

# GAMING THE RULES

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



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 Center for  
**EFFECTIVE  
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# EXECUTIVE SUMMARY

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

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

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



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

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Advocacy Review panel  
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trade associations.”*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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