Testimony of
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INTRODUCTION

Mr. Chairman and members of the Committee. My name is Eleanor D. Acheson. I am the Assistant Attorney General for the Office of Policy Development at the Department of Justice. I am pleased to provide the Department=s views on S. 1378, the ASmall Business Paperwork Reduction Act Amendments of 1999.@ Earlier this session, we recommended that the President veto a similar bill, H.R. 391, and in the 105th Congress, we testified in opposition to H.R. 3310, similar legislation. Although we appreciate that changes have been made to the bill, the Department=s concerns with the bill have not changed.

At the outset, I want to underscore that the Department of Justice strongly supports streamlining information collection requirements and helping small businesses to comply with reporting and recordkeeping obligations. Therefore, we support those provisions in S. 1378 that would facilitate compliance with Federal information collection requirements. This Administration has made it a priority to help small businesses thrive, and we are committed to reducing unnecessary reporting and recordkeeping burdens on all businesses. The Department of Justice would welcome an opportunity to work with you to achieve these goals in a common sense, effective manner that complements existing Administration efforts.

While we support this bill=s goals of reducing burdens on small businesses, we have serious concerns with the provision that would waive civil penalties for certain first-time violations of reporting and recordkeeping obligations. This provision essentially provides one

Afree pass@ for small businesses that violate information collection requirements. While we recognize the vast majority of small businesses are law-abiding, we oppose the bill because it would undermine basic principles of accountability, enforcement and deterrence that are the underpinnings of important regulatory programs that protect Americans= well-being. This in turn creates real risks to the American public. The changes that were made to the bill do not address this fundamental problem. The provision is also unnecessary, because both the law and Administration policies already recognize the special challenges that small businesses face and consider those factors when penalties are assessed for violations. And finally, the penalty waiver provision does not reduce reporting or recordkeeping burdens. In fact, the provision reduces information collection burdens only for those who violate the law. This result would put law-abiding businesses at a competitive disadvantage and could endanger the public.

The civil penalty waiver would have adverse effects that I am confident the bill=s sponsors did not intend. As I will describe, this provision could interfere with the war on drugs; hinder efforts to control illegal immigration; undermine transportation, worker and food safety laws; hamper programs to protect children and pregnant mothers from lead poisoning; and undercut controls on fraud against consumers and the United States. Those are just a few of the unintended consequences we foresee.

SMALL BUSINESS CONCERNS ARE RECOGNIZED IN EXISTING LAW

S. 1378 is unnecessary, because federal statutes and Administration policies already take into account the needs of small businesses in assessing penalties. Congress, for example, has taken steps to address concerns about fairness in regulatory enforcement, including the following:

C **The Small Business Regulatory Enforcement Fairness Act of 1996** (SBREFA), Pub. L. 104-121, Title II, " 201-224, 110 Stat. 857-862 (Mar. 29, 1996) (codified at 5 U.S.C. 601 note), requires agencies to provide compliance assistance to small businesses and to develop

policies to provide for the reduction or waiver of civil penalties by a small entity under appropriate circumstances. SBREFA provides for these policies to apply where a small entity discovers a violation through a compliance assistance or audit program, has made a good faith effort to comply with the law, and has corrected the violation within a reasonable period. SBREFA provides that these policies do not apply where the violation involves willful or criminal conduct; poses serious health, safety or environmental threats; or where the small entity has been subject to multiple enforcement actions by the agency. See Pub. L. 104-121, ' 223. SBREFA also provides for the appointment of a Small Business and Agriculture Regulatory Enforcement Ombudsman, who is charged with hearing small business concerns about agency compliance or enforcement activities, and who can refer the concerns to the agency=s Inspector General in appropriate circumstances. See Pub. L. 104-121, ' 222. Many agencies have developed policies consistent with SBREFA.

C **Other Statutes**. Other statutes specifically direct an agency to consider the size of a small business in obtaining information from it or in assessing penalties. The Occupational Safety and Health Act, for example, requires the Departments of Labor and Health and Human Services to obtain information Awith a minimum burden upon employers, especially those operating small businesses.@ 29 U.S.C. 657 (emphasis added). The Clean Air Act expressly requires appropriate consideration of certain factors in assessing civil penalties, including, among other things, Athe size of the business,@ and Athe economic impact of the penalty on the business.@ See 42 U.S.C. 7413(e)(1). The Consumer Product Safety Act sets forth criteria to determine the size of penalties, including the size of the defendant=s business. See 15 U.S.C. 2069(b).

The Administration and federal agencies also have made a number of efforts to address small business concerns and provide relief from penalties when appropriate. Agencies routinely take into account a business=s size and good faith efforts to comply with the law. These are just a few examples:

C **Memorandum on Regulatory Reform: Waiver of Penalties and Reduction of Reports**. On April 21, 1995, President Clinton issued a memorandum asking all agencies to reduce small business reporting requirements and to develop policies to modify or waive penalties for small businesses when a violation is corrected within a time period appropriate to the violation in question. This policy applies where there has been a good faith effort to comply with applicable regulations and the violation does not involve criminal wrongdoing or a significant threat to health, safety, or the environment. The memorandum also directs agencies to reduce the frequency of regularly scheduled reports by one-half in appropriate circumstances. See Memorandum, ARegulatory Reform C Waiver of Penalties and Reduction of Reports,@ 60 Fed. Reg. 20,621 (April 21, 1995).

C **Department of Justice/Immigration and Naturalization Service.** The Immigration and Naturalization Service (INS), when considering the imposition of penalties for Form I-9 violations (forms employers use to verify employment eligibility), is required by law to give Adue consideration@ to mitigating factors such as the size of the business, the good faith of the employer, the seriousness of the violations, whether the violation involved an unauthorized alien, and the history of previous violations. See Immigration and Nationality Act, ' 274A(e)(5), 8 U.S.C. 1324a(e)(5). As a matter of policy, INS applies these same factors when considering penalties in non-reporting cases involving knowing hires, or continued employment, of unauthorized aliens.

C **The National Oceanic and Atmospheric Administration** has developed a civil penalty waiver and reduction program called the AFix-It Notice.@ Under this program, dozens of minor, first-time violations that are technical in nature and that do not have a direct natural resource impact receive a Fix-It Notice that allows the violation to be corrected in lieu of a penalty. Hundreds of these notices have been issued instead of penalties.

C **The Occupational Safety and Health Administration** provides significant penalty reductions based on employer size, good faith and history of violations, with the smallest employers eligible for the largest reductions. Where information collection requirements do not materially affect workplace health or safety, OSHA has directed its field compliance officers not to issue citations.

C **The Environmental Protection Agency** has a APolicy on Compliance Incentives for Small Businesses,@ that provides for reductions or waivers of penalties for small businesses in appropriate circumstances. Under this and other policies, EPA has mitigated hundreds of thousands of dollars in penalties B including complete waivers of all penalties in appropriate circumstances B for small businesses that make good faith efforts to comply. Recently, EPA proposed to expand the options allowed under the policy that make it possible for more small businesses to obtain waivers or reductions of penalties. See AProposed Modifications to the Policy on Compliance Incentives for Small Businesses,@ 64 Fed. Reg. 41116 (July 29, 1999).

These policies appropriately recognize that good faith efforts to comply with the law, the impact of civil penalties on small businesses, and other factors may appropriately be considered in

assessing civil penalties. The policies complement ongoing agency efforts specifically designed to help small businesses understand and comply with the law.

We must all continue our search for effective ways to streamline and simplify reporting and recordkeeping requirements that apply to small businesses. But efforts to streamline reporting should not undermine law enforcement or regulatory safeguards that protect the public from safety, health, or environmental hazards; fraud; or other risks. The rest of my testimony will focus on why information collection requirements are essential to a wide variety of protections on which we all rely, and why a civil penalty waiver for first-time violators may put the health and safety of our families and communities at risk.

IMPORTANCE OF INFORMATION COLLECTION REQUIREMENTS

By allowing one Afree pass@ for first time violations of information collection requirements, the bill appears to assume that these violations are not significant, or are merely Apaperwork@ infractions. We disagree. Congress has established information collection requirements for a very good reason. Reporting and recordkeeping requirements form the backbone of most federal regulatory programs designed to protect human health, safety, environment, welfare, and other public interests. Federal agencies collect information for many purposes such as monitoring compliance with health and safety regulations, preparing for emergencies, and detecting illegal conduct. The government needs the information to decide how to address or remedy dangers ranging from contaminated food to consumer fraud to illegal immigration. The public relies on the information to make educated choices about where to live, what to eat, where to invest, and what to buy. It is through information collected on a regular and timely basis that we can determine where dangers are, what protections are needed, and when action is necessary to remedy harms, deter future violations, and ensure a level economic playing field for those who abide by the law.

We rely on businesses to provide this information because they are the best sources of that information. They know what they are doing, and how they are doing it. If businesses did not keep and report information important to law enforcement and public health and safety, the government would have to either make decisions without critical information or make much more frequent and intrusive inspections. Both alternatives are undesirable. So instead, we ask businesses to keep records on certain important activities and to report that information on a regular basis to the government, to the public, or both.

When considering legislation such as S. 1378, it is important to remember that information collection violations can have serious on-the-ground effects. A company=s failure to submit required information, or submission of inaccurate information, can mislead the public, regulators and law enforcement officials. Reporting violations may mean serious harms go undetected and unremedied. These are just a few examples that illustrate the importance of these requirements:

C Information allows law enforcement to detect drug trafficking and money laundering. Under federal statutes and implementing regulations, financial institutions must report cash transactions exceeding $10,000 to the Secretary of Treasury. See 31 U.S.C. 5311 et seq. A significant purpose of this requirement is to aid the federal government in criminal investigations. Among other things, this requirement is intended to prevent individuals who obtain cash through illegal activities, such as cocaine trafficking, from Alaundering@ the cash by purchasing cashier=s checks or other negotiable instruments.

C Information protects our food supply. The Department of Agriculture=s Hazard Analysis and Critical Control Point Rule, 61 Fed. Reg. 38,806 (July 25, 1996), requires food processors to retain records documenting their efforts to eliminate food safety hazards and prevent salmonella and fecal contamination. These recordkeeping requirements are essential to evaluating whether food processors are sufficiently safeguarding our food supply from dangerous bacteria.

C Information protects children from lead hazards. The Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. 4851, requires persons who sell or lease housing to let buyers or renters know about lead-based paint hazards. That information is especially important to pregnant mothers and to families with young children. Even at low levels, lead poisoning can reduce a child=s IQ, and can cause permanent developmental problems. By providing lead paint hazard information to families who lease or buy housing, American families can make informed decisions about where to live and how to raise their children in a safe environment.

C Information helps ensure workplace safety. OSHA=s worker right-to-know program in its Hazard Communication Standard requires a certain amount of recordkeeping to ensure that the program is effective. If a worker is unaware that a hazardous chemical substance is present in the workplace, he or she may be at serious risk of illness or death. In one incident, two employees died from asphyxiation in a confined space while cleaning a tank. Failure to follow OSHA=s confined space standards which required monitoring and recording the level of contaminants in the atmosphere before employees enter confined work areas was a significant factor in these fatalities.

C Information helps prevent illegal diversion of controlled substances. The Drug Enforcement Administration implements recordkeeping and reporting requirements to verify the legitimacy of controlled substance sales and to ensure that drug inventories are not lost or improperly diverted. These requirements are critical to drug law enforcement, because these records enable DEA to identify sources of diversion and subsequently document criminal activity. For example, the records of a pharmacy were essential to DEA=s identification and subsequent criminal prosecution of a physician who routinely wrote multiple prescriptions for the same patient for 120-150 doses of highly abused and trafficked controlled substances. Where pharmacies do not report, however, illicit diversions may be harder to detect and require more intrusive investigations. For example, a targeting effort identified a pharmacy suspected of selling commonly sought controlled drugs without prescriptions and of submitting fraudulent Medicare claims. An audit of the pharmacy revealed a shortage of over 85,000 dosage units of controlled drugs in a six month period. The lack of required records to account for those drugs supported the suspicion of criminal distribution but failed to provide definite proof. In that case, a civil complaint for recordkeeping violations was filed and a $35,000 fine resulted.

C Information helps warn against dangers posed by hazardous materials. Environmental statutes often require collection of information to ensure that the agency and the public are aware of and can address contaminants in drinking water, wastewater discharges, or the storage, transportation and disposal of hazardous wastes. For example, in response to the disaster in Bhopal, India, Congress enacted a requirement that companies annually report hazardous chemicals inventories to local fire departments and local and State emergency

planning officials. See Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. 11022(a), (d). Chemical inventory information helps local officials prepare for emergency spills, fires, releases, or other potential disasters. If a facility fails to report hazardous chemical inventory information, local and State officials may never learn what chemicals are present and will not be able adequately to plan for or respond to fires or other disasters. Similarly, in order to protect both workers and the public from the hazards of asbestos, regulations promulgated under the Clean Air Act require advance notice of demolition or renovation of facilities that contain asbestos. See 40 C.F.R. " 61.145(b)(1)-(5); see also 42 U.S.C. 7412. If an entity does not provide notice before demolition or renovation begins, the public and demolition workers may be exposed to airborne asbestos fibers without their knowledge. Other examples are hazardous waste or oil spill reporting requirements that require immediate notification, to allow the federal government to assure that either the responsible parties clean up the hazardous releases or that the government does so in order to protect the public. See CERCLA, 42 U.S.C. 9603(b); Oil Pollution Act, 33 U.S.C. 1321(b).

C Information helps ensure drug safety. The Food and Drug Administration requires sponsors of human drug products to report all serious unexpected adverse drug experiences associated with the use of their drug products. See 21 C.F.R. ' 314.80. These reports are required to enable the Administration to protect the public health by helping to monitor the safety of marketed drugs and to ensure that these drug products are not adulterated or misbranded.

C Information prevents fraud against the taxpayer. Virtually all procurement contracts with the federal government and participation in federal loan and grant programs depend on submission of information. This is also true of Medicare, Medicaid, and federal health care programs, where this dependency is of particular concern. Without this information, the government could not pay its contractors, health care providers and other program participants and would be unable to detect fraud and collect damages under statutes such as the Program Fraud Civil Remedies Act, 31 U.S.C. 3801-3812, Section 1128A of the Social Security Act, 42 U.S.C. 1320a-7a, and the False Claims Act, 31 U.S.C. 3729 et seq. In just 210 referrals under the Program Fraud Civil Remedies Act, the Department has approved requests by agencies to use administrative procedures to recover over $ 7 million in civil penalties.

C Information helps ensure compliance with immigration laws. In order to reduce the magnet of employment opportunities in the United States as an incentive to unauthorized immigration, the Immigration Reform and Control Act of 1986, 100 Stat. 3360-62 (codified at 8 U.S.C. 1324a), requires all United States employers to verify, through examining appropriate documents and completing the INS Form I-9, that their newly hired employees are authorized to

work in the United States. Air carriers are required to provide INS officials with properly completed arrival and departure manifests, which are important not only to allow the INS to comply with Congressional immigration control requirements, but also to provide a non-immigrant with evidence of his or her legal status in the United States.

C Information helps protect investors. The federal securities laws mandate the protection of investors and the maintenance of fair, efficient and competitive securities markets. The regulatory system is based on requiring full, fair and truthful disclosure of material information so that investors can make informed choices.

These examples illustrate how information collection forms the backbone of regulatory programs on which we all rely to protect ourselves, our families and our communities. As I will describe below, S. 1378 undermines the fundamental safeguards provided by these requirements by making it easy for small businesses to be casual about or even to decide not to comply with information collection requirements. The consequences of these Apaperwork@ violations can be devastating.

UNINTENDED CONSEQUENCES OF CIVIL PENALTY WAIVER

While we do not know how the courts would interpret the bill=s language, we expect that the proposed waiver of civil penalties may cause grave consequences to public health, safety or the environment that could be avoided. We appreciate that the drafters of the bill have attempted to address our previously expressed concerns about these risks by providing for some exceptions to the general penalty waiver rule. As I will explain below, however, we do not believe those provisions are adequate. Some of the unintended consequences of the penalty waiver provisions include:

Increased Noncompliance with Reporting Requirements by a Few Bad Actors

Most small businesses try hard to comply with the law. But there will always be some that take illegal shortcuts. This bill would reward those bad actors. It would provide those small businesses with one Afree bite@ at the information collection apple, even if the violations were committed knowingly and in bad faith. Under this bill, unscrupulous businesses would know that they could not be penalized until caught once, and then caught again. Such automatic probation for first time offenders would give bad actors little reason to comply until caught. These bad actors might make the calculated decision to save on the costs of complying with reporting or recordkeeping requirements, while those who small businesses who abide by the law would incur those costs. This would give bad actors an unfair economic advantage over their law abiding competitors.

Impairment of Law Enforcement and Public Protection

Aside from allowing bad actors to have a Afree pass@ for reporting or recordkeeping violations, the bill would fundamentally alter the safeguards that are in place to ensure that regulatory programs indeed protect the public. By removing the deterrent effect of potential civil penalties, the bill makes it easier for small business to ignore the requirements of the law because there are no consequences until they are caught for the second time. This shifts the burden of detecting health, safety, or environmental risks from those in the best position to learn of actual or potential defects or risks to the regulatory agencies. The effect would be a wholesale revision of statutes whose protective effects rely on accurate, timely information. For example, the Consumer Product Safety Act, 15 U.S.C. 2051 et seq. (CPSA) recognizes that companies endanger public safety when they do not report actual or potential defects. Similarly, environmental statutes such as the the Clean Water Act, 33 U.S.C. 1251 et seq., and the Safe Drinking Water Act, 42 U.S.C. 300f-300j-26, depend on accurate and timely reporting to prevent serious environmental and health risks.

Let me offer you an example. A few years ago, the Department brought a civil penalty action under the CPSA against a manufacturer of juvenile products such as cribs, strollers, and car seats. The product involved was a toddler bed with widely spaced rails in its headboards, footboards, and side rails. Within two months of marketing the bed, scores of consumers notified the company that children were getting their heads and limbs caught between the headboard and footboard metal railings. Contrary to law, the company did not notify the Consumer Product Safety Commission (CPSC) of any of these incidents. One year later, the company marketed side rails for the bed. Parents again quickly told the company that their children often got trapped in the side rails. The company once again sat on these complaints. Tragically, a child strangled and died in a footboard. It was only at this point that the company reluctantly informed the CPSC of the death and the serious complaints that foreshadowed the death. The CPSC determined that the company had violated a requirement that such product hazards be reported immediately. See 15 U.S.C. 2064(b).

Under S. 1378, an agency would be able to impose a penalty in a situation like this, but it would be too late. The CPSC should not have to wait until a child dies to impose a penalty. Although this tragic death happened under current law, the bill makes it more likely that such situations would occur, because the bill eliminates any incentives to timely report such hazards. Without timely notice of the danger, the CPSC would be unable to evaluate the need for a recall or to act in time to warn parents of the risk.

Let me provide another example. One small entity against which the Department brought a civil enforcement action operated for almost a decade with illegal and uncontrolled emissions of volatile organic compounds (VOCs). VOCs contribute to ground level ozone, or Asmog.@ This business, which is one of the largest spray-painting operations for department store fixtures, was in an area of the country where ozone poses a severe pollution problem. Because the company had failed to provide information to the government before

building the plant or to obtain required permits to construct and operate, the government was unaware of its operation and could not address the resulting degradation of air quality and harm to public health. Indeed, the severe ozone pollution, to which this company illegally contributed, had already triggered restrictions on the ability of other companies to build facilities in that area. While the company also violated substantive standards, the company=s failure to seek permits and to provide the government with information were information collection violations they had serious, real-world consequences C for the public and for other businesses. A civil penalty waiver would encourage such unlawful behavior, and inadequate record keeping and reporting during the period of violation would make it more difficult to discover and remedy the problem.

ASAFETY NET@ PROVISIONS ARE INADEQUATE

Our concerns are not addressed by the exceptions in the bill that allow agencies to impose penalties under certain circumstances. Although we appreciate the efforts that have been made to address our concerns, the problem with these provisions is that they provide too little, too late. Because the bill undermines the reporting and recordkeeping system as a whole, the underlying purpose of obtaining information to prevent and avert harm is defeated. Without the information in the first place, agencies will have a hard time determining any of the potential harms. The practical result is that agencies will be able to impose penalties and enforce the law B but only when it is too late and the harms have already occurred. And under S. 1378, the opportunities for such harms to occur will multiply.

For example, S. 1378 allows an agency to impose civil penalties where the agency head determines that a violation Ahas the potential to cause serious harm to the public interest@ or the violation Apresents a danger to the public health or safety.@ Although this provision will allow after-the-fact imposition of penalties for lack of recordkeeping in certain dangerous situations, it would impede the agency=s ability to detect and divert such situations because it would encourage some bad actors not to keep required records. If a fertilizer facility

does not keep required information on hazardous chemical inventories, local police and fire officials may not know how to respond when a fire starts at the facility and may unknowingly endanger themselves and the community. Fire fighters could waste valuable time trying to determine what chemicals are stored at the facility, or if they are not aware of the dangers, might enter the facility without proper equipment or protection. In such a case, an agency would not be able to make a timely determination that the violation had a potential to cause harm, because it simply would not have known about the violation until too late.

The criminal activity exception also provides the wrong standard. The bill allows an agency to impose a penalty where, based on the facts and circumstances, Afailure to impose a civil fine would impede or interfere with the detection of criminal activity.@ This standard assumes that agencies can determine, based on a particular violation, whether imposing a penalty will affect the detection of criminal activity. In fact, the impact of a single violation may be difficult to evaluate or predict. It is the failure to provide information (such as reports from pharmacies that lead to discovery of drug diversion), and not the failure to impose a penalty, that interferes with detection of criminal activity. The failure to impose a civil penalty only increases the likelihood that certain bad actors will not file required reports.

Our concerns are further exacerbated by the provision that allows a six-month grace period for a company to correct a violation before a penalty is imposed. Allowing an additional six months to correct a violation may unnecessarily increase serious risks to the public. A violation of an important information collection requirement should be corrected immediately. For example, if an agency discovers through an inspection that a facility storing toxic materials does not contain proper documentation that would alert emergency workers and others to respond to an accident if one should occur, it should not have to wait for six months before requiring that documentation. The fact that harm has not occurred before discovery of a

violation does not mean the public should bear the risks associated with it for up to an additional six months.

Put another way, the reason that the fixes do not alleviate our concerns is because the approach of S. 1378 is fundamentally wrong. The problem with the bill is that it provides a presumption that there will be no penalties unless the agency shows aggravating factors. The result of such a presumption is, as I described above, that small businesses are less likely to comply with the law and agencies will lack critical information when it is needed. This is the exact opposite of existing law and policy, which provide for a presumption of penalties, unless the agency finds mitigating circumstances. The reason that approach is imbedded in the law is that the deterrent effect ensures the quality of information that is so necessary for the effectiveness of our regulatory programs, while allowing agencies and courts to waive or mitigate penalties under appropriate circumstances. Therefore, any attempts to fix the factors in the bill will not address the underlying conceptual weakness of the penalty waiver provision.

A Source of Litigation over New Defenses and a ATrap@ for the Unwary

The Department of Justice also has serious concerns regarding ambiguous and confusing language that will make S. 1378 difficult to implement or to understand, and that will likely be a source of contentious litigation. For example, subsection 2(b)(2) provides that, if a violation presents a danger to public safety, an agency may waive a penalty when the violation is corrected within 24 hours of written notice. This section does not make sense for three reasons. First, agencies already have discretion to waive penalties, so it is unclear what this provision adds. Second, regardless of whether the agency decides to waive a penalty, there should always be a requirement to correct a violation, especially if it will present a danger to the public. Third, it is difficult to understand how parts (A) and (B) of this subsection would apply. Part (A) permits an agency to waive a penalty if a first-time violation is corrected within 24 hours, and Part (B) directs an agency to consider factors such as the violator=s good faith efforts,

the nature of the violations, and the previous compliance history, in determining whether to provide a small business with 24 hours to correct the violation under (A). This is inappropriate and illogical, because the factors should be (and are) taken into account in determining whether to waive a penalty generally, not when determining whether to provide a small business with 24 hours to correct a violation.

The bill also includes many ambiguous terms that will lead to litigation and may be a Atrap@ for the unwary small business. Key terms such as Acivil fines,@ Afirst-time violation,@ and Acorrection@ of violations are undefined, so it is unclear when a small business may benefit from a penalty waiver. For example, it is unclear whether a Afirst-time violation@ means the first time a business is caught with any violation, whether it means the first day of a continuous violation, or whether it is the first violation of a particular requirement. Similarly, the bill allows a small business six months to Acorrect@ a violation before it is subject to a penalty. But again, what precisely does it mean to correct a violation? It would appear that certain violations can never be corrected. If, for example, a company has failed to perform a required test on a food or drug sample that has left the premises, it can never conduct that test. If it has failed to create a contemporaneous record concerning an accident, it may be unable to provide an accurate record several months later. There is a real danger that small businesses will be lulled into believing they are immune from civil penalties for certain conduct when in fact they are not. Neither the uncertainty nor the costs of litigation that could result from this bill will benefit America=s small businesses.

EFFECTS ON STATE ENFORCEMENT PROGRAMS

The provision prohibiting states from imposing civil penalties for first-time violations of Aa requirement regarding collection of information under Federal law, in a manner inconsistent with the provisions of this [bill]@ raises some additional questions. It is unclear precisely when this provision would apply. This provision may be intended to address the

situation where states implement delegated federal programs, such as environmental or labor laws. In those contexts, however, states enforce their own independent statutory and regulatory authorities that have been approved by federal agencies as meeting minimum federal standards. If the sponsors were to revise this provision to reach these delegated programs, then the bill could have broad and intrusive impact on states= abilities to enforce their own laws. We urge the Committee to examine the effects of this provision more carefully, and to hear from state law enforcement personnel about the bill=s implications for state enforcement discretion.

THE PENALTY WAIVER PROVISIONS

DO NOT REDUCE APAPERWORK@ BURDENS

In addition to the problems discussed above, the penalty waiver provisions simply do not accomplish the goal of the bill B to reduce reporting and recordkeeping burdens. We agree that small businesses face a number of obstacles, including the need to provide information requested by federal, state and local governments. But as I described above, the government collects information or requires its dissemination for important and necessary reasons. The solution is not to eliminate the requirement to report, but to address the means of complying with the requirements. Agencies and OMB can, and are working together and through administrative processes to streamline information collection requirements, reduce the number of necessary forms, and provide compliance assistance to guide small businesses through their federal reporting and recordkeeping requirements. This is why we support the provisions of the bill that directly address these burdens, such as establishing a task force to examine ways to streamline reporting and recordkeeping requirements.

CONCLUSION

The Department and the Administration remain committed to promoting small business and effectively implementing the President=s guidance and the SBREFA requirements.

We believe collection of information is vital to effective law enforcement and the protection of the public. We therefore do not support penalty amnesty beyond that provided in current law. The Department looks forward to working with the Committee to reduce any unnecessary burdens on small businesses without jeopardizing essential reporting functions designed to protect the American public.