, 1998, and 1999 to identify the agencies that most frequently appeared to issue rules with a significant economic impact on a substantial number of small entities.[10] Ten departments and agencies had at least 50 entries in at least 1 of these editions of the *Unified Agenda*—EPA; FCC; and the Departments of Agriculture, Commerce, Health and Human Services, the Interior, Justice, Labor, Transportation, and the Treasury. On the basis of the Subcommittee's interests, we selected EPA, FCC, DOJ, and DOL for inclusion in the review. Within DOJ and DOL, we identified the agencies that accounted for most of the departments' totals—INS within DOJ and MSHA and OSHA within DOL. We then confirmed that each of the five agencies selected had civil penalty authority.

To address the first objective of describing the similarities and differences in the selected agencies' policies, we obtained a copy of the report that each of the agencies submitted in 1998 pursuant to subsection 223(c) of SBREFA from the Senate Committee on Small Business. We also obtained copies of each agency's policies and reports from the agencies or through the Internet. We reviewed the agencies' policies and policy descriptions in their reports, noting areas of similarity and difference (e.g., whether the agencies' policies provided civil penalty relief for small entities and the scope of the policies' coverage). We then clarified, where appropriate, our characterizations of the agencies' policies with agency officials.

[10]The *Unified Agenda* is published twice each year in the *Federal Register* by the Regulatory Information Service Center and provides uniform reporting of data on regulatory activities under development throughout the federal government.

We also attempted to use the agencies' subsection 223(c) reports to address the second objective—determining how many civil penalty enforcement actions the agencies had initiated and how many resulted in penalty relief. However, two of the reports did not contain any enforcement data, and in two other cases the data were not presented in the manner specified in the statute or consistent with our objective. Therefore, we asked officials in each selected agency to identify how many civil penalty enforcement actions the agency had initiated against small entities each fiscal year since SBREFA's enactment (i.e., fiscal years 1997, 1998, 1999, and 2000), and how many of those actions in each year resulted in some penalty relief and no penalty relief.

To address our third objective regarding paperwork requirements, we asked the agencies to identify how many of the enforcement actions against small entities that resulted in no penalty relief involved a paperwork requirement. We also asked the agencies to explain why those paperwork-related actions did not result in civil penalty relief. We defined a "paperwork requirement" as involving a collection of information approved by OMB pursuant to the Paperwork Reduction Act of 1995.

This review focused on five selected agencies and cannot be used to characterize the SBREFA programs or policies in other agencies. However, we believe these agencies' programs and policies illustrate the variation in such policies among agencies with a significant regulatory impact on small entities. We did not validate the reliability of the enforcement data that agencies provided. We conducted our review between August 2000 and December 2000 in accordance with generally accepted government auditing standards.

We provided a draft of this report to the Secretary of Labor, the Attorney General, the Chairman of the Federal Communications Commission, and the Administrator of the Environmental Protection Agency for their review and comment. DOJ, DOL, and FCC officials had no substantive comments on the report. The EPA comments that we received are discussed in the "Agency Comments and Our Evaluation" section at the end of this letter, and are reproduced in appendix I.

Selected Agencies' Section 223 Penalty Relief Policies Varied

The five agencies' section 223 policies vary substantially among, and sometimes within, the agencies in terms of (1) whether they apply to all penalty-related enforcement actions involving small entities, (2) whether they provide entities with more penalty relief than similarly situated larger entities, (3) how key terms such as small entity and penalty reduction are defined, and (4) their conditions for and exclusions from penalty relief. Agency officials said that none of the agencies' policies were developed because of SBREFA, and most of the policies had been established before the act took effect.

Agencies' Policies Were Not Adopted in Response to SBREFA

The five selected agencies identified eight penalty reduction and waiver policies as implementing subsection 223(a) of SBREFA. According to the agencies' 1998 reports and our interviews with agency officials, none of the eight policies were adopted as a result of SBREFA's enactment, and most of the policies had been established before the act took effect. As previously noted, the drafters of SBREFA recognized that agencies could use existing programs to satisfy the act's requirements. Some agencies took steps after SBREFA was enacted to publicize and market their existing programs to small entities.

- EPA said in its 1998 report that the agency had "historically addressed the special circumstances of many small entities when assessing penalties in enforcement actions." EPA also said that its program to reduce or waive penalties for small entities consisted of three separate policies, each of which had been initiated before the enactment of SBREFA.
  - EPA issued its *Final Policy on Compliance Incentives for Small Businesses* (small business policy) on May 20, 1996.[11] The policy provides penalty waivers to entities with 100 or fewer employees as incentives to voluntarily disclose violations and to participate in compliance assistance.
  - EPA's policy on *Incentives for Self Policing: Discovery, Disclosure, Correction, and Prevention of Violations* (audit policy), was initially published in the Federal Register on December 22, 1995, and was

[11] An interim version of EPA's small business policy was issued on June 13, 1995, and the final version was published in the *Federal Register* on April 11, 2000 (65 Fed. Reg. 19630).

revised and republished as the final policy on April 11, 2000.[12] The policy provides for reductions and waivers of penalties for entities of all sizes that promptly disclose violations in writing and correct those violations.

- EPA's *Policy on Flexible State Enforcement Responses to Small Community Violations* (small community policy), was issued in November 1995. Under this policy, states may provide small communities with an incentive to request compliance assistance by waiving or reducing the penalty if certain criteria are met. This policy has not been published in the Federal Register, but EPA officials said it was distributed directly to state and local government stakeholders.

As we discuss more fully later in this report, these three policies do not cover all EPA enforcement actions involving small entities, and do not include all civil penalty relief that small entities can receive from EPA.

- FCC said that its existing civil penalty ("forfeiture") policies met the subsection 223(a) requirement. FCC officials said the policy was first published in the Federal Register on August 14, 1997, and became effective on October 14, 1997, replacing a 1991 general policy statement.[13] The Commission noted that many of the factors delineated in SBREFA as potentially relevant considerations in decisions regarding penalty relief were already contained in the Communications Act of 1934, as amended, and were codified in its rule on forfeiture proceedings.[14]
- INS said in its 1998 report that it had "long-established policies" to provide for the reduction or waiver of civil penalties for small entities. INS officials told us during this review that the agency's civil penalty authority regarding small entities primarily related to the following two areas of regulatory activity: (1) employment verification under section 274A of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986; and (2) oversight of air and sea carriers who bring aliens into the United States under section 273 of the act, as amended.

[12]See 60 Fed. Reg. 66706 and 65 Fed. Reg. 19618. The revisions to this policy took effect on May 11, 2000.

[13]See 62 Fed. Reg. 43474 (1997).

[14]See 47 C.F.R. § 1.80.

- In the employer verification area, INS pointed to its "Guidelines for Determination of Employer Sanctions Civil Money Penalties," which were issued in August 1991, as satisfying subsection 223(a) of SBREFA. INS said that the guidelines had been continually updated since their issuance and are part of the INS Field Manual. A less specific version of the INS civil monetary penalty policy was published in the Federal Register in 1987 and was codified in the Code of Federal Regulations.[15] INS also noted in the 1998 report that it published a proposed rule on April 7, 1998, seeking to amend the agency's regulations implementing section 411 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.[16] INS said this statutory provision was aimed at allowing employers of any size who have made a good faith attempt to comply with a particular employment verification requirement to correct technical or procedural failures before they are deemed to be violations of the act. At the time of our review, this proposed rule had not been issued in final form.
- Regarding carriers, INS pointed to a June 10, 1996, proposed rule on "Screening Requirements of Carriers for Reduction, Refund, or Waiver of Fines" as satisfying subsection 223(a) of SBREFA.[17] INS published the final rule on April 30, 1998.[18]

- MSHA said that an existing general civil monetary penalty relief policy satisfied the SBREFA subsection 223(a) requirement. The policy was published in the *Federal Register* on May 21, 1982.[19] In August 1999, MSHA supplemented the policy with a policy letter that "provides clarification of the statutory and regulatory provisions governing the assessment of civil penalties" under the Federal Mine Safety and Health Amendments Act of 1977.
- OSHA said that an existing policy for granting civil monetary penalty relief met the SBREFA subsection 223(a) requirement. OSHA officials said the policy dates back to the Occupational Safety and Health Act of 1970 and was most recently published as a March 1998 instruction

[15]The policy was originally published at 52 Fed. Reg. 16221 (1987) and was codified at 8 C.F.R. § 274a.6.

[16]See 63 Fed. Reg. 16909 (1998).

[17]See 61 Fed. Reg. 29323 (1996).

[18]See 63 Fed. Reg. 23643 (1998).

[19]See 47 Fed. Reg. 22294 (1982). The policy was codified at 30 C.F.R. Part 100.

directive entitled "Providing Assistance to Smaller Employers." The directive summarizes OSHA's detailed penalty relief procedures in its September 1994 "Field Inspection Reference Manual." OSHA's policy has not been published in the *Federal Register*.

With the exception of EPA's small community policy statement and OSHA's instruction directive, all of the agencies' civil penalty relief policies have been published in the *Federal Register* and/or the *Code of Federal Regulations*. FCC replaced its 1991 policy statement with a formal rule after the policy statement was successfully challenged in court.[20] The court concluded that the policy was a rule that was promulgated without notice and opportunity for comment and, therefore, was invalid.

The agencies' authorizing statutes often guide the scope and details of their civil penalty relief policies. For example, section 273 of INA generally did not permit INS to waive or reduce fines imposed on carriers of passengers transported into the United States until the act was amended in 1994 by the Immigration and Nationality Technical Corrections Act of 1994. Also, certain agencies' authorizing statutes require that certain minimum fines be imposed or that certain factors be taken into consideration when granting penalty relief. For example, section 17(a) of the Occupational Safety and Health Act of 1970, as amended, states that any employer who willfully or repeatedly violates certain statutory provisions or associated regulations "may be assessed a civil penalty of not more than $70,000 for each violation, but not less than $5,000 for each willful violation."

Policies Vary in Degree to Which All Small Entity Enforcement Actions and Relief Are Covered

The agencies' section 223 policies vary in the extent to which they cover all civil penalty-related enforcement actions involving small entities and all instances in which small entities can receive civil penalty relief. FCC's, OSHA's, and MSHA's policies generally apply to any of the agencies' federal civil penalty enforcement actions involving small entities. However, an OSHA official said that the agency has interpreted SBREFA as not applying to state health and safety programs approved by OSHA.[21] Therefore, the OSHA enforcement data that we discuss in a later section of this report do

[20] *United States Telephone Ass'n v. FCC*, 28 F.3d. 1232 (D.C. Cir. 1994).

[21] The Occupational Safety and Health Act allows states to operate their own safety and health programs as long as they are determined by OSHA to be at least as effective as the federal OSHA program. Twenty-three states have received delegated authority from OSHA.

not include penalty relief that small entities have received under those state programs.

EPA said states are encouraged, but not required, to adopt the agency's section 223 policies in agency-approved state environmental programs. However, those policies cover only a portion of the various types of enforcement actions in the agency involving small entities. For example, EPA officials said that only two states—Nebraska and Oregon—had adopted the agency's small community policy at the time of our review.[22] Also, EPA's small business policy and the agency's audit policy both require small businesses to voluntarily disclose violations in order to receive civil penalty relief. However, small businesses can receive civil penalty relief without voluntary disclosure as a result of the regular administration of nine environmental statutes EPA administers that permit the use of civil penalties.[23] Therefore, EPA or state environmental officials could discover a violation of one of these statutory requirements by a small entity, propose a civil penalty, and provide the entity with either a waiver or a reduction of the penalty—all without reference to section 223 of SBREFA. As a result, EPA officials said that the data that we discuss later in this report does not include all instances in which small entities receive civil penalty relief.

Similarly, INS officials indicated that their two section 223 policies cover only a portion of the types of agency enforcement actions, and said that the number of small entities receiving penalty relief under the agency's carrier policy represents only a portion of the total number of small entities receiving penalty relief under various other sections of INA. For example, the officials said that carriers could also receive penalty relief under at least five other sections of the act, including section 234 (no advance notice of aircraft arrival or aircraft landing at an unauthorized place), section 255 (employment on passenger vessels of crewmen with certain afflictions), and section 256 (improper discharge of alien crewmen).

[22]EPA said that states have many other mechanisms they can use to reduce penalties for small entities.

[23]EPA said that these types of penalties address violations involving noncompliance, whereas EPA section 223 policies are incentive policies for the regulated community that are preventative and forward looking and are designed to encourage companies to self-regulate, voluntarily audit their operations, come into compliance, and even go beyond what the law requires.

Policies Vary in Extent to Which Small Entities Receive Extra Penalty Relief

The selected agencies' section 223 policies vary in the extent to which they provide small entities with more penalty relief than similarly situated larger entities. Some of the policies (the FCC, EPA audit, and INS carrier policies) provide small entities with no greater penalty relief than they provide to any other regulated entity. Under these broad agency policies, small entities can receive penalty relief on the basis of other factors (e.g., their ability to pay the penalty), but size is not an explicitly relevant factor in determining either the amount of the initial penalty assessed or any reductions from that initial assessment. Other section 223 policies (EPA's small business and small community policies) apply only to small entities. In still other policies (MSHA, OSHA, and INS employment verification), small entities can get penalty relief over and above that provided to larger entities because they meet certain size-related criteria.[24] In some of these policies, the smaller the business, the greater the penalty reduction they can receive. For example, OSHA's policy indicates that employers with 101 to 250 employees can get a 20-percent reduction in civil penalties, employers with 26 to 100 employees can get a 40-percent reduction, and employers with 25 or fewer employees can get a 60-percent reduction. OSHA does not consider employers with more than 250 employees "small businesses," and they therefore are ineligible for size-related penalty relief.

In four of the five agencies included in our review (EPA, OSHA, MSHA, and INS), the agencies' use of targeted relief for small entities is at least sometimes directly traceable to underlying statutes. For example, the Occupational Safety and Health Act of 1970, as amended, requires OSHA to assess civil penalties taking into account, among other things, "the size of the business of the employer being charged." Similarly, the Federal Mine Safety and Health Amendments Act of 1977 requires MSHA to consider, among other things, "the appropriateness of such penalty to the size of the business of the operator charged."

Policies Vary in How Key Terms Are Defined

The agencies' section 223 policies also vary in how certain key terms such as small entity and penalty reduction are defined or used.

[24]However, INS officials said that in some instances, the size of an entity could also make penalty relief for small entities less likely. For example, they said that the owner of a small business may be more likely to know that his/her employees are illegal aliens than the owner of a large business.

Small Entity

SBREFA indicated that the term small entity should be defined the same way it is defined in the RFA—a small business, a small government, or a small organization. The RFA defines each of these terms but identifies a process for agencies to establish other definitions.[25] For example, the act says that the term "small business" has the same meaning as the term "small business concern" under section 3 of the Small Business Act, unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the *Federal Register*."[26]

As previously noted, several of the agencies' section 223 policies (FCC, INS carriers, and EPA audit) provide small entities with no greater penalty relief than that provided to larger entities, all other factors being equal. Not surprisingly, therefore, the term small entity is undefined in these policies.[27] Other agencies' policies that give small entities extra relief either define the term small entity or the agency was able to describe how the term is used in the administration of the policy. However, the policies' definitions of a small entity vary among the agencies, and sometimes vary within the same department or agency. For example:

- EPA's small business policy defines a small business as a person, corporation, partnership, or other entity that employs 100 or fewer individuals across all facilities and operations owned by the business.[28]
- OSHA's policy says that small entities eligible for civil penalty relief are those with 250 or fewer employees at all work sites at any one time during the previous 12 months.

[25]See 5 U.S.C. 601(3), (4), and (5). The RFA says that a "small governmental jurisdiction" generally means governments of cities, counties, or other jurisdictions with a population of less than 50,000. A "small organization" is generally defined as any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.

[26]SBA's current small business size regulations and standards can be found at 65 Fed. Reg. 5533 (2000).

[27]EPA noted in its 1998 section 223 report that companies with more than 100 employees but that are considered "small entities" under the SBA definition of "small business" could use the agency's audit policy. However, the audit policy is not directed toward small entities and, all other factors being equal, they get no greater penalty relief than large entities.

[28]EPA officials said this definition is derived from section 507 of the Clean Air Act, which explicitly defines a small business as a business with 100 or fewer employees.

- MSHA's policy does not specifically define the term small entity. Although MSHA traditionally defines a small mine as having fewer than 20 employees, the agency also sometimes uses SBA's definition of a small entity for the mining industry—500 employees or fewer.[29] However, in its regular penalty assessments, MSHA defines the size of a regulated entity by either the number of hours worked or by tonnage of production.

EPA's definition of a small government eligible for penalty relief also varies. For example, EPA said that any small government or small organization employing 100 or fewer individuals is eligible for penalty relief under the small business policy. However, EPA's small community policy is targeted toward certain communities on the basis of the number of residents (fewer than 2,500), not the number of employees in their local governments. Although the INS employment verification policy requires consideration of the size of the regulated entity in determining penalty assessments, the policy does not define the term small entity.

Penalty Reduction

Most of the agencies' section 223 policies do not contain an explicit definition of a penalty reduction. However, our discussions with officials in the agencies indicated that the term is being used differently across the agencies. For example, the INS carrier enforcement office considers a penalty reduction to be the difference between the penalty imposed on the regulated entity and the statutory maximum penalty. For example, if the statutory maximum penalty for a particular violation was $3,300 and the penalty ultimately imposed on the entity was $1,000, the INS carrier enforcement office considers the $2,300 difference to be the amount of the penalty reduction. However, EPA officials said that the agency does not consider the statutory maximum in determining the amount of penalty relief provided under its section 223 policies. Instead, they said that a penalty reduction is the difference between the amount initially proposed and the amount ultimately assessed. Using the above example with a $3,300 statutory maximum penalty, if EPA initially determined that the penalty should be $1,300 but later reduced the penalty to $1,000, the amount of penalty relief provided would be $300.

The agencies' policies also differ in how penalty reductions are triggered. For example, under OSHA's policy, penalty reductions are automatically

[29]MSHA said that all but approximately 25 mines (less than 1 percent of all mines) meet SBA's definition of a small entity.

provided on the basis of preestablished formulas, and further reductions can occur if the initial penalty determination is appealed. Under the INS carrier policy, penalty relief can occur upon application by the carrier, or automatically under a prearranged memorandum of understanding between the carrier and INS.[30] Penalty relief under EPA's small business and audit policies is triggered only when the small entity voluntarily discloses a violation and asks for relief under the policy.

Policies Vary in Applicable Conditions and Exclusions

Section 223 of SBREFA states that agencies must establish certain "conditions and exclusions" in their penalty relief policies. Although the statute does not require the use of any particular condition or exclusion, it does identify some for possible inclusion. In subsection 223(a), the act says that under the appropriate circumstances, "an agency may consider ability to pay in determining penalty assessments on small entities." Subsection 223(b) lists six conditions and exclusions that agencies may include in their penalty relief policies or programs:

- requiring the small entity to correct the violation within a reasonable correction period;
- limiting the applicability to violations discovered through participation by the small entity in a compliance assistance or audit program operated or supported by the agency or a state;
- excluding small entities that have been subject to multiple enforcement actions by the agency;
- excluding violations involving willful or criminal conduct;
- excluding violations that pose serious health, safety, or environmental threats; and
- requiring a good faith effort to comply with the law.

As table 1 illustrates, the agencies' section 223 policies and related administrative procedures varied in the extent to which they included these suggested conditions and exclusions.[31] All of the policies excluded small

[30]According to the INS carrier policy, carriers who are signatory to such a memorandum of understanding will not be required to apply for penalty relief and will get penalty relief according to certain performance standards.

[31]In some cases, the agencies' section 223 policies contained elements that were related to, but not exactly the same as, the elements suggested in SBREFA. For example, one of the factors listed in MSHA's policy was the effect of the penalty on the operator's ability to continue in business. We considered this element the same as "ability to pay."

entities from receiving penalty relief if they had been subject to multiple enforcement actions. Other common exclusions were violations that involved serious health, safety, or environmental threats and violations involving willful or criminal misconduct. Only one of the policies limited their applicability to violations discovered through participation by the small entity in a compliance assistance or audit program—EPA's audit policy. EPA's small business policy contained this condition until April 2000. The agency decided to eliminate this requirement in order to make it easier for small businesses to take advantage of the policy. Since then, the policy has allowed small businesses to receive penalty relief if violations are discovered by any voluntary means (e.g., via participation in training classes; use of on-line compliance assistance centers; or use of checklists, even if not sponsored by an environmental regulatory agency).

Table 1: Agencies' Section 223 Policies Vary in Use of Conditions and Exclusions Suggested in SBREFA

	EPA			FCC	INS		OSHA	MSHA
Condition or exclusion	**Small Business**	**Audit**	**Small community**		**Carriers**	**Employers**		
Ability to pay	X[a]	X[a]	X[a]	X	X[a]	X[a]	X[a]	X
Reasonable correction period	X	X	X	X			X[b]	X
Compliance assistance or audit program		X						
Multiple enforcement actions	X	X	X	X	X	X	X	X
Willful or criminal conduct	X	X		X			X	
Health, safety, or environmental threats	X	X	X	X			X	X
Good faith	X	X		X		X	X	X

[a]Reflects an additional administrative procedure applicable in the agencies' settlement or adjudication of civil penalties.

[b]Though not explicitly part of the OSHA section 223 policy, OSHA officials noted that a nationwide "quick-fix" program applicable to all businesses can provide a small entity with a 15-percent penalty reduction for the immediate abatement of certain hazards.

Source: GAO analyses of agencies' section 223 policies and related administrative procedures or policies.

Subsection 223(b) of SBREFA makes it clear that the conditions and exclusions that agencies can include in their small entity penalty relief programs and policies are not limited to those suggested in the act. Each of the agencies' policies do, in fact, include other factors. For example:

- FCC's authorizing statute for civil monetary penalties gives the agency the broad discretion to take into account "such matters as justice may require."
- OSHA's and MSHA's authorizing statutes for civil monetary penalties require each agency to consider the gravity of the violation as an additional policy term. MSHA's statute also requires consideration of the "negligence" of the regulated entity.
- As previously noted, EPA's small business policy and the agency's audit policy require violations to be voluntarily disclosed in order to qualify for certain penalty reductions. EPA officials said that environmental statutes also require consideration of such factors as the degree of culpability of the violator and the economic benefit derived from the violation.
- The INS carrier regulation also requires the INS to consider the "effectiveness of the carrier's screening procedures," and the "existence of any extenuating circumstances."
- The INS employer sanctions regulation also requires INS to consider the "seriousness of the violation" and "whether or not the individual was an unauthorized alien."

As previously discussed, agency-specific statutes for four of the five agencies require them to consider the size of the entity as an explicit penalty relief condition.

Most Agencies Were Not Able to Provide Enforcement Data in the Format Requested

MSHA was the only one of the five agencies that provided all of the data required by subsection 223(c) of SBREFA, and it was also the only agency that was able to provide us with more recent data on enforcement actions against small entities. The other agencies either (1) provided data on inspections or small entities, not enforcement actions; (2) said they could only provide data on enforcement actions initiated against entities of any size, not just small entities; or (3) provided data that were inconsistent and incomplete.

Some Agencies Did Not Provide Required Data in Their 1998 SBREFA Reports

Subsection 223(c) of SBREFA required agencies to report by March 1998 on the status of their penalty reduction and waiver programs. Specifically, the statute said that agencies should report the number of enforcement actions against small entities that qualified or failed to qualify for their program or policy and the total amount of penalty reductions and waivers. Although this was a one-time reporting requirement, we reviewed the five selected agencies' section 223 reports to obtain data relevant to our second objective—to determine how many civil penalty enforcement actions each selected agency had initiated against small entities each fiscal year since SBREFA's enactment, and how many of those actions resulted in some form of penalty relief.

Two of the agencies—FCC and INS—provided no small entity-related enforcement data in their 1998 reports. FCC reported the number of enforcement actions taken and the number of persons or entities that received penalty cancellations or reductions between June 1996 and January 1998 in relation to all regulated entities, not just small entities.[32] INS noted in its report that the agency had investigated approximately 6,000 businesses during fiscal year 1997 for violations of section 274A of the INA, resulting in a notice of intent to fine in 888 of those cases. However, INS did not indicate how many of those investigations or notices involved small entities.

Two other agencies provided data in their reports that focused on small entities and offered useful insights into their section 223 programs, but that were not exactly what the statute required. EPA reported that through the end of fiscal year 1997, 95 small entities had received relief under its section 223 program, 10 small entities had not qualified for the program, and 44 cases were still under consideration. EPA also reported that nearly $900,000 in penalties had been reduced or waived through the program. However, EPA's data focused on the number of small entities that had and had not received relief under the program, not the number of enforcement actions initiated against small entities that qualified and failed to qualify for the program.[33] Also, as EPA noted in its report, the data may understate the

[32]In its reply, FCC indicated the number of enforcement actions in which licensees requested a reduction or waiver of civil penalties because of an "inability to pay". However, FCC did not indicate how many of these orders involved small entities.

[33]In commenting on a draft of this report, EPA officials told us that the number of small entities was equivalent to the number of enforcement actions, and therefore said that the agency complied with subsection 223(c) of SBREFA.

number of small entities receiving penalty relief and the dollar amount of that relief. The report presented data for penalty relief provided to small entities under what EPA considered its section 223 policies (as the statute required). However, the report did not reflect any penalty relief that small entities may have received under EPA's general enforcement and penalty policies (i.e., when the small entity did not voluntarily disclose the violation) or relief granted through state enforcement programs.[34]

In its 1998 report, OSHA provided data showing the number of "enforcement actions" (14,550) between March 29, 1997, and December 31, 1997, in which penalties were reduced by size of business categories (e.g., 1 to 10 employees, 11 to 20 employees, etc.).[35] However, the report also indicated that the unit of analysis was small entities, not enforcement actions. OSHA officials told us during this review that the data actually reflect the number of inspections in which penalties were reduced. This difference in the unit of analysis can be important because a single inspection can involve a number of enforcement actions. In its report, OSHA also provided the dollar amount of penalty reductions provided to small entities during this period ($107 million) and said that about three-quarters of this amount was based solely on the size of the businesses.

MSHA's 1998 report provided the required enforcement data in the manner that the statute stipulated. MSHA said that between April 1, 1997, and December 31, 1997, the agency took approximately 77,000 enforcement actions against small entities. Of these, MSHA said that about 48,000 actions were single penalty assessments that did not qualify for a penalty reduction, and the remaining 29,000 actions received penalty reductions totaling about $2.1 million.

Time Frames Covered by the Data Differed

Subsection 223(c) of SBREFA required agencies to submit their reports by March 1998 but did not specify the time frames that the agencies' enforcement data should cover. As a result, the data that the agencies provided varied in the dates covered. For example, MSHA's data covered the period from April 1, 1997, until December 31, 1997. FCC's data covered the period from June 1996 to January 1998. EPA indicated that its data was

[34]According to EPA, states are responsible for the vast majority of environmental programs, and small entities have sought civil penalty relief from state regulators.

[35]OSHA officials said that this is also the number of enforcement actions involving small entities, because OSHA automatically provides penalty relief for small entities.

"through fiscal year 1997" but did not indicate the starting point for the data.[36]

Most Agencies Still Could Not Provide More Recent Data in the Format Requested

Given the difficulty in using most of the data that the agencies provided in their 1998 reports, we asked each agency to provide enforcement data for each fiscal year since SBREFA's enactment (i.e., 1997, 1998, 1999, and 2000). Specifically, we asked the agencies to identify the number of civil penalty enforcement actions that they had initiated in each year, the number initiated against small entities, and how many of the enforcement actions against small entities did and did not result in a waiver or a penalty reduction. We also asked the agencies to provide data on the dollar amount of the civil penalties against small entities that were waived or reduced. SBREFA does not currently require agencies to maintain this information.

MSHA was the only one of the five selected agencies that provided the enforcement data that we requested. (See table 2.) The data indicate that the percentage of enforcement actions against small entities that received some type of penalty relief ranged from about 38 percent in fiscal year 1997 to about 43 percent in fiscal year 1999. The average amount of penalty per enforcement action ranged from about $233 (1997) to about $274 (1999). MSHA officials said that the agency rarely provides full waivers of civil penalties because the agency generally requires a minimal $55 fine for each enforcement action initiated that involves a minor violation that is abated in a timely manner.[37]

[36]In commenting on a draft of this report, EPA officials said the data covered the period from March 30, 1996, through September 30, 1997.

[37]See 30 C.F.R. § 100.4.

Table 2: MSHA Enforcement Actions and Related Penalty Relief for Small Entities—Fiscal Years 1997 Through 2000

	Fiscal Year			
	1997	1998	1999	2000
Number of enforcement actions involving small entities in which a penalty was proposed	103,515	116,949	106,643	105,767
Number of enforcement actions in which small entities received penalty relief	39,015	45,225	45,555	41,090
Percentage of enforcement actions in which small entities received penalty relief	37.7%	38.7%	42.7%	38.8%
Amount of penalties reductions for small entities (in millions)	$9.09	$10.77	$12.48	$11.05

Note: MSHA considered a small entity as any mining business with 19 or fewer employees.

Source: MSHA and GAO analysis.

The other agencies varied in their ability to provide relevant data. OSHA provided data on the number of inspections involving small entities, not the number of enforcement actions. (See table 3.) OSHA officials said that their database is structured in terms of inspections, not enforcement actions, and that the database does not reflect how many enforcement actions occurred during each inspection.

Table 3: OSHA Inspections and Related Penalty Relief for Small Entities—Fiscal Years 1997 Through 2000

	Fiscal Year			
	1997	1998	1999	2000
Number of enforcement inspections involving small entities in which a penalty was proposed	19,617	18,427	17,979	17,187
Number of enforcement inspections in which small entities received penalty relief	19,617	18,427	17,979	17,187
Percent of enforcement inspections in which small entities received penalty relief	100%	100%	100%	100%
Amount of penalty reductions for small entities (in millions)	$88.03	$124.17	$123.15	$127.00
Amount of penalty reductions for small entities based on size of entity (in millions)	$72.85	$101.65	$101.87	$104.92

Note: OSHA considered a small entity as any business with 250 or fewer employees. Also, the data are based on OSHA enforcement actions at the federal level and exclude any penalty relief that small entities may have received under state health and safety programs approved by OSHA.

Source: OSHA and GAO analysis.

The data that OSHA provided indicated that every inspection involving a small entity that resulted in a proposed penalty also resulted in a penalty reduction. As previously noted, OSHA automatically applies its penalty relief criteria to proposed penalties. Small entities can receive the largest penalty reductions, and the smaller the entity the larger the reduction. During each of the last 3 fiscal years (1998 through 2000), OSHA provided small entities with more than $120 million in penalty relief, and in each year more than 80 percent of the reductions provided to small entities were based solely on the size of the entities.

The data that EPA provided to us reflected enforcement under the three elements of its section 223 programs, not all enforcement actions in the agency. Also, the data provided were inconsistent, incomplete, and not in the format that we requested. For example, for fiscal year 1997, EPA said the following:

- Sixty-one small businesses disclosed violations under the agency's audit policy, 19 received some form of penalty relief, and 36 cases were still "under consideration" for relief at the end of the fiscal year. It was not clear how the remaining six cases were resolved, and EPA did not indicate the amount of penalty relief that was provided.
- Twelve small businesses disclosed violations under the agency's small business policy, and 8 received penalty relief after the fiscal year had ended. However, EPA did not indicate how the remaining four cases were resolved or the amount of penalty relief that was provided.
- Seventy-six small communities "utilized" the agency's small community policy, but EPA did not indicate whether all of the communities received relief and, if so, the amount of relief provided.

The data that EPA provided for the other fiscal years were even less complete. For example, EPA said that 76 facilities disclosed violations under the small business policy in fiscal years 1998 and 1999, and that "all businesses that qualified for relief were granted a 100% waiver of the

gravity-based penalty." However, EPA did not indicate how many of the 76 facilities qualified for relief.[38]

Neither FCC nor INS could provide us with any data on civil penalty enforcement actions against small entities. Officials in both agencies told us that because their agencies do not provide special civil penalty relief based on the size of the regulated entity, they do not keep data on enforcement actions by size of entity.

Most Agencies Could Not Identify Paperwork-Related Enforcement Actions Against Small Entities

We also asked agencies to determine whether any of the enforcement actions during this period that did not result in penalty relief involved paperwork requirements. SBREFA does not require agencies to maintain this information. Because MSHA was the only agency that could identify the number of enforcement actions against small entities that did not result in some type of penalty relief, it was also the only agency that could identify the number of such actions that involved a paperwork requirements. (See table 4.)

[38]In EPA, civil penalties are made up of two components: (1) the gravity of the violation (e.g., the nature; duration; and environmental, safety, or public health impacts of the violation) and (2) the economic benefit that the small entity derives from the violation. EPA's section 223 policies allow the agency to reduce gravity-based penalties, and provide the agency with the discretion to waive economic benefit penalties, as appropriate. However, EPA officials said that economic benefit penalties are rarely imposed. In commenting on a draft of this report, EPA officials said that all 76 facilities qualified for a waiver of both gravity-based and economic benefit penalties.

Table 4: Percent of MSHA Enforcement Actions Involving Small Entities Without Penalty Relief That Involved Paperwork Requirements—Fiscal Years 1997 Through 2000

	Fiscal Year			
	1997	1998	1999	2000
Number of enforcement actions in which small entities did not receive penalty relief	64,500	71,724	61,088	64,677
Number of enforcement actions against small entities that did not result in relief that involved paperwork requirements	4,537	5,146	5,162	4,654
Percentage of enforcement actions against small entities that did not result in relief that involved paperwork requirements	7.0%	7.2%	8.5%	7.2%

Note: MSHA considered a small entity as any mining business with 19 or fewer employees.

Source: MSHA and GAO analysis.

The MSHA data indicated that, in each year, less than 9 percent of the enforcement actions without some type of penalty reduction involved paperwork requirements. MSHA said that most of these actions imposed single $55 fines that were required by regulation or involved more serious violations that could have an impact on the health and safety of employees. MSHA provided the following examples of what they considered to be "serious" paperwork-related violations:

- MSHA regulations require that all electrical equipment must be frequently examined, tested, and properly maintained by a qualified person to ensure safe operating conditions, and that a record of such examinations must be kept and made available to miners and representatives of the Secretary of Labor. Failure to keep such records, although technically a "paperwork" violation, may represent failure to maintain the equipment in the specified manner.
- MSHA regulations also require that self-propelled mobile equipment to be used during a shift must be inspected before being placed in operation on that shift. Any defects on the equipment that are not corrected immediately must be reported to and recorded by the mine operator. Therefore, an MSHA inspection that discovers defects in self-propelled equipment may also be recorded as a paperwork-related violation.

FCC and INS officials said they could not provide data on enforcement actions involving small entities because their agencies do not distinguish between large and small entities. FCC provided information on certain enforcement actions involving paperwork requirements, but the data were

for all enforcement actions, not just those against small entities. EPA officials said the agency does not maintain data on paperwork-related enforcement actions. OSHA officials said that there are no enforcement actions involving small entities that do not receive some form of penalty relief under the agency's section 223 policy. Therefore, there are no examples of such actions that involve paperwork requirements.

Conclusions

Congress provided agencies with substantial discretion in developing their section 223 civil penalty relief policies. Not surprisingly, the agencies used that discretion and developed policies that vary substantially. For example, some of the agencies' policies cover all civil penalty enforcement actions involving small entities, but other policies cover only some such actions. Some of the policies apply only to small entities or provide them with extra civil penalty relief, and other policies provide small entities with no greater relief than large entities. The agencies also varied in how key terms were defined and in their policies' conditions and exclusions. This variability notwithstanding, all of the agencies' policies and programs that we reviewed were within the discretion afforded to them by SBREFA. Agencies were allowed to limit the scope of their programs to only a portion of their enforcement actions against small entities, and they could decide not to give small entities any additional civil penalty relief. Agencies were also allowed to establish whatever conditions or exclusions they wanted for participation in their programs, subject to the requirements and limitations in other statutes.

Agencies' differing missions and operating environments may legitimately require differences in the agencies' civil penalty relief policies. However, some elements of agencies' policies can be strengthened and made more consistent without impinging on agencies' flexibility. For example, if Congress wants agencies' section 223 policies to be more inclusive, it could require that those policies cover all instances in which small entities can receive civil monetary penalties. Also, if Congress wants small entities to receive more civil penalty relief than is provided to larger entities (unless, of course, larger entities receive a complete penalty waiver), it could require that agencies' policies or programs provide extra reductions for small entities. These kinds of changes would improve small entities' opportunities to receive relief from federal civil monetary penalties. However, Congress could still permit the agencies' policies to delineate relevant conditions and exclusions under which the penalty relief would be authorized without allowing the conditions and exclusions to be so restrictive that they unduly limit the scope of the policies themselves. For

example, agencies could continue to exclude small entities that have been subject to multiple enforcement actions, exclude violations involving willful or criminal conduct, and require that entities correct the violations within a reasonable period.

Even if agencies made these changes to their section 223 policies, Congress would still be unable to oversee the implementation of those policies without data. Agencies are not currently required to collect data on the implementation of their civil penalty policies under section 223; the statute imposed a one-time reporting requirement that expired in 1998, and some of the agencies failed to satisfy this requirement. To facilitate congressional oversight, Congress could require agencies to maintain certain types of implementation data, such as (1) the number of enforcement actions in which civil penalties were proposed, (2) the number of those actions involving small entities, (3) the number of those actions in which small entities received some type of penalty relief, and (4) the dollar amount of the relief provided. By maintaining such data, agencies would be able to make the data available when Congress exercises its oversight duties in this area. The data would also help the agencies themselves understand how their section 223 policies are operating. When providing such data to Congress, agencies should clearly define key terms such as "small entity" and "penalty reduction" so that Congress can understand whether variations in agencies' data are caused by differences in the implementation of agencies' section 223 programs or other factors.

Matters for Congressional Consideration

If Congress wishes to strengthen civil penalty relief for small entities, it should consider amending section 223 of SBREFA to require that agencies' policies or programs (including relevant conditions and exclusions) cover all of the agencies' civil penalty enforcement actions involving small entities and provide small entities with more penalty relief than other similarly situated entities. Also, to facilitate congressional oversight in this area, Congress should consider amending the act to require agencies to maintain data by fiscal year or some other time period on such factors as the number of enforcement actions involving all small entities, the number of enforcement actions that resulted in penalty reductions, and the amount of penalty relief provided. Any such data provided to Congress should clearly indicate how the agency defines key terms such as "penalty reduction" and "small entities."

Agency Comments and Our Evaluation

On January 4, 2001, we sent a draft of this report to the Secretary of Labor, the Attorney General, the Chairman of the FCC, and the Administrator of EPA for their review and comment. Department of Justice officials said they had no comments on the draft report. On January 16 and 18, 2001, FCC and DOL officials told us they had no comments on the matters for congressional consideration but provided several suggestions to clarify particular sections of the report, which we included as appropriate. On January 24, 2001, we met with the Director of EPA's Office of Regulatory Enforcement and the Director of the agency's Office of Compliance to discuss the draft report. During the meeting, the Directors provided several suggestions to clarify certain sections of the report. For example, they requested that the report clearly state that SBREFA does not currently require agencies to maintain the information that we requested in relation to our second and third objectives. They also said the report should indicate that EPA views information collection requirements as the foundation of many health and safety statutes, and that violations of those requirements should not automatically be treated as minor infractions meriting a waiver of civil penalties. We made these and other changes to the draft report, and provided the Directors with a revised draft reflecting the changes made.

On January 26, 2001, the Directors of EPA's Offices of Regulatory Enforcement and Compliance provided written comments on the revised draft report, which are reproduced in appendix I. The Directors said they found our evaluation helpful and were taking steps to implement some of the report's "recommendations." For example, the Directors said they were planning to begin collecting data on the number of small businesses taking advantage of EPA's audit policy. However, they also provided several "overarching comments" regarding the report. First, they said that "[d]istinguishing between requirements that have an information collection request and those that do not is an inaccurate litmus test for differentiating 'major' and 'minor' violations." Second, they said it is not clear that penalties issued against small businesses in EPA enforcement actions are a "significant concern," noting that EPA reduces penalties below the statutory maximums, settles most cases below the initial penalty offers, and is required by the agency's statutes and penalty policies to consider ability to pay, "which enables EPA to take small business concerns into account in its enforcement actions." The Directors also said EPA believes that penalty incentives should reward those who make voluntary efforts to comply with regulatory requirements, and that agencies implementing SBREFA programs should continue to consider the penalty factors that

Congress has established (e.g., recovery of any economic benefit of noncompliance).

We did not indicate in our draft report that violations involving an information collection were, in any sense, "minor" violations. In fact, as previously indicated, we added a sentence to the revised draft that the Directors reviewed reflecting EPA's and other agencies' concerns about this issue in relation to legislation that Congress had considered. Regarding the Directors' second point, it is not clear how EPA can determine whether penalties issued against small entities are a significant concern without the enforcement data that the Directors said the agency does not possess or that they described as "inadequate." Also, an entity's "ability to pay" may be unrelated to whether that entity is considered "small" for purposes of SBREFA. Therefore, taking into account a business' ability to pay does not ensure that small business concerns are taken into account. Regarding the Directors' last points, we noted in the conclusion of our draft report that even if agencies' policies were required to provide extra reductions for small entities, agencies would still be free to impose other conditions and exclusions on the receipt of penalty relief. Those factors could include, among other things, consideration of an organization's voluntary efforts to comply and congressionally established factors.

The EPA Directors also provided several "technical" comments on the draft report. In several of these comments, the Directors stated the agency's position on various issues but did not recommend changes to the draft report. For example, in one such comment, they emphasized that EPA offers penalty relief to small entities both through its section 223 policies and through its policies implementing environmental statutes, and indicated that EPA views "ability to pay" separate and distinct from "ability to continue in business." In other comments, the Directors noted that EPA data tracking for the agency's voluntary disclosure policies was "inadequate" (although improvements were being made), and that other data that we requested on the agency's small communities policy did not exist.

However, in other technical comments the Directors suggested changes to the draft report. For example, they said the report should indicate that an enforcement program needs to meet many competing goals, and said addressing the recommendations in the draft report may create tensions with our previous recommendations regarding equitable treatment for

comparable violations.[39] Although we agree conceptually that an agency's enforcement program may face competing goals, we do not believe that providing penalty relief for small entities and maintaining data on the amount of relief provided are inconsistent with a strong civil penalty program. Furthermore, we do not believe that the matters for congressional consideration in this report conflict with our previous recommendations. In the report that the Directors cited, we listed a number of factors that an agency could appropriately consider when determining the penalties to be imposed (e.g., the severity of the violation and the degree of economic benefit obtained). With the enactment of section 223 of SBREFA (less than 2 weeks after the publication of our report), the size of the entity involved in the violation became yet another factor that agencies could legitimately consider when determining equitable penalty amounts.

In another comment, the Directors said the number of small entities described as having received relief in EPA's 1998 report also represented the number of enforcement actions taken during the reporting period. Therefore, they said the information that subsection 223(c) of SBREFA required be included in the agency's report was, in fact, included. However, readers of EPA's 1998 report were not provided this information at the time that the report was issued. Therefore, readers had no way of knowing whether the information that EPA provided (on the number of small entities receiving penalty relief) was consistent with the statutory requirement (number of enforcement actions resulting in penalty relief). In the revised draft report that the Directors reviewed, we had already noted that, in commenting on this report, EPA said the number of small entities was equivalent to the number of enforcement actions taken. Therefore, no changes were made to the final report.

As arranged with your office, unless you publicly announce the contents of this report earlier, we plan no further distribution until 30 days after the date of this report. At that time, we will send copies of this report to Senator Richard J. Durbin, Ranking Member of the Subcommittee; the Honorable Elaine Chao, Secretary of Labor; the Honorable John Ashcroft, U.S. Attorney General; the Honorable Michael K. Powell, Chairman of the Federal Communications Commission; and the Honorable Christine Todd

[39]GAO/RCED-96-23.

Whitman, Administrator of the Environmental Protection Agency. We will also make copies available to others on request.

If you have any questions regarding this report, please contact me or Curtis Copeland on (202) 512-6806. Key contributors to this assignment were John Tavares and Aaron Shiffrin.

Sincerely yours,

Carlotta C. Joyner
Director, Strategic Issues

Comments From the Environmental Protection Agency

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 26 2001

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

Carlotta Joyner
Director of Strategic Issues
U.S. General Accounting Office
441 G Street, NW, Room 2906
Washington, DC 20548

RE: EPA's Comments on Draft Report Entitled "Implementation of Selected Agencies' Civil Penalty Relief Policies for Small Entities"

Dear Ms. Joyner:

Thank you for the opportunity to comment on the draft General Accounting Office (GAO) report entitled "Implementation of Selected Agencies' Civil Penalty Relief Policies for Small Entities." We appreciate GAO's availability to meet with us on January 23, 2001 and its willingness to incorporate specific language changes concerning U.S. Environmental Protection Agency's (EPA) implementation of SBREFA section 223. We found your evaluation to be helpful and we are taking steps to implement some of your recommendations. For example, we are planning to begin collecting data on the number of small businesses taking advantage of EPA's audit policy.

The Office of Enforcement and Compliance Assurance (OECA) has reviewed the revised draft report and would like to address a number of overarching comments and other more "technical" concerns. These comments provide additional context to your report and EPA's efforts to encourage compliance by small entities.

Overarching Issues

- Distinguishing between requirements which have an Information Collection Request (ICR) and those which do not is an inaccurate litmus test for differentiating "major" and "minor" violations. Some requirements which need an ICR have a direct impact on releases to the environment and may constitute "major" violations. For example, the failure to monitor and record equipment leaks as required by law means that leaking components are not repaired which, in turn, means higher emissions of hazardous pollutants. Most agencies, including EPA, have policies which distinguish between major and minor violations and which do not rely on the distinction between ICR or "paperwork" violations and non-ICR or "non-paperwork" violations.

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- It is not clear to us that penalties issued against small businesses in EPA enforcement actions is a significant concern in our programs. EPA, as standard practice, already reduces penalties substantially below the statutory maximum and settles most cases for an amount below the initial penalty offer. Further, our statutes and penalty policies require consideration of ability to pay, which enables EPA to take small business concerns into account in its enforcement actions, even if a small business does not meet the requirements of EPA's SBREFA section 223 program. (See October 20, 2000 letter to Carlotta Joyner, page 6). To underscore this point, EPA has received only two SBREFA complaints under the "Regulatory Fairness Program" in the past twelve months compared to the thousands of inspections and enforcement actions undertaken every year.

- EPA believes that penalty incentives should reward those who make voluntary efforts to comply with regulatory requirements, whether through self-auditing, utilizing compliance assistance or participating in other voluntary programs.

- Congress has established numerous "penalty factors" in environmental laws. In the past, GAO reports have audited EPA against these kinds of criteria. For example, previous GAO reports have underscored the need for accurate reporting and monitoring by facilities and recovery of economic benefit of noncompliance by regulatory agencies. Agencies implementing SBREFA programs should continue to consider the penalty reduction factors which Congress has established.

Technical Comments

Paperwork Violations

- Current agency policies, developed with extensive input from state agencies, already distinguish between major and minor violations -- these distinctions are not based on "paperwork" versus "non-paperwork" violations. Frequently, penalties are waived altogether for minor violations.

- The collection, retention and reporting of information required under the regulations is essential to allow: 1) sources to monitor and properly control emissions; 2) inspectors to assess current compliance and the compliance history of a facility; and 3) the agency to identify sources that deviate from normal industry/sector trends. For example, the control of emissions of VOC from equipment leaks in petroleum refineries requires not only the installation of properly designed equipment, but also the operation and maintenance of the equipment. To properly maintain the equipment, the Standards of Performance for Equipment Leaks of VOC in Petroleum Refineries (NSPS Subpart GGG) require affected facilities to identify components subject to the leak detection and repair (LDAR) program, periodically monitor for leaks and repair leaking components. ICR 0983.06 covers activities by facilities to record information identifying leaking equipment, repair methods used to stop the leaks and dates of repair. Thus, without good records: a refinery can not efficiently find and repair leaks: the Agency can not determine compliance with emission

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reduction requirements effectively; and the Agency would not be able to use comparisons of leak rates between facilities with similar emission sources as an indicator of the quality of a particular source's LDAR program. Leaks not identified are not repaired. In response to a question from the Honorable Henry A. Waxman, the National Enforcement Investigations Center estimates that more than 80 million pounds of volatile organic compounds are released every year from refineries alone due to failure to properly identify and repair leaks.[1]

Competing Directives

- EPA suggests that the report reflect that an enforcement program needs to meet many competing goals, some of which have been emphasized in this report[2] and others in previous GAO reports. Addressing the GAO recommendations in this report may, for example, create tensions with recommendations in a prior GAO report stating that "penalties play a key role in environmental enforcement by deterring violators and by ensuring that regulated entities are treated fairly and consistently so that no one gains a competitive advantage by violating environmental regulations" and recommending "that the Administrator, EPA, revise the assessment of penalties for violations of the Clean Water Act to ensure that the penalties for significant and comparable violations of different types of discharge limits are equitable. In developing the changes, the Administrator should consider the economic benefits gained from noncompliance, the severity of the violations, the permittee's previous compliance record, and the deterrent effect of the penalty." *See* GAO Letter Report RCED-96-23 ("Water Pollution: Many Violations Have Not Received Appropriate Enforcement Attention") (citing prior reports regarding the importance of penalties).

Penalty Reduction Also Provided in Enforcement Response Policies

- EPA would like to underscore that the agency offers targeted relief to small entities in two ways: through our forward looking SBREFA section 223 incentive policies and *separately* through penalty policies implementing environmental statutes. These statutes provide for penalty reductions related to a number of small business factors such as: ability to pay, the ability to continue in business, the size of the business, and such other matters as justice may require. Note also, there is a distinction between "ability to pay" and "ability to continue in business" (the report states in footnote 29 that GAO does not believe there is a distinction). EPA will consider a penalty reduction or waiver of a penalty even if the small business may have the *ability* to pay, but to do so would put

[1] EPA can provide to GAO the letters f rom Congressman Waxman to EPA dated March 12, 1999 and EPA's response dated June 29, 1999 containing this exchange but excluded it from these comments for the sake of brevity.

[2] This report suggests, "If Congress wants to strengthen civil penalty relief for small entities, it should consider amending section 223 of SBREFA to require that agencies' policies or programs (1) provide small entities with more penalty relief than other similarly-situated entities and (2) cover all of the agencies' civil penalty enforcement actions involving small entities."

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the violator out of business.

Data Issues

- GAO states that EPA did not provide the exactly data that SBREFA 223 required in its Report to Congress. Each instance of penalty relief granted under EPA's SBREFA section 223 policies is the *same* as an enforcement action. Thus, the number of small entities reported also represents the number of enforcement actions, so the required information was in fact provided in the 1998 report."

- GAO states (page 17) that, "(A)lso, the data [EPA] provided were inconsistent, incomplete, and not in the format that we requested." The fiscal year 1997 data used in the Report to Congress was a one-time "snapshot" of disclosures processed by the date of the Report to Congress. Subsequent data provided to GAO was not analogous. Further, the data EPA provided did not necessarily "fit" into the format requested by GAO for years subsequent to the data covered in the Report to Congress. Recognizing that data tracking for our voluntary disclosure policies was inadequate, in fiscal year 2000, EPA introduced a "field" into the Agency's Docket Case Information" system for systematically tracking small business policy disclosures. Each EPA regional office became responsible for tracking these violations. A quality analysis and control of the field's information is currently underway. To date, Docket indicates that 16 small entities received relief under the small business policy in fiscal year 2000; all concluded cases provided a 100% penalty waiver. Four cases are still pending. Docket indicates that 429 entities at 2,200 facilities disclosed violations under the audit policy in fiscal year 2000. Docket does not currently define the size of the disclosing entity under the audit policy. EPA is planning to create a field to track use of the audit policy by small businesses (consistent with the definition established in 1990 under section 507 of the Clean Air Act Amendments).

- Other data GAO requested simply do not exist. For example, states who adopted the small communities policy told us that they could not provide information on the amount of penalty relief provided to small communities. Moreover, EPA does not collect data on the number of times states use their small communities policy. States that elect to adopt the small communities policy monitor the program according to their individual needs and procedures. EPA continues to work with the two states - Oregon and Nebraska - that have chosen to adopt the small communities policy. Oregon has supplied annual totals on communities that participated in its small communities policy. Nebraska supplied aggregate numbers. Oregon reported 3 participating communities in 1998, 0 participating communities in 1999, and 7 participating communities in 2000. Nebraska reported 234 participating communities since inception of its small communities program in 1995.

- EPA's small business policy recognizes disclosures to states under similar state small business policies. Since the vast majority of EPA's regulatory authority is delegated to the states, many small entities, rather than utilizing EPA's section 223 program, use similar state policies. EPA's ability to burden states by collecting data on use of state small

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business policies is limited by the Paperwork Reduction Act which requires EPA to obtain OMB approval for collections of information posing identical questions to ten or more respondents. In fact, knowing that EPA would have to draft a one-time report to Congress on its SBREFA penalty reduction program, EPA obtained OMB approval to collect voluntary information from the states on the status of their penalty reduction programs. In 1998, EPA recognized the need to create a formal mechanism for collecting information on the number of facilities that disclosed violations under the small business policy.

Conclusion

We hope you will find these comments useful and that they will enable your report to convey a better understanding of EPA's SBREFA section 223 program and enforcement response policies. We request that this letter be attached to and submitted with the final report. Please feel free to call us if you have any questions about this response, or you may contact Carolyn Dick at (202) 564-4007 or Jonathan Binder at (202) 564-2516.

Sincerely,

Eric V. Schaeffer, Director
Office of Regulatory Enforcement

Michael M. Stahl, Director
Office of Compliance

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