RESOLUTION DISAPPROVING OF HCF'A'S SURETY BOND RULE
Mr. BOND. Mr. President, today I introduce a measure on behalf of myself, Mr. BAUCUS, Mr. GRASSLEY, and others which sends a strong message to the Health Care Financing Administration (HCF'A) that the United States Senate disapproves of its recent rule regarding surety bond requirements for home health agencies.

The surety bond regulation, coupled with HCF'A's implementation of the Interim Payment System (IPS) for home health agencies under the Medicare program, is a threat to the viability of our Nation's home health agencies to provide high quality care to our Nation's seniors and disabled.

Over this past month alone, in St. Louis, Missouri, two of the largest home health providers decided to get out of the home health business—leaving hundreds of elderly and disabled patients searching for a new provider. The invaluable, dedicated services provided by the largest independent provider in St. Louis, the Visiting Nurses Association (VNA), will no longer be realized by the approximately 600 home care patients the agency has served.

It is regrettable that a government bureaucracy is forcing a home health agency, that has served the St. Louis area for 87 years, out of the home health care business.

The Balanced Budget Act of 1997 requires that all Medicare-participating home care agencies hold surety bonds for amounts at least 15 percent of the home health agencies' annual Medicare revenue, plus $50,000. This provision was modeled after a successful Florida Medicaid statute which imposes surety bonds on home care providers as a way of ensuring that only reputable businesses entered Florida's Medicaid program.

This need and modest idea, however, has been severely distorted by HCF'A. HCF'A's surety bond rule deviates from Florida's program in two major ways:

First, the Florida program requires a $50,000 bond. HCF'A's rule requires the bond amount to be the greater of $50,000 or 15 percent of the home care agency's previous year's Medicare revenues.

Since HCF'A issued its initial rule back in January of 1998, constituents in my home State have reported numerous problems in securing these bonds. These reputable individuals involved in the home health industry are refusing to sell home care bonds under the regulation's requirements. Those few companies that are selling bonds are requiring backup collateral equal to the face value of the bond, or personal guarantees from the owners of the business.

Second, the Florida program requires only new home care agencies to secure these bonds. Agencies with at least one year in the program and with no history of any type of Medicare sanctions were exempted from the bond requirement. HCF'A's rule, however, requires all Medicare-participating home care agencies to hold bonds, regardless of how long an agency has been in Medicare and regardless of the agency's good Medicare history. Further, HCF'A's rule requires every home care agency to purchase new surety bonds every year.

HCF'A's rule is outrageous. These requirements are unreasonable and unaffordable, especially for the smaller, freestanding home health agencies. HCF'A's surety bond regulations threaten the existence of many small business home health providers and the essential services they provide to our Nation's seniors and disabled.

The surety bond requirement reflects HCF'A's attitude that all Medicare providers are suspect. Rather than keeping unscrupulous providers out of the home health business, HCF'A's rule will penalize and put many decent home health agencies out of business.

In promulgating this rule, HCF'A did not consider the long-standing reputation of most home health agencies, their years of compliance with Medicare's regulations, or their history of providing high quality and avoiding overpayments from the government. These providers have worked long and hard within the convoluted Medicare program, have abided by the rules and regulations, and have been subjected to numerous audits by fiscal intermediaries.

HCF'A's careless disregard, which has already put many conscientious law-abiding companies out of business, must be dealt with immediately. It is especially incomprehensible when the small businesses at risk provide a service so valued by the disabled and older Americans who receive it.

On Tuesday, June 8, the Regulatory Fairness Board for Region VII held a public meeting in Frontenac, Missouri, a suburb of St. Louis. My Red Tape Reduction Act of 1996 created ten Regional Fairness Boards to provide a voice for the small businesses, collecting comments from small businesses on their experience with Federal regulatory agencies. The Ombudsman, created under the same law, is to use these comments to evaluate the small business responsiveness of agency enforcement actions.

According to Scott George, a small business owner from Mt. Vernon, Missouri who serves on the Regional Fairness Board, this particular meeting of the Fairness Board was dominated by testimony from smaller, freestanding home health care agencies that will be driven out of business by the HCF'A regulations. They testified that more than 1,100 home health care providers nationwide have already closed their doors this year. Mr. George noted that every company that testified before the Regional Fairness Board said they would be driven out of business by year-end. One couple traveled from Ft. Myers, Florida to testify that they will be out of business by the time of the Regional Fairness Board for their area holds a hearing absent relief from the HCF'A regulations.
Mr. President, concerns similar to those expressed in Missouri this Tuesday were raised with HCFA during its rulemaking. Regrettably, HCFA acted like a quarter horse down the home stretch with blinders on, ignoring the comments submitted by small business as well as the agency’s statutory obligations under the Administrative Procedures Act (APA) and the Regulatory Flexibility Act of 1980 as amended by my Red Tape Reduction Act in 1996.

In April, at the urging of myself and other Senators, the Small Business Administration’s Office of Advocacy sent a letter to HCFA to advise the agency of the significant NEGATIVE impact this rule would have on small home health care providers. SBA’s letter documents the deficiencies in the HCFA efforts to implement the bonding requirement. As set forth by the Chief Counsel of Advocacy, HCFA appears to have exceeded the Congressional mandate of the Red Tape Reduction Act of 1996, inappropriately waived the APA’s requirement for a general notice of proposed rulemaking with the opportunity for comment, and bypassed the procedural and analytical safeguards provided by the Regulatory Flexibility Act as amended by my Red Tape Reduction Act in 1996.

The SBA Office of Advocacy petitioned HCFA to exclude the provisions requiring the 15 percent bond requirement and the capitalization requirements pending a “proper and adequate analysis” of the impacts on small businesses. HCFA did not exclude these requirements. Not only does this exceed the scope of the 1997 Congressional directive, but it also imposes an undue financial burden on reputable home health agencies. Furthermore, in its June final rule, HCFA did not conduct a Regulatory Flexibility analysis of the rules impact on small home health care providers. HCFA certified that the rule would not have a significant economic impact on a substantial number of small entities. HCFA’s certification is in direct conflict with the comments submitted by the Office of Advocacy and the home health care industry regarding the small business impacts of the rule.

In 1996, Congress voted to enhance its ability to put a stop to excessive regulations and sloppy agency rulemakings. Enacted as part of my Red Tape Reduction Act, the Congressional Review Act enhances the ability of Congress to serve as such a backstop. Senators Nickles and Reid sponsored the bipartisan Congressional Review Act. Although Congress did not adopt the provision, the Chief Counsel monitors compliance with the Regulatory Flexibility Act and the Congressional Review Act. Although Congress did direct the agency to develop surety bonding requirements and provide a deadline for such a rule to be issued, this does not relieve the agency of its responsibility to conduct such a rulemaking in accordance with existing laws intended to ensure procedural fairness in the rulemaking process.

The practical implication of Congress expressing its disapproval of the June rule is to require HCFA to go back and to conduct rulemaking in accordance with the intent of Congress as expressed in the Balanced Budget Act of 1997 and in keeping with the APA and the Regulatory Flexibility Act. As part of the rulemaking, HCFA should conduct an appropriate initial and final Regulatory Flexibility analysis in accordance with Sections 603 and 604 of the Regulatory Flexibility Act. Congress enacted these procedural safeguards to require agencies to assess the impact of rules such as HCFA’s on small entities and to ensure that agencies choose regulatory approaches that are consistent with the underlying statute while minimizing the impacts on small entities to the extent possible. We should pass the resolution we are introducing today to ensure HCFA implements its statutory responsibilities in accordance with the law.

While I strongly support the vigorous routing of fraud and abuse whenever and wherever it is found, Congress and the HHS should conduct appropriate initial and final Regulatory Flexibility analyses in accordance with the law. While I strongly support the vigorous routing of fraud and abuse whenever and wherever it is found, Congress and the HHS should conduct appropriate initial and final Regulatory Flexibility analyses in accordance with Sections 603 and 604 of the Regulatory Flexibility Act. Congress enacted these procedural safeguards to require agencies to assess the impact of rules such as HCFA’s on small entities and to ensure that agencies choose regulatory approaches that are consistent with the underlying statute while minimizing the impacts on small entities to the extent possible. We should pass the resolution we are introducing today to ensure HCFA implements its statutory responsibilities in accordance with the law.

Many of the elderly and disabled being cared for at home would not be able to remain there if it were not for the services provided by this vital industry. We should clean up the fraud and abuse, not shut the industry or cut off these critical services.

It is clear that HCFA must be held accountable, and I look forward to working with my colleagues in beginning this process today. Mr. President, I ask unanimous consent that a SBA Office of Advocacy letter be included in the RECORD.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:
The final rule is troubling for a number of reasons: 1) The proposal, although probably within HCFA’s regulatory and statutory authority, goes far beyond the requirements contemplated by Congress when it enacted the BBA; 2) HCFA’s good cause exception and waiver of the proposed rulemaking may be arbitrary and capricious under the Administrative Procedure Act (APA); and 3) HCFA has not sufficiently addressed how home health agencies to meet increasing public demand in an aging population. Moreover, the resulting lack of market competition and potential for cost shifting and government-based home health agencies may lead to increased prices.

II. WAIVER OF ADMINISTRATIVE PROCEDURE

An agency is subject to the notice and comment requirements in 5 U.S.C. §553 unless the agency is exempt from coverage of the APA, or the agency establishes “good cause” for not complying with the APA and the statute. When an agency waives the notice and comment procedures required by the APA, however, there should be compelling reasons therefor. In fact, courts have held that exceptions to APA procedures are to be “narrowly construed and only reluctantly countenanced.” New Jersey v. EPA, 26 F.2d 1038, 1045 (D.C.Cir. 1980).

In the instant case, the agency waived both the notice and comment requirement and the requirement to allow a 30-day public hearing on the final rule. The agency modified the notice and comment requirement to require a $50,000 or comparable surety bond. The statutory deadline is less than 150 days after enactment of the statute. HCFA cannot rely on the surety bond requirement because there is a statutory exception when the implementation deadline is less than 150 days after enactment of the statute. HCFA cannot rely on the rule being contrary to public interest.

First, with regard to the impracticability of issuing a proposed rule, as a general matter, “strict congressionally imposed deadline, without more, by no means warrant invocation of the good cause exception.” Pety v. Block, 737 F.2d 1193, 1203 (D.C.Cir. 1984). In addition, there is no good cause exception where an agency unwilling to provide notice or an opportunity to comment could simply wait until the deadline, then raise up the “good cause” banner and promulgate rules without following APA procedures. Council of Southern Mountains, Inc. v. Donovan, 763 F.2d 573, 581 (D.C.Cir. 1981).

By way of example, in Pety v. Block, the court found that the petition was timely filed, and the petition “made no showing either of a complex and extraordinary statute concerning changes in administrative reimbursements under the Child Care Food Program that impaired the agency’s ability to adequately promulgate interim rules.” The statute required notice and comment on the final rule as well. The court stated that the agency had good cause to waive notice and comment because Congress imposed a statutory deadline of about 4½ months after enactment of 21 U.S.C. §6048, which mandated that the effective date for the surety bond requirement be January 1, 1996. The agency waived the notice and comment requirement because the agency’s waiver was timely, and so that legislation would not be issued as a proposed rule before issuing a final rule if, as here, a statute establishes a specific deadline for the implementation of a rule. The HCFA cannot rely on a statutory deadline as the Secretary may permit (applicable to state Medicaid agencies with surety bonds in place). Senate hearings on H.R. 2015, the Balanced Budget Act of 1997, indicated that HCFA had no real opportunity to provide meaningful or full input or comment.

HCFA had not included the additional regulatory requirements, including the requirement for HCFA to request or be requested or contemplated by Congress, to provide for a $50,000 or comparable surety bond. The agency based its “good cause” waiver on three factors: 1) issuing a proposed rule would be impracticable because Congress mandated that the deadline be less than 150 days after enactment of the statute; 2) delay in issuing the regulations would be contrary to the public interest; and 3) HCFA had good cause to waive notice and comment when the deadline is less than 150 days. Third, HCFA claims that a delay in implementing the final rule would be contrary to public policy. Quite the contrary, implementing the final rule as written would be contrary to public policy. The final rule imposes serious economic burdens on an industry already under increased scrutiny and financial hardship including a recent moratorium on entrants to the Medicare program and eliminating audits. HCFA has yet to announce its intention to include home health agencies in the enormously complicated prospective payment system now used by hospitals. HCFA’s ability to provide an adequate and necessary level of home health care for those communities not served by giant hospital-based providers will surely decrease. This result seems contrary to the stated public policy objective of Congress and HCFA.

Finally, it should be noted that HCFA did not attach a post-effective date comment period to the final rule. However, the fact that HCFA attached a comment period to the final rule is not a valid substitute for the normal provisions of the APA. The third circuit stated that: “[i]f a period for comments, after issuance of a rule, could cure a violation of the APA’s requirements, an agency could at will impose a non-statutory deadline and radially overhaul the Medicare reimbursement system.” (Emphasis added). Moreover, “[o]nce published, the interim rules took up 37 pages of explanatory text; 37 pages of revised regulations, and 41 pages of new data tables.” 1d.

In the instant case, HCFA had five months to implement a proposal to require a $50,000 or comparable surety bond from home health agencies. After HCFA added additional bond requirements (on the basis of comments received or requested or contemplated by Congress), the regulation took up 63 pages in the Federal Register: 18 pages of explanatory text, 6 pages of revised regulations, and 39 pages of application documents. The final rule appeared in the Federal Register on January 5, 1998, at least four days after the mandatory effective date.

The Office of Advocacy opines that if HCFA had not included the additional regulatory requirements, the agency would have been able to demonstrate that it had good cause to waive notice and comment.

HCFA has based its good cause exception to notice and comment on the fact that they have the statutory authority to do so with regard to this particular type of rule. The agency states: “Issuing a proposed rule prior to issuing a final rule is also unnecessary with respect to the Medicare surety bond regulation because the Congress has already authorized audits.” HCFA has not been cited as a proposed rule before issuing a final rule if, as a statute establishes a specific deadline for the implementation of a rule. HCFA cannot rely on the rule being contrary to public interest. However, there should be compelling reasons therefor. In fact, courts have held that exceptions to APA procedures are to be “narrowly construed and only reluctantly countenanced.” New Jersey v. EPA, 26 F.2d 1038, 1045 (D.C.Cir. 1980).

The Office of Advocacy states that if HCFA had used the 30-day interim deadline as a statutory deadline, the agency would have had ample time to follow the proper notice and comment procedures. Based on the circumstances of this rulemaking and pointed case law, HCFA cannot rely on the rule being contrary to public policy.

HCFA’s waiver of administrative procedure would be less troubling if the rule were not so burdensome. By waiving notice and comment, HCFA is libero to implement its proposed rule without first having to determine the impact on small entities.
of the rule. Such an analysis could have yielded other, less burdensome alternatives that would have accomplished the agency’s public policy objectives.

Since HCFA did not request a waiver of notice and comment, the agency must comply with the Regulatory Flexibility Act.

III. REGULATORY FLEXIBILITY ACT

Even when a regulation is statutorily mandated, agencies are obligated by law to adhere to certain requirements prior to issuing the implementation. Specifically, the RFA requires agencies to analyze the impact of proposed regulations on small entities and consider flexible regulatory alternatives that would reduce the burden on small entities—without abandoning the agency’s regulatory objectives. Agencies may forgo the analysis if they certify (either in the proposed or final rule) that the rule will not have a significant economic impact on a substantial number of small entities. Agency compliance with certain provisions of the RFA is judicially reviewable under section 611 of the RFA.

It is not clear from the instant rule whether HCFA has actually certified the rule pursuant to section 604 of the RFA or attempted a final regulatory flexibility analysis (FRFA) pursuant to section 604 of the RFA. In either case, the agency failed to complete the requirements of the RFA.

HCFA expresses confusing “certification-like” statements throughout the text of the final rule. However, the actual certification and statement of factual basis are to be found in the final rule. If the agency was attempting to certify, then it did so erroneously and improperly. The Supreme Court has discussed the rule below. On the other hand, perhaps HCFA did not intend to certify, but instead intended to prepare a FRFA. The agency did some type of analysis: “we have prepared the following analysis [which agency officials state in other material provided in this preamble, constitutes an analysis under the [RFA].” 63 Fed. Reg. at 303. The problem with that declaration is that there is more than one type of analysis under the RFA. There is the preliminary assessment analysis which helps agencies determine whether to certify, and in the case of a final rule, there is a FRFA when an agency determines that certification is not appropriate. If HCFA was attempting to certify, then it was inadequate because it contained no analysis of alternatives to reduce the burden on small home health care providers. This, too, is more fully discussed below.

A. CERTIFICATION

When an agency determines and certifies that a rule will not have a significant economic impact on a substantial number of small entities, then it is logical to assume that the agency has already performed some basic level of analysis to make that determination. Will a substantial number of small entities be affected? How many and which? Will the industry be affected? Will all home health agencies be affected. According to SBA’s regulations, a small home health care agency is one which does not exceed $15 million in receipts and an employee count of 100 or less. 1993 data obtained from the U.S. Bureau of the Census by the Office of Advocacy indicates that such agencies represent 7% of all home health care providers and not just the ones with “aberrant” billing practices. After all, the majority of home health agencies apparently do not have aberrant billing practices. HCFA presents evidence that in 1990, Medicare overpayments were 7 percent of all claims paid to HHAs, and of that 7 percent, 34 percent related to Medicare. Care. Fourteen percent of 7 percent is .0098. 14 percent remained uncollected by Medicare overpayments were 7 percent of all those offenders were recidivist; or whether those offenders are primarily large or small.

With regard to the capitalization requirement, HCFA states that, “An organization must at all times be at least a financially sound provider of home health services under the Medicare program will already be properly capitalized without the need for Medicare to require such capitalization.” This statement is basically true. However, the issue of adequate capitalization is relative and fungible because it is based on a number of factors like varying overhead costs, location, profit margins, competition, etc. Surely some home health agencies cannot meet the capitalization requirement. If a home health agency is not Medicare certified, then the agency makes timely compliance with the RFA, HCFA should have prepared a final regulatory flexibility analysis to fulfill all the required elements for that analysis.

B. FINAL REGULATORY FLEXIBILITY ANALYSIS

The preparation of a FRFA may be delayed but not waived. Section 608(b) of the RFA requires that an agency delay the rule, but only if an agency determines that the rule will have a significant economic impact on a substantial number of small entities. Therefore, under the RFA, HCFA should have prepared a final regulatory flexibility analysis (FRFA) pursuant to section 604 of this title [regarding the preparation of FRFAs] for a period of not more than one hundred eighty days after the date of publication in the Federal Register of a final rule by publishing in the Federal Register, not later than such date of publication, a written finding that the rule is being promulgated in response to an emergency that makes timely compliance with
the provisions of section 604 of this title impracticable. If the agency has not prepared a final regulatory analysis pursuant to section 604 of this title within one hundred and eighty days after the date of publication of the final rule, such rule shall lapse and have no effect. Such rule shall not be repromulgated until a final regulatory flexibility analysis is completed by the agency.

FRFAs may not be waived because they serve a vital function in the regulatory process. The preparation of a FRFA allows an agency to carefully tailor its regulations and avoid unnecessary and costly requirements while maintaining important public policy objectives. The FRFA also provides a public record for the final rule, which should include things like data, public comments and a full description of cost-based agencies would be operating in a vacuum without this information to develop suitable alternatives.

Since the agency did not issue a proposed rule, the agency had an obligation to consider carefully all of the significant comments regarding the impact of the final rule. After all, the agency was apparently unsure of the impact. The congressional letter should have been some indication that there would be a significant economic impact and that further analysis was required. HCFA did extend the comment period for obtaining a bond of $50,000 for 60 days, and in some ways limited the liability of sureties. However, the agency did not change the bond or capitalization requirement. For these reasons, why such changes were not feasible. Inasmuch as the agency failed to heed any of the comments regarding impact—even those from Congress—the comment period served no real function.

The dearth of information regarding less costly alternatives is possibly the most serious defect in the analysis prepared by HCFA. When HCFA first began, HCFA never demonstrated why the $50,000 bond was insufficient or would not accomplish the objective of discouraging bad actors. HCFA has twisted this rule, the agency had an obligation to consider carefully all of the comments regarding impact.