

**REPORT OF THE FEDERAL ELECTION COMMISSION
ON COMPLIANCE WITH THE
SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT OF 1996, AS
REQUIRED BY EXECUTIVE ORDER 13892**

Introduction

Executive Order 13892 requires that each agency “shall submit a report to the President demonstrating that its civil administrative enforcement activities, investigations, and other actions comply with SBREFA, including section 223 of that Act,” and that a copy of the report shall be posted on the agency’s website. EO 13892 (Oct. 9, 2019), Sec. 10.

In March of 1996, Congress enacted the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”).¹ SBREFA modified the regulatory and administrative processes of federal agencies in a number of ways that are intended to benefit small businesses and other small entities.

SBREFA requires any agency that regulates small entities to establish a program for providing informal guidance to small entities on how to comply with the statutes and regulations within its jurisdiction. SBREFA Section 213. SBREFA also requires these agencies to establish a policy or program for the reduction, and under appropriate circumstances for the waiver, of civil penalties for violations of a statutory or regulatory requirement by small entities. SBREFA Section 223. SBREFA required agencies to establish these programs by March 29, 1997, and to submit a report on their compliance with these requirements to four congressional committees by March 29, 1998. SBREFA Sections 213 and 223. The Commission submitted its report as required by SBREFA.

The Commission issues advisory opinions to any individual or entity that requests advice on the application of the statutes or regulations within its jurisdiction to a specific transaction or activity to be engaged in by the requesting person. In addition, the Commission uses several mechanisms at various stages of the administrative enforcement process that may reduce or waive civil penalties for respondents, including small entities. The Commission timely reported to Congress on its compliance with these requirements. Thus, the Commission has satisfied the requirements of sections 213 and 223 of SBREFA.

Informal Small Entity Guidance Program

1. SBREFA’s “Small Entity Guidance” Requirements

Section 213(a) of SBREFA states that “[w]henver appropriate in the interest of administering statutes and regulations within the jurisdiction of an agency which regulates small entities, it shall be the practice of the agency to answer inquiries by small entities concerning information on, and advice about, compliance with such statutes and regulations, interpreting and applying the law to specific sets of facts supplied by the small entity.” Section 213(a) also states

¹ Pub. L. No. 104-121, Title II, 110 Stat. 857, 5 U.S.C. § 601 note (1996) (Small Business Regulatory Fairness).

that “[i]n any civil or administrative action against a small entity, guidance given by an agency applying the law to facts provided by the small entity may be considered as evidence of the reasonableness or appropriateness of any proposed fines, penalties or damages sought against such small entity.”

2. The Commission’s Advisory Opinion Process

Since 1975, the Commission has issued advisory opinions on the application of the Federal Election Campaign Act² (“FECA”) to any individual or entity inquiring about the application of the FECA, or Commission regulations promulgated thereunder, to a specific transaction or activity to be engaged in by the requesting person. The Commission also issues advisory opinions on the application of the Presidential Election Campaign Fund Act³ (“the Fund Act”), and the Presidential Primary Matching Payment Account Act (“the Matching Payment Act”).⁴ The Commission’s advisory opinion process is governed by 52 U.S.C. § 30108 and part 112 of Title 11 of the Code of Federal Regulations.

A requestor may request an advisory opinion on his or her own behalf or through a representative.⁵ In order to obtain an advisory opinion, a requestor must submit a written request that describes a specific transaction or activity that the requestor plans to undertake or is presently undertaking.⁶ Requests presenting a general question of interpretation, or posing a hypothetical situation, or regarding the activities of unrelated third parties, do not qualify as advisory opinion requests.⁷ The Commission makes complete requests available to the public, and accepts comments submitted by any interested party for ten days thereafter.⁸

Section 30108(a) requires the Commission to issue a written advisory opinion to the requesting entity within 60 calendar days after receiving a “complete” request, *i.e.*, a request that qualifies under 11 C.F.R. § 112.1. However, the 60 calendar day period is reduced to 20 calendar days for requests (1) that are submitted by a candidate or a candidate’s authorized committee (or an agent of either) during the 60 days preceding an election for federal office in which the requesting candidate is seeking nomination or election; and (2) that present a specific transaction or activity related to that election, and explain the connection between the activity and that election in the request.⁹ In addition, the Commission may respond to some advisory opinion requests that present significant, time-sensitive questions within 30 days.¹⁰

The Commission’s Office of General Counsel (“OGC”) receives and analyzes all advisory opinion requests, and prepares one or more draft opinions for Commission consideration. The Commission makes at least one draft advisory opinion public and accepts

² 52 U.S.C. §§ 30101-45.

³ 26 U.S.C. §§ 9001 et seq.

⁴ 26 U.S.C. §§ 9031 et seq.

⁵ 11 C.F.R. § 112.1(a).

⁶ 11 C.F.R. § 112.1(b).

⁷ *Id.*

⁸ 52 U.S.C. § 30108(d); 11 C.F.R. §§ 112.2(a), 112.3.

⁹ 11 C.F.R. § 112.4(b).

¹⁰ See Notice of New Advisory Opinion Procedures and Explanation of Existing Procedures, 74 FR 32160, 32162 (July 7, 2009).

public comment on the drafts. The Commission reviews and votes on draft advisory opinions during its public meetings, and requestors, including their representatives and counsel, may appear at the meeting in person or remotely to respond to Commissioners' questions.¹¹ Advisory opinions must be approved by an affirmative vote of at least four Commissioners.¹² Once approved, the opinion is sent to the requestor and made available to the public.¹³

Two categories of individuals and entities may rely upon advisory opinions issued by the Commission: 1) any person involved in the specific transaction or activity at issue in the advisory opinion, and 2) any person involved in a specific transaction or activity that is materially indistinguishable from the transaction or activity at issue in the advisory opinion.¹⁴ The FECA protects these two categories of persons from sanction under FECA and chapters 95 or 96 of the Internal Revenue Code if they rely on a Commission advisory opinion in good faith.¹⁵

The FECA states that “[n]o opinion of an advisory nature may be issued by the Commission or any of its employees except in accordance with the provisions of [52 U.S.C. § 30108].”¹⁶

The advisory opinion process is the method through which the Commission provides advice to the regulated community on the application of the FECA, the Fund Act, or the Matching Payment Act to specific factual situations. Thus, this process complies with SBREFA's small entity guidance requirements.

3. Other Guidance Assistance Programs

The Commission also has other programs for providing general guidance to the public on complying with the statutes within its jurisdiction. For example, since early in its existence, the Commission has published four compliance manuals, called Campaign Guides, that assist the regulated community in complying with the FECA; each guide is targeted at a particular segment of the Commission's regulated community. These guides are written in plain English, are available on the Commission's website, and are periodically updated; thus, they satisfy the small entity compliance guide requirement in section 212 of SBREFA.¹⁷

In addition, the Commission's Information Division operates toll-free numbers through which any individual or entity can obtain compliance guidance. The Commission's Information Specialists field calls from the regulated community and assist callers in identifying and obtaining rules and Commission publications that are relevant to the caller's situation, and,

¹¹ See Notice of New Advisory Opinion Procedures and Explanation of Existing Procedures, 74 FR 32160 (July 7, 2009).

¹² 2 U.S.C. § 30106(c); 11 C.F.R. § 112.4(a).

¹³ 11 C.F.R. § 112.4(g).

¹⁴ 52 U.S.C. § 30108(c)(1)(A) and (B); 11 C.F.R. § 112.5(a).

¹⁵ 52 U.S.C. § 30108(c)(2); 11 C.F.R. § 112.5(b).

¹⁶ *Id.*

¹⁷ That provision requires that for any rule for which an agency is required to prepare a regulatory flexibility analysis, the agency shall publish one or more guides that “explain the actions a small entity is required to take to comply” with the rule, “using sufficiently plain language likely to be understood by affected small entities,” and shall post the guide on the agency's website. Section 212(a).

where appropriate, directs callers to information on how to submit an advisory opinion request.¹⁸ Political committees can also ask questions about how to comply with reporting requirements by contacting their assigned analyst from the Reports Analysis Division (“RAD”).

The Information Division also holds periodic conferences and webinars for members of the regulated community. The purpose of these events is to teach attendees the law, and provide them with a forum in which they can ask questions and obtain materials related to the FECA and the Commission. The conferences and webinars feature presentations by members of the Commission, the Information Division, RAD and OGC, and seminars in which attendees participate in exercises on the application of the law to hypothetical situations. Some webinars and conferences are targeted at certain segments of the regulated community, *e.g.*, corporations and labor organizations, candidates, or political party committees. Other conferences target regions of the country, and feature breakout sessions for various segments of the regulated community. The conferences and webinars provide members of the regulated community with useful compliance information.

Reduction and Waiver of Civil Penalties for Small Entities

1. SBREFA’s Requirements for the Reduction and Waiver of Civil Penalties

Section 223 of SBREFA requires all agencies that regulate the activities of small entities to establish a program or policy 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. SBREFA specifically states that, under appropriate circumstances, an agency may consider ability to pay in determining the civil penalty to be paid by a small entity. SBREFA Section 223(a).

2. The Commission’s Reduction and Waiver Mechanisms

There are several steps in the Commission’s administrative enforcement process that have the effect of waiving or reducing civil penalties. Enforcement cases are generated from external complaints, self-reporting by persons who have committed violations, and referrals from other agencies and other offices within the FEC.¹⁹ The primary internal sources of enforcement matter referrals are the Audit Division and RAD. Potential referrals to OGC enforcement from Audit and RAD are subject to certain internal thresholds relating, in most cases, to the monetary

¹⁸ The legislative history of SBREFA demonstrates that informal methods for providing guidance, such as through toll-free telephone numbers, are acceptable methods of satisfying the section 213 requirement. 142 Cong. Rec. E571-01 (daily ed. Apr. 19, 1996) (statement of Rep. Hyde); 142 Cong. Rec. S3242-02 (daily ed. Mar. 29, 1996) (statement of Sen. Bond). However, the Commission is unable to use the toll-free numbers for that purpose. In an effort to encourage the regulated community to seek guidance information, the Commission gives callers the option of remaining anonymous when they seek guidance on the toll-free lines. Without the identity of the caller, there is no way to take the guidance given into account in assessing penalties in subsequent civil or administrative actions. Furthermore, as explained above, the Commission’s authority to provide advice outside the advisory opinion process is limited: “[n]o opinion of an advisory nature may be issued by the Commission or any of its employees except in accordance with the provisions of [52 U.S.C. § 30108].” 52 U.S.C. § 30108(b).

¹⁹ 52 U.S.C. § 30109(a); 11 C.F.R. § 111.3(a).

amount of a violation.²⁰ While these thresholds are not limited to small entities, they provide a mechanism whereby the enforcement process can effectively be foreclosed before it begins, thereby excusing a party from an enforcement process that may result in a civil penalty. Smaller violation amounts tend to correlate to smaller entities, so those entities' violations are less likely to be referred to OGC enforcement. RAD referrals to the Audit Division (which may ultimately result in referral to OGC) are subject to monetary thresholds as well; committees may only be referred to the Audit Division if they meet a certain threshold for overall receipts or disbursements. Thus entities with a lower overall activity level, which tend to be smaller, are less likely to be referred for an audit. Similarly, the Enforcement Priority System ("EPS") requires that all cases be rated when they come into the office to determine whether the Commission will pursue them to the civil penalty phase or dismiss them early on. EPS ratings take into account a number of factors, including the amount in violation.

The Administrative Fine Program (AFP), which is based on the 1999 amendment to the FECA, also has the effect of waiving or reducing civil penalties. The AFP allows the Commission to use a more streamlined enforcement process to handle late-filer and non-filer violations.²¹ The Commission approves internal thresholds based on overall receipts and disbursements for scheduled reports that are used to determine which committees are subject to the AFP. Entities with a lower overall activity level, which tend to be smaller, are less likely to be captured in the AFP. In addition, the AFP includes a challenge or appeals process.

For the matters pursued via the enforcement process, the statute requires that the Commission negotiate the amount of civil penalties with a respondent found to have violated the law; the Commission cannot unilaterally impose a civil penalty.²² The Commission's program for reduction and waiver of civil penalties operates within the confines of those negotiations. When the Commission enters into conciliation with a respondent, the respondent receives a proposed conciliation agreement containing, in almost every case, a proposed civil penalty. The respondent is then afforded the opportunity to persuade the Commission that the civil penalty amount should be reduced or waived because of the respondent's circumstances. After considering the respondent's arguments, where appropriate, the Commission may agree to a reduced civil penalty amount, or waive it entirely.

In addition, for persons who have self-reported violations, the Commission has established a policy under which it will offer such persons a significantly lower penalty than it would normally seek had the violations come to its attention as a result of a complaint or referral.²³ Although the self-reporting policy is not specific to small entities, it does have the effect of significant reduction of the civil penalty for a small entity that utilizes the program.

In addition to the regular enforcement process described above, the Commission has established the Alternative Dispute Resolution ("ADR") program to promote compliance by

²⁰ See, e.g., RAD Review and Referral Procedures, 2019-2020, https://www.fec.gov/resources/cms-content/documents/2019-2020_RAD_review_and_referral_procedures.pdf.

²¹ 52 U.S.C. § 30109(a)(4)(C).

²² 52 U.S.C. § 30109(a)(4); 11 C.F.R. § 111.18.

²³ Policy Regarding Self-reporting of Campaign Finance Violations (Sua Sponte Submissions), 72 FR 16695 (Apr. 5, 2007).

encouraging settlements outside of the general enforcement process for certain types of matters. The voluntary ADR program aims to resolve complaints faster, reduce costs, and bring cases to a mutually satisfactory resolution. While the size of the entity is not considered directly in determining which matters are appropriate for ADR, the amount of the alleged violation is considered, as with RAD referrals to the regular enforcement process; smaller violation amounts tend to correspond to smaller entities, in effect making it more likely that small entities will not be referred at all or, if they are, will be able to participate in ADR. Resolutions in the ADR program often include remedial measures, such as having a political committee respondent hire compliance specialists or having representatives or employees of the respondent entity attend FEC educational conferences. While persons negotiating ADR settlements may agree to pay a civil penalty, the inclusion of non-monetary remedies has the effect of reducing penalties for small entities when they participate in ADR, because discounts may be offered in exchange for non-monetary remedies. In addition, financial hardship may be considered in the ADR program, which may also have the effect of reducing penalties for small entities in some cases.

Further, in 2011, the Commission adopted a program by which persons may have a legal question considered by the Commission during either RAD's regular review of reports that are submitted or in the audit process, prior to the stage at which enforcement proceedings may be initiated.²⁴ When RAD or the Audit Division requests that a person take corrective action during the report review or audit process, if the person disagrees with the request based upon a material dispute on a question of law, the person may seek Commission consideration of the legal issue pursuant to this procedure. This program affords small entities, among others, an opportunity to resolve legal questions or clarify their reporting obligations and take any appropriate corrective action before entering the enforcement process, obviating or reducing civil penalties.

Conclusion

SBREFA requires agencies that regulate small entities to establish a program for providing informal guidance to those entities on how to comply with the statutes and regulations within its jurisdiction, and to establish a policy or program for the reduction and waiver of civil penalties for small entities. The Commission's advisory opinion process serves as the informal small entity guidance program required by Section 213 of SBREFA, while its enforcement process complies with the reduction and waiver of civil penalties required by Section 223 through its internal thresholds for enforcement referrals, Enforcement Priority System, conciliation process, ADR program, Administrative Fines program, and requests for consideration of legal questions.

²⁴ See Policy Statement Regarding a Program for Requesting Consideration of Legal Questions by the Commission, 81 FR 29861 (May 13, 2016).