

regulatory requirements for small business, to create a cooperative regulatory environment for small business, and to make federal regulators accountable for "excessive" enforcement actions.

SBREFA, among other things, requires federal enforcement agencies to institute two new policies. The first is a communication policy, described in section 213 of SBREFA, in which each agency must "answer inquiries by small entities concerning information on, and advice about, compliance with" statutes and regulations within the agency's jurisdiction, "interpreting and applying the law to specific sets of facts supplied by the small entity." The second is an enforcement policy, required by section 223 of SBREFA, in which each agency must establish a program 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.

SBREFA incorporates the definition for "small entity" that is established by existing law (5 U.S.C. 601, 15 U.S.C. 632, 13 CFR part 121) for those businesses to be covered by the agency policies. Generally, a small entity is a business concern that is independently owned and operated, and is not dominant in its field of operation. SBREFA defines "small governmental jurisdictions" that serve populations of 50,000 or less as small entities. An agency may establish one or more other definitions for this term, in consultation with the SBA and after opportunity for public comment, that are appropriate to the agency's activities.

In the Interim Policy Statement, FRA invited comments on the definition of "small entity," potential alternative definitions, and supporting rationale for suggested alternative definitions. FRA also held a public meeting on September 28, 1999 to further explore the issue.

## II. Definition of Small Entity in the Railroad Industry

Pursuant to its statutory authority, the SBA promulgated regulations that clarify the term "small entity" by industry, using number of employees or annual income as criteria. 13 CFR 121.101-108, and 201. In the SBA regulations, main line railroads with 1500 or fewer employees, and switching or terminal establishments with 500 or fewer employees constitute small entities. The SBA regulations do not address hazardous material shippers in the railroad industry, or commuter railroads. However, commuter railroads are governmental jurisdictions, and

some may fit within this statutory delineation for small governmental jurisdictions, or small entities addressed in SBREFA.

Prior to the SBA regulations establishing size categories, the Interstate Commerce Commission (ICC) developed a classification system for freight railroads as Class I, II or III, based on annual operating revenue. (The detailed, qualifying criteria for these classifications are set forth in 49 CFR part 1201.) The Department of Transportation's Surface Transportation Board (STB), which succeeded the ICC, has not changed these classifications. The ICC classification system has been used pervasively by FRA and the railroad industry to identify entities by size. The SBA recognizes this classification system as a sound one, and concurred with FRA's decision to use it in the Interim Policy Statement, provided the public has notice of the classification system in use for any particular proceeding and an opportunity to comment on it.

In the Interim Policy Statement, FRA defined "small entity," for the purpose of communication and enforcement policies, the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*), and the Equal Access to Justice Act (5 U.S.C. 501, *et seq.*), to include only those railroads which are classified as Class III. FRA further clarified the definition to include, in addition to Class III railroads, hazardous material shippers that meet the income level established for Class III railroads (those with annual operating revenues of \$20 million per year or less, as set forth in 49 CFR 1201.1-1); railroad contractors that meet the income level established for Class III railroads; and those commuter railroads or small governmental jurisdictions that serve populations of 50,000 or less.

## III. Analysis of Comments

FRA received ten comments regarding the definition of a small entity (which can be accessed on-line at DOT's Docket Management System at <http://dms.dot.gov>). FRA also received additional comments from several organizations during the public meeting held on September 28, 1999. While a number of commenters expressed the view that FRA has been very helpful and flexible in its approach to dealing with small businesses, commenters differed on their proposed definitions of "small entity."

Two small railroads agreed that FRA should retain the definition of a small railroad, as it has been used historically, and as it was used in the Interim Policy Statement: Class III railroads. One other commenter also agreed with that

definition, and also agreed with FRA's definitions for other entities: contractors and hazardous materials shippers meeting the economic criteria established for Class III railroads in 49 CFR 1201.1-1, and small governmental jurisdictions or commuter railroads that serve populations of 50,000 or less.

The American Short Line Railroad Association (ASLRA) (now The American Short Line and Regional Rail Association) suggested the most expansive definition, proposing that FRA regard all entities classified as Class II and Class III carriers by the Surface Transportation Board (STB) as small entities. ASLRA did not address application of the definition to hazardous materials shippers, contractors, governmental units, or commuter operations. ASLRA believes that its proposed definition is consistent with SBA's "1500 employees for main line railroads" and "500 employees for switching or terminal establishments" definitions because the SBA's definition would include all except one Class II and Class III carriers. ASLRA also claimed that the definition would not impose any additional burdens on FRA beyond what FRA already undertakes during its communication and enforcement processes. However, as ASLRA commented, "FRA has consistently recognized the special needs of Class II and Class III railroads, and has specially tailored its regulatory requirements or implementation dates for them in many instances." As noted, FRA does have a history of being very responsive to entities' concerns during its rulemaking and enforcement processes, and does not feel that Class II entities have been adversely affected by FRA's treatment of their concerns. FRA will continue to address those concerns in its regulatory and enforcement actions. Nevertheless, including Class II railroads as small entities in this policy would require that FRA provide those railroads, which are of considerable size and sophistication (with annual operating revenues of up to \$250 million), the benefits of the agency's communication and enforcement policies, which are clearly designed for much smaller entities that truly merit such special attention. FRA will continue to provide compliance guidance and consideration of financial condition to any particular Class II railroad entity that needs these actions, but will not include all of the Class II entities within these policies because they are intended for a class of railroads much more likely to need such actions. As such, FRA sees no justification in expanding its current definition of a