

April 2019

Report on the Regulatory Flexibility Act, FY 2018

Annual Report of the Chief Counsel for
Advocacy on Implementation of the
Regulatory Flexibility Act and Executive
Order 13272



The Office of Advocacy of the U.S. Small Business Administration was created by Congress in 1976 to be an independent voice for small business within the federal government. The office is led by the Chief Counsel for Advocacy who is appointed by the President and confirmed by the U.S. Senate. The chief counsel advances the views, concerns, and interests of small business before the White House, Congress, federal agencies, federal courts, and state policymakers. The office relies on economic research, policy analysis, and small business outreach to identify issues of small business concern.

Ten regional advocates around the country and an office in Washington, D.C., support the chief counsel's efforts. This annual report on federal agency compliance with the Regulatory Flexibility Act is mandated by Section 612 of the Regulatory Flexibility Act. It is available on Advocacy's website at <https://advocacy.sba.gov>. Reports from previous years are available there as well.

Information about Advocacy's initiatives on behalf of small businesses is accessible via the website; three Listservs (regulatory communications, news, and research); and social media including a blog, Twitter feed, Facebook page, and LinkedIn presence.



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April 2019

To: The White House
 The Senate Committee on Small Business and Entrepreneurship
 The House Committee on Small Business

The Regulatory Flexibility Act (RFA) is the statutory basis of small entity consideration in federal rulemaking. The RFA assigns the Office of Advocacy official responsibility in rulemaking—to monitor whether agencies are taking small entities into account and to inform them of small businesses’ concerns in order to improve regulations.

The RFA allows small businesses to participate in regulatory decisions that affect them. It also directs the Chief Counsel for Advocacy to monitor and report on how well federal agencies are complying with the law. This report fulfills this mandate, covering fiscal year 2018: from October 1, 2017, to September 30, 2018. In addition, Executive Order 13272, “Proper Consideration of Small Entities in Agency Rulemaking,” requires Advocacy to report on agency activities that demonstrate consideration of small entities in rulemaking. Chapter 2 reports on their compliance in FY 2018.

From the earliest days of his administration, President Trump identified private-sector deregulation as a top priority. Executive Order 13771, “Reducing Regulation and Controlling Regulatory Costs,” required that any new regulations be balanced by the reduction of at least two other regulations. It also required that any costs imposed by new regulations be entirely offset by eliminating costs of existing regulations. Executive Order 13777, “Enforcing the Regulatory Reform Agenda,” put a framework in place to bring about this vision of regulatory reform.

Advocacy has captured this deregulatory momentum to bring small businesses’ priorities to the forefront—to inform agencies’ decisions about which rules to review and reform, and to articulate small businesses’ concerns with them. The RFA requires agencies to analyze the economic impact of a rule whenever it would impose a significant economic burden on a substantial number of small entities. Advocacy continues to monitor and speak up on behalf of small businesses in deregulatory rulemakings. And in response to Executive Orders 13771 and 13777, our small business outreach has expanded nationally, in the Regional Regulatory Reform Roundtable initiative.

Advocacy’s overall efforts to promote federal agency compliance with the RFA resulted in \$253.3 million in regulatory cost savings for small entities in FY 2018. These savings came from seven deregulatory actions taken by five agencies.

- The largest compliance cost saving resulted from changes to the Department of the Interior’s Venting and Flaring Rule. According to the agency, the compliance costs of the earlier rule amounted to 24 to 86 percent of annual revenues from marginal wells, which form the majority of those on agency-administered leases. The revisions yielded small business cost savings of \$72,000 per firm, or \$127 million.
- Another regulatory cost savings resulted from the Environmental Protection Agency’s decision not to impose additional insurance requirements on hardrock mining sites. Small businesses argued that this would duplicate existing federal and state regulations that address this issue. The withdrawal resulted in annual cost savings of \$60.4 million.
- Compliance cost savings also ensued from the one-year delay in implementing the Department of Energy’s Ceiling Fan Light Rule. This delay gives small businesses more time to comply with the rule, and saves them as much as \$1.7 million.

Other successes lightened the small business regulatory load, though not easily quantifiable.

- In one example, EPA reversed a policy known as “once-in always-in.” This policy imposed the most stringent requirements on major sources of hazardous air pollutants, but it contained no incentive to improve performance and reduce emissions. The revised policy allows small businesses that have been classified as major sources to benefit from their pollution reduction efforts.
- Federal agencies’ varying definitions of “small business” complicate regulatory compliance, creating confusion and extra paperwork with no apparent benefit. One improvement this year was EPA’s adoption of the Small Business Administration’s small business size standards for the fee schedule for the Toxic Substance Control Act. The new definition also allows more small businesses to qualify for reduced fees.

Chapter 2 reports on agencies’ compliance with Executive Order 13272. Advocacy provided training in RFA compliance to 132 officials at six agencies. Advocacy confirmed whether agencies had posted their RFA procedures on their websites. Table 2.2 provides these links, which all but two agencies provided.

Also of note in FY 2018:

- Advocacy continued its deregulatory effort, the Regional Regulatory Reform Roundtable Initiative. The initiative informs federal agencies of small businesses’ priorities for deregulation.
- Advocacy held 23 regulatory reform roundtables in 16 states and received input from small businesses in many others. In some cases, agency officials attended roundtables and heard small business concerns directly. And in all cases, Advocacy followed up with agencies in formal letters, teleconferences, and issue roundtables.
- Advocacy staff visited 67 small businesses in 15 states. They heard directly from small business owners and observed business locales and operations, and they came away with a better understanding of the practical issues small businesses face with regulatory compliance.
- The Regional Roundtable initiative effort has yielded progress in lightening small businesses’ regulatory load. Details appear in the report, [What Small Businesses Are Saying and What Advocacy Is Doing About It: Progress Report on the Office of Advocacy’s Regional Regulatory Reform Roundtables](#), on page 34.
- On April 11, 2018, the Treasury Department and White House Office of Information and Regulatory Affairs signed a memorandum of agreement allowing Treasury regulations to be reviewed under E.O. 12866. This executive order requires significant regulations to be submitted to the Office of Management and Budget. Previously, most Internal Revenue Service regulations were exempt from 12866 review.
- Finally, in 2018, Advocacy continued its work coordinating the interagency working group called for by the Trade Facilitation and Trade Enforcement Act. The group of six agencies evaluated the small business impact of the NAFTA renegotiation which resulted in the United States–Mexico–Canada Agreement.

It is an honor to present to you this report on federal agency compliance with the Regulatory Flexibility Act. My office looks forward to continuing these efforts and achieving significant reductions in small businesses’ regulatory burdens.

Sincerely,

A handwritten signature in black ink that reads "Major L. Clark, III". The signature is written in a cursive, flowing style.

Major L. Clark, III
Acting Chief Counsel for Advocacy

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Chapter 1

The Regulatory Flexibility Act, Small Business, and the Era of Deregulation

Shortly after his inauguration in January 2017, President Donald J. Trump issued two executive orders aimed at ameliorating the regulatory burden faced by the private sector. The first, E.O. 13771, “Reducing Regulation and Controlling Regulatory Costs,” commonly known as “one-in, two-out,” required that any new regulations be balanced by the elimination of at least two other regulations. It also required that the incremental cost of new regulations be entirely offset by elimination of existing costs of other regulations. The second, E.O. 13777, “Enforcing the Regulatory Reform Agenda,” set a framework for implementing this vision of regulatory reform, requiring inter alia that each agency appoint a Regulatory Reform Officer to supervise the process of regulatory reform going forward. The Office of Advocacy determined that these measures could be an opportunity to reduce the federal regulatory impact on small business. Since in most instances

the agencies will implement the regulatory reform executive orders through notice and comment rulemaking, the requirements of the Regulatory Flexibility Act (RFA) will play a role.

To maximize this opportunity for small business regulatory reform, Advocacy has launched the Regional Regulatory Reform Roundtable initiative. Advocacy headquarters staff and regional advocates have hosted small business roundtables around the country in order to identify small business regulatory issues and to assist agencies with regulatory reform and reduction in compliance with Executive Orders 13771 and 13777. Advocacy invited several federal agencies to send representatives to these roundtables to hear directly from stakeholders on specific recommendations for regulatory changes. In FY 2018, these regulatory review and reform roundtables were held in 23 cities.



Regional Regulatory Reform Roundtable, Milwaukee, Wis.

SBA Administrator Linda McMahon joins Advocacy staff members at the Regional Regulatory Reform Roundtable in Milwaukee, Wis., as part of Advocacy’s continuing effort to hear directly from affected small businesses about their existing federal regulatory burdens. She shared her personal story of building her family business, and she encouraged small businesses to discuss their ideas for regulatory reform.

Agencies' implementation of these executive orders offer significant opportunities for regulatory relief targeted to small businesses. In this context, the RFA requires agencies to analyze their deregulatory actions to maximize small business benefits in the marketplace. This report includes descriptions of success stories of small business burden reduction achieved by the agencies and Advocacy.

Since its passage in 1980, the Regulatory Flexibility Act (RFA)¹ has helped establish small business consideration as a necessary part of federal rulemaking. In 2017, Advocacy sent a memorandum to federal agencies recommending that agencies consider small entity interests in implementing EO 13771 and in subsequent deregulatory actions. (See Appendix C.) The memo also reminded agencies of their obligations under the RFA and of the assistance Advocacy could offer to conduct small entity outreach.

In the past, Advocacy has made regulatory reform recommendations directly to agencies based on a review of rules subject to the requirements of section 610 of the RFA and based on outreach to small entity representatives. In addition, once agencies designated Regulatory Reform Officers and established Regulatory Reform Task Forces under EO 13777, Advocacy offered these recommendations and other assistance and views to agencies, as suggested by EO 13777, section 3(e). Since then, Advocacy has engaged in a longer-term effort to make specific recommendations to agencies and the Office of Management and Budget about regulations and regulatory policies that could be modified to lower small entities' compliance costs. In addition to writing public comment letters to voice small business concerns, Advocacy also has been working

directly with agencies to assist in developing and recommending regulatory changes. Advocacy's Regional Regulatory Reform Roundtables have allowed small businesses around the country to discuss the challenges they face with regulatory implementation and compliance. These meetings explore small entities' suggestions for regulatory streamlining and savings, and participants discuss ways to improve small business participation in agencies' rulemakings. These discussions inform Advocacy's ongoing and future recommendations to the federal agencies tasked with reducing the number of regulations.

The RFA, Its Requirements, and Efforts to Strengthen It

The RFA was passed in 1980 to address the disproportionate impact of federal regulations on small businesses. Under the RFA, when an agency proposes a rule that would have a "significant economic impact on a substantial number of small entities," the rule must be accompanied by an impact analysis, known as an initial regulatory flexibility analysis (IRFA), when it is published for public comment.² When the final rule is published, it must be accompanied by a final regulatory flexibility analysis (FRFA).³ Alternatively, if a federal agency determines that a proposed rule would not have such an impact on small entities, the head of that agency may "certify" the rule and bypass the IRFA and FRFA requirements.⁴

The key to understanding the RFA's importance is that in order to produce an IRFA, the agency must consider less burdensome alternatives to its own rule, and in the FRFA the agency must explain why it

1. 5 U.S.C. § 601, *et seq.* The Regulatory Flexibility Act was originally passed in 1980 (Pub. L. No. 96-354). The Act was amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. No. 104-121), the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. No. 111-203), and the Small Business Jobs Act of 2010 (Pub. L. No. 111-240).

2. 5 U.S.C. § 603.

3. 5 U.S.C. § 604.

4. 5 U.S.C. § 605(b).

chose among the alternatives in the IRFA.⁵ Applying the RFA to deregulatory actions is the latest development in the enforcement of the RFA.

In 1996 Congress passed the Small Business Regulatory Enforcement Fairness Act (SBREFA). The amendments to the RFA under SBREFA emphasized federal agency compliance with the RFA, imposing specific procedures addressing small business concerns regarding environmental and occupational safety and health regulations and making a federal agency's compliance with certain sections of the RFA judicially reviewable, meaning petitioners could challenge regulations based on the agency's failure to comply with those sections of the statute.

In 2002, Executive Order 13272, "Proper Consideration of Small Entities in Agency Rulemaking," directed Advocacy to begin providing training to federal agencies to apprise them of their responsibilities under the RFA and to educate them on the best RFA compliance practices. Advocacy continues to train agency rulewriters and to track agency compliance with these requirements.

The Small Business Jobs Act of 2010⁶ codified some of the procedures introduced in E.O. 13272. That same year, the Dodd-Frank Wall Street Reform and Consumer Protection Act became law.⁷ The new law created the Consumer Financial Protection Bureau and made the agency's major rules subject to the RFA's SBREFA panel provisions.

Executive Order 13563, "Improving Regulation and Regulatory Review," signed in 2011, directed agencies to heighten public participation in rulemaking, consider overlapping regulatory requirements and

flexible approaches, and conduct ongoing regulatory review.⁸ President Obama concurrently issued a memorandum to all federal agencies, reminding them of the importance of the RFA and of reducing the regulatory burden on small businesses through regulatory flexibility. In this memorandum, President Obama directed agencies to increase transparency by providing written explanations of any decision not to adopt flexible approaches in their regulations. The following year, President Obama further attempted to reduce regulatory burdens with Executive Order 13610, "Identifying and Reducing Regulatory Burdens," which placed greater focus on initiatives aimed at reducing unnecessary regulatory burdens, simplifying regulations, and harmonizing regulatory requirements imposed on small businesses.⁹

Conclusion

Since its passage in 1980, the RFA has demonstrated remarkable staying power. It has helped establish small business consideration as a necessary part of federal rulemaking. The careful tailoring of regulation to business size has helped make better regulations with improved compliance in pursuit of safety, health, and other public goods. The subsequent regulatory and legislative improvements have solidified Advocacy's participation in rulemakings affecting small business. What these regulatory reform initiatives all have in common is agreement that the regulatory burden on small business must be minimized. Over its 38-year history, the RFA has provided federal agencies with the framework to accomplish this goal. With Advocacy's ongoing monitoring, this important tool will continue to

5. 5 U.S.C. § 604.

6. *Small Business Jobs Act*, Pub. L. No. 111-240 (2010).

7. *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub. L. No. 111-203 (2010).

8. E.O. 13563, "Improving Regulation and Regulatory Review," www.gpo.gov/fdsys/pkg/FR-2011-01-21/pdf/2011-1385.pdf (Jan. 18, 2011).

9. E.O. 13610, "Identifying and Reducing Regulatory Burdens," www.whitehouse.gov/sites/default/files/docs/microsites/omb/eo_13610_identifying_and_reducing_regulatory_burdens.pdf (May 10, 2012).

remind agencies that are writing new rules or re-viewing existing ones to guard against “significant economic impacts on a substantial number of small entities.”

Chapter 2

Compliance with Executive Order 13272 and the Small Business JOBS Act of 2010

Federal agencies' compliance with the Regulatory Flexibility Act has improved since President George W. Bush signed Executive Order 13272, Proper Consideration of Small Entities in Agency Rulemaking, in 2002. The executive order established new responsibilities for Advocacy and federal agencies to facilitate greater consideration of small businesses in regulatory development. Portions of it have been codified in the Small Business Jobs Act of 2010.¹⁰

E.O. 13272 requires Advocacy to educate federal agency officials on compliance with the RFA, to provide resources to facilitate continued compliance, and to report to the Office of Management and Budget on agency compliance with it.

RFA Training

Advocacy launched its RFA training program in 2003. Since that time the office has offered RFA training sessions to every rule-writing agency in the federal government. These training sessions are attended by the agencies' attorneys, economists, and policymakers. In FY 2018, Advocacy held six training sessions for 132 federal officials (see Table 2.1). The entire list of agencies trained since FY 2003 appears in Appendix D.

Table 2.1 RFA Training at Federal Agencies in FY 2018

| Date | Agency | Number Trained |
|----------|--|----------------|
| 11/08/17 | Department of Labor | 37 |
| 03/07/18 | Department of Justice, Drug Enforcement Agency | 16 |
| 03/14/18 | Department of Commerce, Bureau of Industry and Security | 13 |
| 06/14/18 | Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service | 22 |
| 07/10/18 | Federal Deposit Insurance Corporation | 27 |
| 07/26/18 | Department of Transportation, Federal Aviation Administration | 17 |

RFA Compliance Guide

To provide clear directions on RFA compliance, Advocacy publishes a practical manual called "A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act." The hands-on guide has been updated to include Executive Orders 13771 and 13777 on reducing and reforming federal regulations.¹¹

¹⁰ *Small Business Jobs Act, Pub. L. No. 111-240, 124 Stat. 2504 (2010).*

¹¹ *The current edition can be found at www.sba.gov/advocacy/guide-government-agencies-how-comply-regulatory-flexibility-act.*

Agency Compliance with E.O. 13272

E.O. 13272 requires federal agencies to take certain steps to boost transparency and ensure small business concerns are represented in the rulemaking process. These steps include the following:

- **Written RFA Procedures.** Agencies are required to show publicly how they take small business concerns and the RFA into account when creating regulations. Most agencies have posted their RFA policies and procedures on their websites. Table 2.2 provides links to each agency's procedures.
- **Notifying Advocacy.** Agencies are required to engage Advocacy during the rulemaking process, to ensure small business voices are being heard. If a draft regulation may have a significant impact on a substantial number of small entities, the agency must notify Advoc-

cacy by sending copies of the draft regulation to the office.

- **Responding to Comments.** If Advocacy submits written comments on a proposed rule, the agency must consider these comments and provide a response to them in the final rule published in the *Federal Register*. The Small Business Jobs Act of 2010 codified this as an amendment to the RFA.

A summary of federal agencies compliant with these three requirements is shown in Table 2.2.

As a result of E.O. 13272 and the Small Business Jobs Act, federal agencies have become more familiar with the RFA and have established cooperative relationships with Advocacy. In addition to improving compliance with the RFA, Advocacy finds that E.O. 13272 has improved the office's overall relationship with federal agencies.

Small Business Site Visit, Detroit, Mich.

Advocacy staff members visited the headquarters of RBV Contracting to discuss the regulatory burdens facing small construction companies. Owners and employees explained how some federal regulations could be simplified to decrease burdensome paperwork and streamline the application processes.



Table 2.2 Federal Agency Compliance with Rule-Writing Requirements under E.O. 13272 and the JOBS Act, FY 2018

| Agency | Written Procedures on Website in 2018 | Url of Agency's RFA Procedures | Notifies Advocacy | Responds to Comments |
|---------------------------------|---------------------------------------|---|-------------------|----------------------|
| Cabinet Agencies | | | | |
| Agriculture | √ | https://www.ocio.usda.gov/policy-directives-records-forms/guidelines-quality-information/regulatory | √ | √ |
| Commerce ^a | √ | https://www.fisheries.noaa.gov/national/laws-and-policies/guidance-conducting-economic-and-social-analyses-regulatory-actions | √ | √ |
| Defense | √ | https://www.acq.osd.mil/dpap/dars/index.html | √ | n.a. |
| Education | X | | √ | √ |
| Energy | √ | https://www.energy.gov/sites/prod/files/gcprod/documents/eo13272.pdf | √ | n.a. |
| Environmental Protection Agency | √ | https://www.epa.gov/sites/production/files/2015-06/documents/guidance-regflexact.pdf | √ | √ |
| General Services Administration | √ | https://www.gsa.gov/policy-regulations | √ | n.a. |
| Health and Human Services | √ | https://www.fda.gov/ForIndustry/SmallBusinessAssistance/ucm167644.htm | √ | n.a. |
| Homeland Security | √ | https://www.dhs.gov/publication/signed-regulatory-flexibility-act-executive-order-13272-memo-2004 | √ | √ |
| Housing and Urban Development | √ | https://www.hud.gov/program_offices/sdb/policy/sbrefa | n.a. | n.a. |
| Interior | √ | https://www.doi.gov/sites/doi.gov/files/migrated/ppa/upload/Interim-Guidance-UMRA-and-EO-12866-C3_APP3.pdf | √ | √ |
| Justice | X | | √ | n.a. |
| Labor | √ | https://www.dol.gov/general/regs/guidelines | √ | √ |
| Small Business Administration | √ | https://www.sba.gov/about-sba/sba-performance/policy-regulations/laws-regulations | √ | n.a. |
| State | X | | √ | n.a. |
| Transportation | √ | https://www.transportation.gov/sites/dot.dev/files/docs/1979%20Regulatory%20Policies%20and%20Procedures.doc | √ | n.a. |

Table 2.2 Federal Agency Compliance with Rule-Writing Requirements under E.O. 13272 and the JOBS Act, FY 2018

| Agency | Written Procedures on Website in 2018 | Url of Agency's RFA Procedures | Notifies Advocacy | Responds to Comments |
|---|---------------------------------------|--|-------------------|----------------------|
| Treasury ^b | √ | Treasury: https://www.treasury.gov/about/role-of-treasury/orders-directives/Pages/td28-03.aspx Internal Revenue Service: https://www.irs.gov/irm/part32/irm_32-001-005#idm140712272166000 | √ | n.a. |
| Veterans Affairs | √ | https://www.va.gov/ORPM/Regulatory_Flexibility_Act_EO_13272_Compliance.asp | √ | n.a. |
| Independent Agencies | | | | |
| Consumer Financial Protection Bureau ^c | n.a. | n.a. | √ | √ |
| Consumer Product Safety Commission | √ | https://www.cpsc.gov/Regulations-Laws--Standards/Rulemaking#The_Regulatory_Flexibility_Act | √ | n.a. |
| Equal Employment Opportunity Commission | √ | https://www.eeoc.gov/eeoc/plan/regflexibilityact.cfm | √ | n.a. |
| Federal Acquisition Regulation Council | √ | https://www.acquisition.gov/ | √ | n.a. |
| Federal Communications Commission | √ | https://www.fcc.gov/sites/default/files/fcc-directive-1158.2.pdf | √ | √ |
| Federal Reserve Board ^c | n.a. | n.a. | | |
| National Labor Relations Board ^c | n.a. | n.a. | √ | n.a. |
| Securities and Exchange Commission ^c | n.a. | n.a. | √ | n.a. |

Notes:
 √ = Agency complied with the requirement.
 X = Agency did not comply with the requirement.
 n.a. = Not applicable because Advocacy did not publish a comment letter in response to an agency rule in FY 2018 or because the agency is not required to do so.
 a. NOAA drafts most regulations the Commerce Department releases.
 b. On April 11, 2018, Treasury and the Office of Management and Budget signed a memorandum of agreement stating that tax regulations would be reviewed under E.O. 12866.
 c. Independent agencies are not subject to the E.O. requiring written procedures.

Chapter 3

Communication with Federal Agencies and Small Businesses

Advocacy's Communication with Federal Agencies

An essential goal of the Regulatory Flexibility Act is to communicate the special concerns of small business to the federal agencies as they go about their rulemaking business. In fact the RFA requires of the agencies some specific forms of engagement with small business. These communications form the basis of their small business regulatory analysis and regulatory burden reduction.

Interagency Communications

Advocacy utilizes numerous methods of communication to present the concerns of small businesses and other small entities to federal officials promulgating new regulations. Meetings with officials, comment letters to agency directors, and training sessions on RFA compliance help facilitate

meaningful participation by all interested parties and produce more effective federal regulation. In FY 2018, Advocacy's communications with federal agencies included 17 formal comment letters and RFA compliance training sessions for 132 federal officials. Table 2.1 lists the agencies where training was held this year, and Appendix D contains a list of all agencies that have participated in RFA training since 2003.

In response to President Trump's executive orders on private sector deregulation, the office has received considerable small business input through regional regulatory reform roundtables and an online comment form. Advocacy has sent 26 letters to the heads of federal agencies conveying small



Regional Regulatory Reform Roundtable, Scranton, Pa.

Small businesses shared insights into the effects of federal agency regulations at the Regional Regulatory Reform Roundtable in Scranton, Pa. Advocacy staff members received feedback about federal regulatory compliance hurdles from small businesses in the banking, construction, and real estate industries.

businesses' experiences with federal regulatory compliance and their top priorities for reform.

E.O. 12866 and Interagency Review of Upcoming Rules

Executive Order 12866, Regulatory Planning and Review, celebrated its 25th anniversary in FY 2018.¹² The stated objectives of EO 12866 are to enhance planning and coordination of new and existing regulations, reaffirm the primacy of federal agencies in the regulatory decision-making process, restore the integrity and legitimacy of regulatory review and oversight, and make the process more accessible and open to the public.

Under EO 12866, the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) reviews all significant executive agency regulations. OIRA will also meet with interested parties to listen to any issues with a rule under its review in what are called "12866 meetings." Advocacy attends these meetings when the regulation will affect small businesses. Advocacy also participates in the OIRA-led review of upcoming rules in order to advise on the anticipated impact of those rules on small entities

Of note during FY 2018, on April 11, 2018, the Treasury Department and OIRA signed a memorandum of agreement allowing the review of Treasury regulations under EO 12866. Previously, certain Treasury regulations were exempt from 12866 review.

Additionally, each agency, including independent regulatory agencies, prepares an agenda of all the regulatory actions under development or review for the fiscal year. OIRA then publishes these as the Unified Regulatory Agenda. Each agency, including independent regulatory agencies, must also create a regulatory plan containing the most important proposed or final regulations the agency expects to release that fiscal year or thereafter.

SBREFA Panels

In 1996, the Small Business Regulatory Enforcement Fairness Act (SBREFA) amended the RFA to require certain agencies to convene review panels whenever a potential regulation is expected to have a significant economic impact on a substantial number of small entities. These are commonly called SBREFA or SBAR panels (for small business advocacy review). These panels provide for small business input at the earliest stage of rulemaking—when a topic is still being studied, before a proposed rule sees the light of day.

Three agencies are covered by this requirement: The Consumer Financial Protection Bureau, Environmental Protection Agency, and Occupational Safety and Health Administration (OSHA). In FY 2018, one SBREFA panel was initiated: OSHA convened a panel on telecommunications towers in August 2018. The list of SBREFA panels convened since 1996 can be found in Appendix D.

Regulatory Agendas

In addition to the Unified Regulatory Agenda, agencies are required by section 602 of the RFA to publish a regulatory flexibility agenda that specifically addresses regulatory actions that will affect small businesses. These also must be published in the Federal Register each spring and fall. The agendas facilitate public participation, specify the subjects of upcoming proposed rules, and indicate whether these rules are likely to have a significant economic impact on a substantial number of small entities. Agencies are specifically required to provide these agendas to the Chief Counsel for Advocacy and make them available to small businesses and their representatives. Often, the agendas alert Advocacy and interested parties to forthcoming regulations of interest. The FY 2018 regulatory agendas were published on January 12, 2018, and June 11, 2018. They are a key component of the regulatory planning mechanism prescribed in Executive Orders 12866 (Regulatory Planning and Review) and 13771 (Reducing Regulation and Controlling Regulatory

12. Executive Order 12866, Regulatory Planning and Review, September 30, 1993. https://www.reginfo.gov/public/jsp/Utilities/EO_12866.pdf

Costs). The regulatory agendas can be found here: <https://www.reginfo.gov/public/do/eAgendaMain>.

Retrospective Review of Existing Regulations

Under section 610 of the RFA, agencies are required to conduct a retrospective review of existing regulations that have a significant economic impact on small entities. Executive Orders 13563 and 13610, requiring all executive agencies to conduct periodic retrospective reviews of all existing regulations, bolster the mandate of section 610. As a result, agencies publish retrospective reviews in the Unified Agenda of Regulatory and Deregulatory Actions semiannually. The purpose of the retrospective reviews is to determine whether such regulations should be continued without change or amended or rescinded to minimize any significant economic impact on a substantial number of small entities.¹³ In reviewing the regulations, agencies must consider the following factors:

- the continued need for the rule;
- complaints or comments from the public;
- the complexity of the rule;
- whether the rule overlaps, duplicates or con-

- conflicts with federal, state, and local rules; and
- the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule.

The Department of Transportation's regulatory review process is just one useful example of how agencies incorporate section 610 reviews into their semiannual regulatory unified agenda.¹⁴ DOT divides its rules into ten groups and analyzes one group each year. For rules that do not appear to have a significant economic impact on a substantial number of small entities, DOT provides a short explanation in its fall agenda. For rules that appear to have such an impact, DOT conducts a formal section 610 review the following year and seeks public comments to determine whether there are opportunities to reduce the economic burden on small entities. In each fall agenda, DOT publishes the results of the analyses completed during the previous year.¹⁵

Advocacy continues to monitor retrospective review plans and their implementation and accepts feedback from small entities regarding any rules needing review.

Advocacy's Outreach to Small Business

In the Congressional Findings and Declaration of Purpose section of the Regulatory Flexibility Act, Congress states, "The process by which Federal regulations are developed and adopted should be reformed to require agencies to solicit the ideas and comments of small businesses, small organizations, and small governmental jurisdictions..."¹⁶

In helping to fulfill this purpose, Advocacy assists governmental agencies by conducting outreach to small entities and relaying information from one to the other. In most instances, Advocacy encourages the agencies to participate in these outreach efforts.

¹³ 5 U.S.C. § 610(a).

¹⁴ U.S. Department of Transportation's Review Process (Jan. 20, 2015), <https://www.transportation.gov/regulations/dots-review-process>.

¹⁵ 83 Fed. Reg. 58051 (Nov. 16, 2018), <https://www.federalregister.gov/documents/2018/11/16/2018-24091/department-regulatory-and-deregulatory-agenda-semiannual-summary>.

¹⁶ Regulatory Flexibility Act, Pub. L. No. 96-3554, 94 Stat. 1164 (codified at 5 U.S.C. § 601).

Advocacy engages with small business stakeholders through a variety of mechanisms, ensuring that the lines of communication remain open and that small business concerns are heard by the appropriate contacts within the federal agencies. For example, Advocacy publishes regulatory alerts that are emailed to various small entity lists. In addition, Advocacy directs targeted email notices to stakeholders who may be affected by a rulemaking. These alerts allow small businesses to stay informed of regulatory developments without having to conduct searches of their own. Advocacy regularly meets with small entities, both informally through in-person meetings and teleconferences, and at more structured events. Advocacy routinely attends stakeholder events and conferences to present specific regulatory topics, and more generally to inform small business stakeholders about the federal rulemaking process and how to write effective comment letters.

Advocacy hosts in-person gatherings as a key means of acquiring small business input. Two kinds of roundtables were held in FY 2018: issue roundtables and regional roundtables.

Regulatory Roundtables

Advocacy's issue roundtables focus on small business regulatory topics. Most of these sessions occur in Washington, D.C. These roundtables provide direction on which issues are of greatest importance, and they facilitate open and frank discussions about small business-related concerns. Advocacy hosted 12 issue roundtables in FY 2018. They are listed in Table 3.1 and described in the section that follows.

Consumer Financial Protection Bureau

Financial Issues

May 10, 2018

The roundtable focused on two requests for information issued by the Consumer Financial Protection Bureau (CFPB) seeking input on the agency's rulemaking processes, adopted regulations, and new rulemaking authorities. The participants discussed the requests and suggested possible changes to the rulemaking process. Officials from the CFPB attended the roundtable.

Department of Agriculture, Agricultural Marketing Service

Bioengineered Food Disclosure Requirements

June 14, 2018

On May 4, 2018, the U.S. Department of Agriculture's Agricultural Marketing Service (AMS) proposed a rule to establish a national mandatory bioengineered food disclosure standard. The proposed rule would require food manufacturers and all other entities that label foods for retail sale to disclose information about bioengineered food and ingredient content. The rule provides a uniform standard for disclosure. During a teleconference Advocacy gave a brief overview of how to write an effective comment letter on the rule and sought input from small entities on the proposed rule and its effects, specifically the definition of very small business for the purposes of exemption, and whether the agency should consider other alternatives to the rule.

Department of the Interior, Fish and Wildlife Service

Mitigation Policy

December 12, 2017

On November 6, 2017, the Fish and Wildlife Service published a request for comment on its existing Mitigation Policy and Endangered Species Act Compensatory Mitigation Policy. The agency specifically requested comments on whether to retain or remove net conservation gain as a planning goal within mitigation policies. During the roundtable teleconference, agency officials conducted a brief overview of current mitigation policies and participants gave feedback on the policies and the goal of net conservation gain.

Department of Labor

Proposed Rule on Tip Regulations Under the Fair Labor Standards Act

December 14, 2017

On December 14, 2017, Advocacy held a roundtable teleconference on a Department of Labor proposal to rescind the parts of its tip regulation that bar certain tip-sharing arrangements in establishments where the employers pay full federal minimum wage and do not take a tip credit against their minimum wage obligations. This proposal reverses a 2011 DOL regulation that created this restriction.

Under this proposed rule, employers paying a full minimum wage to employees could require workers to share their tips with other employees, including employees who do not customarily receive tips (such as “back of the house” staff). In the FY 2018 Consolidated Appropriations Act, Congress amended multiple provisions of the Fair Labor Standards Act with respect to an employer’s use of its employees’ tips and rescinded part of the 2011 DOL regulations. DOL plans on releasing a new proposed rule on this issue in 2019.

Department of Labor, Occupational Safety and Health Administration (OSHA); Mine Safety and Health Administration (MSHA)

Labor Department Regulatory Reform; OSHA Update October 2, 2017

This roundtable was held at the U.S. Department of

Labor. It began with a regulatory reform meeting hosted by the agency called “Cut the Red Tape Summit: Eliminating Excessive Regulation to Create Jobs and Growth.” This was pursuant to the Executive Orders 13771 and 13777 on reducing the private sector’s regulatory burden. The high-level presenters included the agency’s acting solicitor of labor, acting chief of staff, and acting assistant secretary of labor for policy. Following that presentation, the deputy assistant secretary and acting assistant secretary of labor for occupational safety and health provided an update about regulatory reform at the agency and outlined its policy and regulatory priorities going forward.

OSHA’s State and Cooperative Programs; Litigation; Regulatory Reform

January 19, 2018

Table 3.1 Regulatory Roundtables Hosted by the Office of Advocacy

| Agency | Purpose | Date |
|---|--|----------|
| Consumer Financial Protection Bureau | CFPB’s rulemaking processes, adopted regulations, and new rulemaking authorities | 05/10/18 |
| Department of Agriculture | Proposed rule to establish national mandatory bioengineered food disclosure standard | 06/14/18 |
| Department of Interior, Fish and Wildlife Service | Teleconference on mitigation policy | 12/12/17 |
| Department of Labor | Department of Labor’s proposed rule on tip regulations under the FLSA | 12/14/17 |
| Department of Labor, Occupational Safety and Health Administration; Mine Safety and Health Administration | Executive Orders 13771 and 13777; update on OSHA activities and policy priorities | 10/02/17 |
| | OSHA’s state and cooperative programs; litigation; regulatory reform | 01/19/18 |
| | DOL’s public liaison; electronic reporting; Congressional hearings | 03/16/18 |
| | Regulatory reform; telecommunications towers; OSHA’s Safe and Sound program | 07/27/18 |
| | Compliance initiatives; electronic reporting; telecommunications towers | 09/21/18 |
| Environmental Protection Agency | Web and teleconference on persistent, bioaccumulative, and toxic (PBT) chemicals under TSCA Section 6(h) | 11/16/17 |
| | User fees for administration of TSCA; March 2018 update of decision on definition of Solid Waste | 03/30/18 |
| | Reviewing new chemicals under amended TSCA; industry perspective on TSCA section 5 | 09/07/18 |

This roundtable featured an update by OSHA officials on the agency's cooperative and state programs. These programs encompass compliance assistance and outreach activities for businesses and organizations. They include OSHA's Alliance Program, OSHA Challenge, Safety and Health Achievement Recognition Program (SHARP), OSHA Strategic Partnership Program (OSPP), and Voluntary Protection Programs (VPP). Next, there was an update on recent litigation concerning OSHA rulemaking practices that test longstanding OSHA policies and could affect small businesses. Advocacy provided an update on its activities on regulatory reform for small business and reviewed OSHA and MSHA's Regulatory Agendas, noting particularly the significant shift in regulatory priorities and the regulatory outlook for small business.

DOL's Public Liaison; Electronic Reporting;
Congressional Hearings
March 16, 2018

This roundtable covered four topics. First was an update from the Office of Public Liaison at the U.S. Department of Labor, which creates and coordinates opportunities for dialog between the agency and the public. Second, OSHA officials gave an overview of its new electronic injury and illness recordkeeping and reporting requirements. The final rule requires employers in certain industries to submit their employee injury and illness recordkeeping data to OSHA electronically. Third, a staff member of the House Education and Workforce Committee discussed two recent hearings about OSHA and MSHA. The first hearing concerned MSHA's regulatory priorities and the state of workplace safety in the mining industry. The second hearing focused on how OSHA can work with small business job creators to expand compliance assistance to promote safe and healthy workplaces. Fourth was a recap of a recent meeting of the American Bar Association's Occupational Safety and Health Law Section. Topics from the meeting included litigation, rulemaking initiatives, regulatory reform, and enforcement.

Regulatory Reform; Telecommunications Towers;
OSHA's Safe and Sound Program

July 27, 2018

This roundtable had three parts. First was an update on Advocacy's Regional Regulatory Reform Roundtables. Next was a discussion of OSHA's planned panel on telecommunications towers, including the scope of the rulemaking and the industries that might be affected.¹⁷ Third, an OSHA official discussed the agency's Safe+Sound initiative and its upcoming Safe+Sound Week—a nationwide event to raise awareness of the value of safety and health programs.

Compliance Initiatives; Electronic Reporting;
Telecommunications Towers
September 21, 2018

This roundtable began with an update on DOL's Office of Compliance Initiatives. The office seeks to foster a culture of compliance assistance within DOL to complement the agency's enforcement efforts. In August 2018, the office launched two websites: Worker.gov, to provide information about workers' rights, and Employer.gov, on job creators' responsibilities toward their employees. Next was a presentation on OSHA's proposal to amend its final electronic reporting rule, which requires employers in certain industries to electronically submit to OSHA injury and illness data. Third, an industry representative discussed OSHA's SBREFA panel on telecommunications towers.

Environmental Protection Agency

Persistent, Bioaccumulative, and Toxic Chemicals
Under TSCA Section 6(h)

November 16, 2017

At this roundtable, EPA officials provided a presentation on five persistent, bioaccumulative, and toxic (PBT) chemicals that the agency had identified under the Toxic Substance Control Act. These chemicals included decabromodiphenyl ethers (DecaBDE); hexachlorobutadiene (HCBD); pentachlorothiophenol (PCTP); phenol, isopropylated, phosphate (3:1); and 2,4,6-Tris(tert-butyl) phenol. The agency provided background information on PBTs and the agency's obligation to regulate as

¹⁷ The panel meets prior to the issuance of a draft rule. It is known as a Small Business Advocacy Review (SBAR) or SBREFA panel.

mandated by TSCA. Additionally, the agency highlighted its existing knowledge on the uses of the five chemicals, as well as other information on them.

Toxic Substances Control Act User Fees; Decision on Definition of Solid Waste

March 30, 2018

The roundtable had two parts. First, EPA officials discussed the agency's proposal to establish fees to cover costs associated with its work under various sections of the Toxic Substance Control Act. As part of its proposed rule, the agency also discussed a revision to its small business definition. The SBA Office of Size Standards also presented on the same topic, providing information about the SBA process for establishing size standards and discussing its consultation with EPA on this proposed rule. Second was a discussion of the D.C. Circuit Court's reconsideration of the recycling provisions of the EPA hazardous waste rule and the implications of these changes for manufacturers and recyclers who are subject to these regulations.

Reviewing New Chemicals under the Amended Toxic Substances Control Act

September 7, 2018

At this roundtable EPA provided an overview of its review process for new chemicals under the Toxic Substance Control Act. Additionally, there were

two industry speakers representing the interests of small businesses who urged the agency to reduce delays, complete reviews within the statutory deadlines, and perform with greater predictability and transparency.

Regional Regulatory Reform Roundtable Initiative

In June 2017, Advocacy launched the Regional Regulatory Reform Roundtable initiative to allow small businesses around the country to discuss the unique challenges they face with regulatory implementation and compliance. This outreach initiative is meant to help relieve the private sector regulatory burden as directed by Executive Orders 13771 and 13777. Advocacy is working with federal agencies to ensure that small businesses' priorities for relief are addressed.

Regional Regulatory Reform Roundtables

Regional roundtables bring together local small businesses, trade associations, congressional leaders, and federal regulatory agencies to identify regulatory barriers and challenges in each region. The meetings also explore small entities' suggestions for regulatory streamlining and savings, and



Small Business Site Visit, Tampa, Fla.

Advocacy staff members visited Ameriscape Services following a Regional Regulatory Reform Roundtable in Tampa. The nursery and landscaping industries in Florida have a large economic impact on the state, producing \$21 billion in sales per year and employing 232,000 people.

participants discuss ways to improve small business participation in agencies' rulemakings. These discussions inform Advocacy's ongoing and future recommendations to the federal agencies tasked with reducing the number of regulations. This initiative began in June 2017 and continues to the present. For a detailed report on this effort, see [What Small Businesses Are Saying and What Advocacy Is Doing About It, Progress Report on the Office of Advocacy's Regional Regulatory Reform Roundtables](#).

Between June 1, 2017, and September 30, 2018, Advocacy held 33 regional regulatory reform roundtables in 21 states. The locations included rural and urban areas, geographic regions, and a range of industries. The geographical diversity provided a close-up perspective of how a single federal rule can have varying economic impacts on different types of small businesses based upon the practices, economic conditions, and other factors specific to their region. **Table 3.2** shows the roundtable dates and locations.

Site Visits

To maximize Advocacy's resources, each roundtable trip included site visits to nearby small businesses to discuss their specific regulatory concerns. These have been valuable and informative experiences for

Advocacy. Small business owners greatly appreciated Advocacy's site visits. They were grateful for the chance to show Advocacy staff how their business functions, as well as the rare opportunity to meet one-on-one and talk through their concerns. Advocacy has encouraged the small business hosting the site visit to invite their peers, in order to learn from others facing similar regulatory burdens. These small personal meetings have become an important way to collect more detailed information to help in the regulatory reform effort.

Advocacy made at least 84 site visits in 22 states between June 2017 and September 2018. The list of business locations appears in **Table 3.3**.

Examples of Regulatory Concerns

As a result of the roundtables, Advocacy learned firsthand of the current and most pressing challenges small businesses across the country are dealing with and what the federal government can do to assist them. In these face-to-face meetings, small businesses have told Advocacy stories that exemplify how federal regulations drain small businesses' resources, energy, and in some cases even their desire to stay in business. The following examples highlight recurring themes that small business owners raised.

Small Business Site Visit, Galveston, Tex.

In Galveston, Tex., Advocacy staff toured the Ocean Star Offshore Energy museum, a small, nonprofit museum situated on a decommissioned oil rig. After the tour, the group discussed the history of the offshore industry and how small entities play a major role in an industry that is assumed to be dominated by large corporations.



- The costly rules associated with the implementation of the **Affordable Care Act (ACA)**, and health care costs in general, are an example of small businesses' regulatory burden. A small hotel operator in St. Louis, Mo., told Advocacy that not all small businesses can afford health insurance for their employees, particularly because they do not have the option of joining an association to lower health care costs. Additionally, he said that the ACA causes problems in finding skilled labor. He felt that larger businesses can provide better benefits at lower cost, while offering the same wages. Small businesses are unable to compete and lose skilled employees to their larger counterparts. He suggested small businesses be given the opportunity to purchase insurance across states to help drive down costs.
- Another focus of small business complaints has been the Department of Labor's **Overtime Rule**, particularly the "white collar exemption." Advocacy heard that the threshold

for this regulation was set too high, making it extremely costly and burdensome. While many small operators believe there should be an increase in pay for their workers, any mandatory increase should be less drastic. A small human resources company in Boise, Idaho, indicated that the rule does not recognize the very real problem small businesses face recruiting and retaining employees. Focusing only on salary negates other incentives and puts a small organization at a disadvantage compared to large companies that can offer employees more money.

- A small financial services company in Cincinnati, Ohio, complained that the Department of Labor's **Fiduciary Rule** will put many small broker-dealers out of business. They consider the rule to be the biggest change to the financial advisor sector in years, and that more care should have been taken determining the rule's potential impact on small operators. They told Advocacy that the rule creates a bar-

Table 3.2 Regional Roundtable Dates and Locations through FY 2018

| Date | Location | Date | Location |
|----------|---------------------------|---------|----------------------------|
| 6/7/17 | Baton Rouge, Louisiana | 4/10/18 | Atlanta, Georgia |
| 6/8/17 | New Orleans, Louisiana | 4/30/18 | Modesto, California |
| 7/11/17 | Boise, Idaho | 5/2/18 | Sacramento, California |
| 7/13/17 | Coeur d'Alene, Idaho | 5/3/18 | Santa Clarita, California |
| 7/31/17 | Lexington, Kentucky | 6/5/17 | Tampa/Brandon, Florida |
| 8/1/17 | Cincinnati, Ohio | 6/6/18 | Oviedo, Florida |
| 8/2/17 | Cadiz, Ohio | 6/7/18 | Jacksonville, Florida |
| 8/3/17 | Cleveland, Ohio | 7/18/18 | West Des Moines, Iowa |
| 9/12/17 | St. Louis, Missouri | 7/19/18 | Dubuque, Iowa |
| 9/14/17 | Kansas City, Kansas | 7/19/18 | Platteville, Wisconsin |
| 10/16/17 | Glen Allen, Virginia | 8/7/18 | Casper, Wyoming |
| 11/28/17 | Manchester, New Hampshire | 8/8/18 | Fort Collins, Colorado |
| 11/29/17 | Boston, Massachusetts | 8/9/18 | Colorado Springs, Colorado |
| 3/13/18 | Detroit, Michigan | 9/11/18 | Princeton, New Jersey |
| 3/16/18 | Milwaukee, Wisconsin | 9/12/18 | Scranton, Pennsylvania |
| 3/19/18 | San Antonio, Texas | 9/13/18 | Poughkeepsie, New York |
| 3/20/18 | Houston, Texas | | |

rier in the advisor-client relationship, and that small businesses who need investment advice will be unable to get it.

- Small businesses in the transportation industry nationwide reported strong feelings about compliance with the Federal Motor Carrier Safety Administration's rule requiring **electronic logging devices (or ELDs)**. A small farmer in Kansas City, Kan., complained that small farms cannot afford the new devices and the rule's costly requirements. Large commercial carriers have the resources to implement the devices, but independent drivers do not. This is a common concern heard from small businesses that need to transport their goods. The farmer's biggest complaint was that the ELD regulation is inflexible and does not allow for wait time. He believed this oversight will increase the shortage of commercial drivers, a big concern for his industry.

- The Food and Drug Administration's **Tobacco Deeming rule** was reported to be a big concern to small cigar manufacturers and store operators. The rule implements FDA's authority to electronic cigarettes, cigars, and pipe tobacco. These products are now subject to the federal prohibition on free sampling, federal warning label requirements, and the require-

ment that tobacco manufacturers register with the FDA and seek the agency's review of new tobacco products. At the roundtable in Tampa, Fla., the owner of a cigar store in Ybor City told Advocacy that the costly impacts of this rule on small businesses will wipe out half of his industry.

Follow Up

After the initial regional roundtables, Advocacy started providing feedback to the federal agencies responsible for the rules with the highest number of complaints. In 15 letters to the heads of regulatory agencies, Advocacy enumerated the small business concerns and suggested fixes for specific rules. In fall 2018, Advocacy sent 11 additional follow-up letters. A sample of these letters to agency heads appears as Appendix E of this report. All of these letters are publicly available on Advocacy's regulatory reform website, <http://advocacy.sba.gov/regulation/regulatory-reform>.

Small Business Site Visit, Tampa, Fla.

The owners of Urban E Recycling discussed the high cost of regulatory compliance in relation to transportation and fuel. The company properly disposes of and recycles electronics from neighboring recycling centers.



Table 3.3. Locations of Regulatory Reform Site Visits through FY 2018

| State | City | Business Visited |
|-------------------|---------------------|---|
| California | Berkeley | Lawrence Berkeley National Lab |
| | Clovis | Valley Chrome Plating Inc. |
| | Goleta | Seek Thermal |
| | Lodi | Valley Iron Works |
| | Los Angeles | Los Angeles Cleantech Incubator |
| | Modesto | Sciabica's Olive Oil |
| | Sacramento | Pucci Pharmacy |
| | Salida | Flory Industries |
| | Stockton | Ross Roberts Truck Repair, Inc. |
| | Valencia | King Henry's |
| | Westley | Great Pacific Nut Company |
| Colorado | Buena Vista | Elk Mountain Ranch |
| | Colorado Springs | Bristol Brewing Co. / Ivywild School |
| | Florissant | Florissant Fossil Beds Natl Monument |
| | Fort Collins | Rocky Mountain Adventures |
| Florida | Cedar Key | Aquaculture Visit at FWC Senator Kirkpatrick Marine Lab |
| | Geneva | Yarborough Ranches |
| | Jacksonville | Florida Roads Contracting |
| | Jacksonville | Signature Land |
| | Lutz | B3 Medical |
| | Orlando | Global Enterprises |
| | Oviedo | Black Hammock Adventures |
| | Oviedo | Citizens Bank of Florida |
| | St. Augustine | St. Augustine Distillery |
| | Tampa | 81Bay Brewing Company |
| | Tampa | In the News |
| | Tampa | J.C. Newman Cigar Company |
| | Tampa | PBX Change |
| | Tampa | Tabanero Cigars |
| Tampa | Urban E Recycling | |
| Thonotosassa | Ameriscape Services | |
| Georgia | Atlanta | Angel's Paradise Learning Academy |
| | Cumming | Grub Burger |
| | Marietta | Sigma Thermal |
| Idaho | Boise | City Peanut Shop |
| | Boise | True Lock Manufacturing |
| | Hayden | Coeur Greens |
| Iowa | Cedar Rapids | Great Clips |
| | Cedar Rapids | Lion Bridge Brewing Company |
| | Council Bluffs | Rasmussen Mechanical Services |
| | Manning | Puck Custom Enterprises, Inc. |
| | West Des Moines | Focus OneSource |
| Kansas | Kansas City | Watco Companies Kaw River Railroad |
| | Lenexa | Lightbulbs, Etc. |

Table 3.3. Locations of Regulatory Reform Site Visits through FY 2018

| State | City | Business Visited |
|----------------------|------------------|---------------------------------------|
| Kentucky | Lexington | Barrel House Distillery |
| | Lexington | Salters Alliance Farm |
| | Newport | BB Riverboats |
| Louisiana | Baton Rouge | Tin Roof Brewing Company |
| | New Orleans | Blaine Kern's Mardi Gras World |
| | New Orleans | WeChem |
| Massachusetts | Gloucester | Massachusetts Fishermen's Partnership |
| Michigan | Detroit | Architectural Salvage Warehouse |
| | Detroit | RBV Contracting |
| | Farmington Hills | Vicount Industries |
| | Plymouth | E&E Manufacturing |
| Missouri | Saint Louis | Chocolate, Chocolate, Chocolate |
| New Hampshire | Manchester | Red Arrow Diner |
| New Jersey | Budd Lake | KB Ingredients |
| | Chester | Alstede Farms |
| | Edison | Argent Associates |
| New York | Brooklyn | Red Hook Winery |
| | Goshen | Pawleski Farms/Farmroot |
| | Poughkeepsie | Service Master by NEST |
| | Wappinger Falls | Honey Bee Childcare |
| Ohio | Brecksville | Caruso's Coffee |
| | Lebanon | FECON Inc. |
| | Solon | Chagrin Valley Soap & Salve |
| | Willoughby | Melrose Farms Community |
| | Willoughby | ProBuilt Homes |
| Pennsylvania | Dickson City | Red Line Towing |
| | Dunmore | Road Scholar Transportation |
| | Philadelphia | DiBruno Bros |
| | Philadelphia | Geno's Steaks |
| | Philadelphia | Pat's King of Steaks |
| Texas | Galveston | Ocean Star Offshore Energy Museum |
| | Houston | Axistrade |
| | Houston | Everest Valve Company |
| | Houston | Original Ninfa's on Navigation |
| | Nixon | Mesquite Field Farm |
| Virginia | Chester | VHI Transport |
| Washington | Spokane | Wemco |
| | Spokane | Zak Designs |
| Wisconsin | Milwaukee | Lakefront Brewery |
| | Sheboygan | Wigwam Mills |
| Wyoming | Casper | Mammoth Networks |
| | Laramie | Trihydro |

Chapter 4

Advocacy's Public Comments to Federal Agencies in FY 2018

In FY 2018 the Office of Advocacy submitted 17 formal comment letters to regulatory agencies. The most frequent concerns were that agencies needed to consider the impact of their proposed rules on small business (seven letters) and that they did not consider significant alternatives (seven letters). The lack of or need for more small entity outreach was also noted in five of the comment letters.

Figure 4.1 summarizes Advocacy's issues of concern. Table 4.1 lists all the comment letters submitted in FY 2018 in chronological order. Each letter is summarized in the following section, arranged by agency.

Figure 4.1 Number of Specific Issues of Concern in Agency Comment Letters, FY 2018

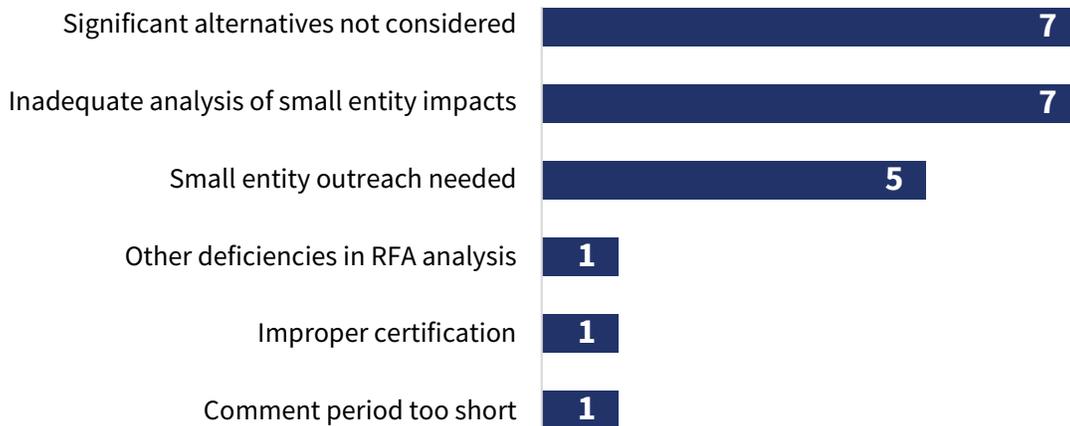


Table 4.1 Regulatory Comment Letters Filed by the Office of Advocacy, FY 2018

| Date | Agency* | Topic | Citation to Rule |
|----------|------------------------------|--|--|
| 12/26/17 | Fed Reserve Board, FDIC, OCC | Simplifications to the Capital Rule Pursuant to the Economic Growth and Regulatory Paperwork Reduction Act of 1996 | 82 Fed. Reg. 49984 (10/27/17) |
| 02/02/18 | DOC Census Bureau | Annual Business Survey (ICR 201712-0607-001) | 82 Fed. Reg. 61534 (12/28/17) |
| 02/09/18 | NAS NRC | Review of Advances Made to Made to the IRIS Process | (PIN: DELS-BEST-17-03) |
| 03/09/18 | DOI BOEM | 2019-2024 National Outer Continental Shelf Oil and Gas Leasing Draft Proposed Program | 82 Fed. Reg. 30886, (07/03/17) |
| 03/12/18 | DOI NPS | Proposed Changes to Road-based Commercial Tour Requirements and Fees | Proposed Changes to Road-based Commercial Tour Requirements and Fees, (10/24/17), available at https://parkplanning.nps.gov/document.cfm?documentID=83652 |
| 04/17/18 | DOL and DHS | Small Business Feedback to Approve Increases in Worker Capacity Under the H-2B Visa Program | 83 Fed. Reg. 3189 (01/23/18) |
| 04/27/18 | EPA | Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities | 83 Fed. Reg. 36435 (07/30/18) |
| 05/19/18 | FCC | In the Matter of Petition of USTelecom for Forbearance | WC Docket 18-141 |
| 05/24/18 | EPA | National Emission Standards for Hazardous Air Pollutants and New Source Performance Standards: Petroleum Refinery Sector | 83 Fed. Reg. 15458 (04/10/18) |
| 06/07/18 | CFPB | Request for Information Regarding CFPB Rulemaking Processes | 83 Fed. Reg. 10437 (03/09/18) |
| 06/29/18 | USDA | Proposed National Bioengineered Food Disclosure Standard | 83 Fed. Reg. 19860 (05/04/18) |
| 07/25/18 | HHS FDA | Regulation of Premium Cigars, Advance Notice of Proposed Rulemaking | 83 Fed. Reg. 12901 (03/26/18) |
| 08/01/18 | FCC | Regulatory Reform Priorities | CG Dkt. Nos. 18-152, 02-278; WC Dkt. No. 17-84; WT Dkt. No. 17-79; GN Dkt. No. 17-258; and WC Dkt. No. 18-141 |
| 08/13/18 | EPA | Definition of “Waters of the United States”- Recodification of Pre-Existing Rules | 83 Fed. Reg. 32227 (07/02/18) |
| 08/30/18 | EDUC | Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program | 83 Fed. Reg. 37272 (07/31/18) |
| 09/25/18 | DOI FWS | Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Listing Species and Designating Critical Habitat; Interagency Cooperation; and Prohibitions to Threatened Wildlife and Plants | 83 Fed. Reg. 35193, 83 Fed. Reg. 35178, 83 Fed. Reg. 35, 174 (07/25/18) |
| 09/27/18 | DOL OSHA | Proposed Tracking of Workplace Injuries and Illnesses Rule (Electronic Reporting Rule) | 83 Fed. Reg. 36494 (07/30/18) |

| Date | Agency* | Topic | Citation to Rule |
|-----------------|--------------------------------------|-------|---|
| *Abbreviations: | | | |
| BOEM | Bureau of Ocean Energy Management | FDA | Food and Drug Administration |
| Census | U.S. Census Bureau | FDIC | Federal Deposit Insurance Corporation |
| CFPB | Consumer Financial Protection Bureau | FWS | Fish and Wildlife Service |
| EDUC | Department of Education | HHS | Department of Health and Human Services |
| DHS | Department of Homeland Security | NAS | National Academy of Sciences |
| DOC | Department of Commerce | NRC | National Research Council |
| DOI | Department of the Interior | NPS | National Park Service |
| DOL | Department of Labor | OCC | Office of the Comptroller of the Currency |
| EPA | Environmental Protection Agency | OSHA | Occupational Safety and Health Administration |
| FCC | Federal Communications Commission | USDA | Department of Agriculture |

Summaries of Advocacy’s Official Public Comments

Consumer Financial Protection Bureau

Issue: Request for Information on CFPB’s Rulemaking Processes

On June 7, 2018, Advocacy submitted comments on the Consumer Financial Protection Bureau’s request for information on its rulemaking processes. Advocacy recommended that the agency:

- improve its initial outreach to small entities,
- gather information specific to the small entities it regulates, and
- improve its panel process by improving informational materials, providing more time to review and respond to them, and allowing more time to prepare for conference calls.

Advocacy also recommended that the agency:

- improve its method of dealing with proprietary information,
- consider new data and studies presented by

small entity representatives,

- include recommendations in the SBREFA panel report on how to reduce the impact of upcoming regulations, and adopt these recommendations,
- improve its notices of proposed rulemaking by adhering to the Plain Writing Act,
- establish comment periods long enough to allow small businesses to read and understand the proposed rule and to formulate a comment, and
- improve its compliance guides by improving readability, using fewer disclaimers, and providing written clarification upon request.

Department of Agriculture

Issue: National Bioengineered Food Disclosure Standard

On May 4, 2018, the U.S. Department of Agriculture’s Agricultural Marketing Service (AMS) published a proposed rule titled National Bioengineered Food Disclosure Standard. Advocacy submitted a com-

ment letter on June 28, 2018. While Advocacy appreciated AMS’s work on the congressionally mandated bioengineered food disclosure standards, Advocacy remained concerned about the proposed rule’s im-

pact on small businesses, including small food manufacturers and retailers. Advocacy recommended that AMS adopt a broader definition of “very small business,” provide an exemption for small retail-

ers displaying food for sale in bulk containers, and extend the compliance deadlines for the rule. As of year-end FY 2018, the rule had not been made final.

Department of Commerce, Census Bureau

Issue: Annual Business Survey

In January 2018, the U.S. Census Bureau submitted announced plans for a new survey titled the Annual Business Survey (ABS). The new survey would take the place of three existing economic surveys: The Survey of Business Owners, the Annual Survey of Entrepreneurs, and the Business R&D and Innovation for Microbusinesses survey. The new survey would lower respondent burden, increase data quality, and create operational efficiencies. The new survey would not collect demographic characteristics of nonemployer business owners, who comprise 80 percent of all business owners. Unless an alternative data collection method for non-employers is developed, the 2012 SBO will be the last full count of all small businesses by gender, ethnicity, race, and veteran status.

On February 2, 2018, Advocacy submitted a letter to the Census Bureau urging the agency to continue to produce comprehensive small business data, including both small employer firms and nonemployer firms. Further, Advocacy supported the Census Bureau’s initial plan in development to continue to produce non-employer demographic data by leveraging existing government administrative records.

As of year-end FY 2018, Advocacy was working with the Census Bureau to begin the process of producing demographic statistics on non-employer business owners using administrative records to continue to provide a comprehensive view of small businesses in the economy.

Department of Education

Issue: Federal Loan Program Repayment Rules

On August 30, 2018, Advocacy submitted a comment letter in response to the Department of Education’s notice of proposed rulemaking entitled General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program. The department proposed to create institutional accountability regulations for evaluating and adjudicating borrower defenses to repayment for loans first disbursed on or after July 1, 2019. The proposed rule would also provide for actions the department may take to collect from schools financial losses due to successful borrower defense to repayment discharges.

Advocacy was concerned that the department had certified that the proposal would not have a significant economic impact on a substantial number of small entities but had not provided a sufficient fac-

tual basis for this claim. Small institutions communicated to Advocacy that the proposal could result in potentially significant costs. Advocacy recommended that the department publish either a supplemental certification with a valid factual basis or an initial regulatory flexibility analysis before proceeding with the rulemaking. This would satisfy the requirements of the RFA and give interested parties enough information to file meaningful comments. As of September 30, 2018, a final rule has not been published.

Issue: Regulation of Premium Cigars

In April 2014, the Food and Drug Administration (FDA) issued a proposed regulation (the “deeming rule”) that would make certain unregulated products subject to FDA regulation, including premium cigars. Advocacy submitted comments on the deeming rule at that time, including concerns that the initial regulatory flexibility act analysis did not consider alternatives that the FDA could pursue to accomplish its goals while minimizing the economic impact on small businesses. The deeming rule be-

came final in May 2016. On March 26, 2018, the FDA published an advance notice of proposed rulemaking (ANPRM) entitled Regulation of Premium Cigars. On July 25, 2018, Advocacy submitted a comment letter to the FDA, commending the agency for requesting further information on the regulation of premium cigars and reiterating that the agency should explore all significant alternatives to minimize the economic impact on small businesses. At the end of FY 2018, the agency was still reviewing the ANPRM.

Issue: Outer Continental Shelf Oil and Gas Leasing

On April 28, 2017, President Trump issued Executive Order 13795, Implementing an America-First Offshore Energy Strategy. This E.O. directs agencies to revise the schedule of proposed oil and gas lease sales so that they include annual lease sales to the maximum extent permitted by law. On May 1, 2017, the secretary of the interior responded to this directive by issuing Secretarial Order 3350, America-First Offshore Energy Strategy, which called for enhanced opportunities for energy exploration, leasing, and development in the Outer Continental Shelf.

On January 4, 2018, The Interior Department’s Bureau of Ocean Energy Management released the 2019–2024 National Outer Continental Shelf Oil and Gas Leasing Draft Proposed Program. The draft proposal would open 98 percent of the Outer Continental Shelf for consideration for oil and gas leasing over the five-year period beginning in 2019. The proposal names 47 lease sales in all four regions of the Outer Continental Shelf: Alaska (19 lease sales); Pacific region (7 lease sales); Gulf of Mexico (12 lease sales); Atlantic region (9 lease sales).



Regional Regulatory Reform Roundtable, Council Bluffs, Iowa

Small businesses, their representatives, and Senate and Congressional staffers convened at the Regional Regulatory Reform Roundtable in Council Bluffs, Iowa. They discussed the unique regulatory challenges faced by small businesses in this region and potential solutions that Advocacy could bring back to Washington, D.C.

Advocacy filed comments on the proposal on March 9, 2018. Advocacy applauded the agency for keeping the public informed of its proposal for oil and gas leasing. Advocacy advised the agency to consider the economic impacts on small entities when evaluating the proposed program. Given the information Advocacy received from small business owners, the proposal may have both positive and negative

effects on small entities. The agency should consider ways to offset any burdens on other industries as a result of offshore drilling, including impacts to tourism, coastal recreation, commercial fisheries, and sport fishing. Comments on the draft proposed plan were due March 9, 2018. As of September 30, 2018, the agency had not published a proposed plan for review.

Department of the Interior, Fish and Wildlife Service

Issue: Revision of the Regulations for Listing Species and Designating Critical Habitat; Interagency Cooperation; Prohibitions to Threatened Wildlife and Plants

On July 25, 2018, the Interior Department's Fish and Wildlife Service and the Commerce Department's National Marine Fisheries Service published two proposed revisions to regulations for endangered and threatened wildlife and plants. The Fish and Wildlife Service concurrently published a third rule.

The first joint rule revises portions of the regulations implementing section 4 of the Endangered Species Act, designating critical habitat. The second joint rule clarifies the interagency consultation process under section 7 of the Endangered Species Act, and the third rule revises Fish and Wildlife Service

regulations concerning the prohibition for activities involving endangered and threatened species.

In a comment letter dated September 25, 2018, Advocacy applauded the agencies' efforts to update and revise these specific provisions of the Act to make them clearer and more succinct. Advocacy recommended that the agencies give special consideration to the public comments and small business recommendations on several specific areas for review in each of the three rules. As of September 30, 2018, the rule had not been finalized.

Small Business Site Visit, West Des Moines, Iowa

Advocacy staff members met with Focus OneSource, a company created to manage human resources administration and regulatory compliance for small businesses. The group discussed this new type of employment relationship and the regulatory compliance assistance these companies provide.



Department of the Interior, National Park Service

Issue: Road-based Commercial Tour Requirements and Fees

On October 24, 2017, the Department of the Interior National Park Service announced an open comment period on a proposal to change commercial use authorization requirements and fees. The proposed fee structure would increase fees at seventeen of the top revenue-producing national parks and was scheduled to go into effect on January 1, 2019. Though not required to do so, the Park Service collected public comments through its website. Advocacy heard

from several small businesses that the effects of the fee increase would be detrimental. In its comment letter, Advocacy applauded the agency's efforts to engage the public and encouraged it to consider the impacts on small entities of the increased fees. Advocacy encouraged the agency to consider alternatives for small businesses, including exemptions to the fee increases based on the size of the business. The finalized rates go into effect on October 1, 2019.

Departments of Labor and Homeland Security

Issue: Raising the H-2B Visa Program Worker Cap

The H-2B visa program allows employers to hire temporary foreign workers to perform non-agricultural jobs in seasonal businesses. At almost every Advocacy regional roundtable, small businesses expressed concern with the statutory limit of 66,000 H-2B workers per year. In 2018, both the Departments of Labor and Homeland Security received far more applications than the 33,000 visas allowed in the first half of the year. As of March 2018, DOL received applications for over 140,000 H-2B workers, and the two agencies instituted a lottery process to distribute these visas.

In March 2018, President Trump signed into law a spending bill with a provision that allows DHS and DOL to raise the number of H-2B visas, because the number of workers requested had exceeded that year's cap of 66,000 workers. On April 16, 2018, Advocacy submitted a comment letter to DHS and DOL recommending that the agencies authorize this increase. In May 2018, DHS, in consultation with DOL, published a final rule creating a one-time increase in the number of H-2B visas. This action added 15,000 more visas and allowed more small businesses to take advantage of this program.

Department of Labor, Occupational Safety and Health Administration

Issue: Electronic Reporting Rule (Tracking of Workplace Injuries and Illnesses)

On July 30, 2018, the Occupational Safety and Health Administration (OSHA) published a proposed rule on electronic reporting of employee injury and illness data. It rescinded the requirement that employers with 250 or more employees submit certain employee injury and illness data to OSHA electronically. These employers would still be required to submit summaries to OSHA electronically. The proposal was intended to protect sensitive worker information and avoid unnecessary costs.

On September 27, 2018, Advocacy submitted comments on the proposed changes and raised four

issues. First, due to concerns over the disclosure of confidential business information, Advocacy recommended eliminating the requirement to electronically submit summary data. Second, because certain industries have declining injury and illness rates, Advocacy recommended exempting more industries to reduce unnecessary paperwork and reporting. Third, Advocacy recommended eliminating or better defining the anti-retaliation provisions of the rule. Finally, Advocacy recommended that OSHA reconsider the necessity of collecting employer identification numbers due to the potential for fraud. No final rule was published in FY 2018.

Issue: Disposal of Coal Combustion Residuals from Electric Utilities

On April 27, 2018, Advocacy submitted a comment letter to the EPA on the following proposed rule: Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities; Amendments to the National Minimum Criteria (Phase One). The proposal sought to revise the existing federal regulations for coal combustion residuals (CCR) from electric utilities. The proposed changes included establishing alternative performance standards for units located in states with approved permit programs, modifying alternate closure provisions, allowing the use of CCR in a final cover system of a unit subject to closure, and adding boron to the list of constituents. Advocacy

conveyed small business concerns that the proposed revisions would increase their compliance costs. Advocacy recommended that EPA carefully address small business concerns and consider providing relief and flexibilities to small businesses while still accomplishing the agency's regulatory objective. On July 30, 2018, EPA finalized part of the proposed revisions. In its final rule, EPA modified compliance dates for the closure of unlined surface impoundments and aquifer location standards. EPA also revised its groundwater protection standards for constituents that were previously required to meet background levels.

Issue: National Emission Standards for the Petroleum Refinery Sector

In a comment letter dated May 24, 2018, Advocacy reiterated its comments of October 28, 2014, opposing the imposition of fence-line monitoring requirements on small refiners. Advocacy recommended

that the agency consider broader relief from fence-line monitoring than the limited technical changes proposed. The agency had taken no further action as of September 30, 2018.

Issue: Definition of “Waters of the United States”; Recodification of Pre-Existing Rules

On July 12, 2018, the EPA and the Army Corps of Engineers published a supplemental notice of proposed rulemaking. The notice pertained to a proposed rule of the same title published on July 27, 2017. The proposed rule began the two-step process of revising the definition of “waters of the United States.” The 2017 proposal would rescind the definition of “waters of the United States” as promulgated in the 2015 Clean Water Act rule and instead apply the definition of “waters of the United States” as it existed before the 2015 rule. The 2018 notice clarifies that the regulatory action would permanently repeal the 2015 rule. Furthermore, the notice seeks additional comments from the public on reasons and considerations for the agencies' proposal to repeal the 2015 rule.

definition of “waters of the United States.” First, rescinding the 2015 rule would provide certainty to small entities as to the current definition. Second, Advocacy believes that the agencies had not properly considered small entity impacts under the RFA in the 2015 rule, an additional important consideration in support of its repeal. For the second step of the rule-making process, Advocacy urged the agencies to consider the impacts on small entities when revising the definition and to conduct a proper and thorough regulatory flexibility analysis when writing the new rule. As of September 30, 2018, the agencies were still reviewing comments submitted on the proposed and supplemental proposed rules.

In a comment letter dated August 13, 2018, Advocacy applauded the two agencies' efforts to revise the

Federal Communications Commission

Issue: In the Matter of Petition of USTelecom for Forbearance

On May 4, 2018, USTelecom filed a petition with the FCC requesting a grant of nationwide forbearance from regulations regarding the unbundling and resale mandates imposed on incumbent local exchange carriers (ILECs) under the 1996 Telecommunications Act. The FCC subsequently established a schedule for comment giving affected parties only 30 days to provide comments and/or file opposition, with a 15-day reply comment period. On May 19, 2018, Advocacy submitted public comments expressing support for several motions filed by affected small business stakeholders requesting that the

FCC extend the time period allowed for comment on the petition. The FCC ultimately extended the comment period. Advocacy met with the FCC chairman's staff in July 2018 and shared the concerns that small competitive local exchange carriers raised regarding the petition. The FCC must deny the petition within one year of its filing, or else it will be deemed granted. Advocacy continues to speak with small business stakeholders that oppose the petition. As of September 30, 2018, the FCC is continuing to consider the petition, and the agency has until August 2019 to make a decision to deny the petition.

Issue: Regulatory Reform Priorities

On July 30, 2018, Advocacy met with the FCC chairman's staff to discuss issues identified by Advocacy as regulatory priorities through outreach with small businesses, as well as any new regulatory approaches that may unduly disadvantage small businesses. On August 1, 2018, Advocacy submitted a letter to the FCC summarizing the meeting, which included

a discussion of the following topics: (1) definitions and regulations under the Telecommunications Consumer Protection Act, (2) promoting investment in the 3550-3700 MHz band, (3) the USTelecom petition for forbearance, and (4) streamlining regulation to reduce barriers to infrastructure deployment.

Federal Reserve, Federal Deposit Insurance Corp, Comptroller of the Currency

Issue: Simplifications to Capital Rules

On December 26, 2017, Advocacy submitted comments to the Federal Reserve Board, the Federal Deposit Insurance Corporation, and the Office of the Comptroller of the Currency on the agencies' proposed rulemaking on Simplifications to the Capital Rule Pursuant to the Economic Growth and Regulatory Paperwork Reduction Act of 1996. The proposal would simplify compliance with certain aspects of the capital requirements for small community banks. Specifically, the agencies proposed that those banking organizations apply a simpler regulatory capital treatment for: (1) Mortgage servicing assets; (2) certain deferred tax assets arising from temporary differences; (3) investments in the capital of unconsolidated financial institutions; and (4) capital issued by a consolidated subsidiary of a banking organization and held by third parties. The

proposal also included revisions to the treatment of certain acquisition, development, or construction exposures that are designed to address comments regarding the current definition of high volatility commercial real estate exposure under the capital rule's standardized approach. Under the standardized approach, the proposed revisions to the treatment of acquisition, development, or construction exposures would not apply to existing exposures that are outstanding or committed before any final rule's effective date. In addition to the proposed simplifications, the agencies also proposed various additional clarifications and technical amendments to the agencies' capital rule.

Advocacy commended the agencies for taking steps to reduce the burden on small financial institutions.

However, Advocacy noted that for several years, small financial institutions have incurred several costly regulatory changes and that there may be ways to reduce the burden further. Advocacy en-

couraged the agencies to consider the alternatives that the industry may suggest. As of September 30, 2018, a final rule had not been published.

National Academy of Sciences, National Research Council

Issue: Integrated Risk Inventory System

On February 9, 2018, Advocacy submitted a comment letter to the National Research Council, the operating arm of the National Academy of Sciences, regarding improvements to EPA's Integrated Risk Inventory System (IRIS). The chemical hazard assessments made under IRIS are often used in regulations promulgated by EPA and other regulatory bodies. Small businesses are very concerned with the accuracy of their scientific determinations. In April 2011 the National Research Council tasked the EPA with improving the scientific objectivity and transparency of these chemical assessments. While Advocacy applauded EPA's substantial achievements in implementing the National Research Council's recommendations, the office noted that EPA needed additional work on steps necessary to identify study quality, select key studies, utilize expert judgment evaluating complex streams of evidence, and finally derive sound toxicity values.

Chapter 5

Small Business Regulatory Cost Savings and Success Stories

In FY 2018, small businesses saved \$255.3 million in estimated forgone regulatory cost savings because of the Regulatory Flexibility Act and the Office of Advocacy's efforts to promote federal agency compliance. There were additional regulatory successes whose impacts are not quantifiable. These are described in the Small Business Regulatory Success Stories section of this chapter.

In FY 2018, small businesses benefited from Advocacy's RFA activities through seven deregulatory actions. Compliance cost savings for small businesses that resulted from deregulatory actions arose from the withdrawal or delay of final and proposed regulations.

One of this year's deregulatory cost savings concerned the delay and suspension of certain provisions of the Venting and Flaring Rule proposed by the Department of the Interior's Bureau of Land Management. Advocacy published regulatory alerts encouraging small businesses affected by the rule to comment. The Bureau of Land Management subsequently finalized a rule to rescind and/or revise certain requirements of the 2016 final rule, resulting in total cost savings of \$127 million.

Another deregulatory cost saving highlighted this year was the Environmental Protection Agency's decision not to issue final regulations on financial responsibility requirements applicable to hardrock mining sites. The proposed rule required hardrock mining facilities to maintain insurance to remediate the impacts of potential releases of hazardous substances. However, as addressed in Advocacy's comments asking EPA to withdraw the proposed rule, the rule would have duplicated existing federal and state regulations that address this issue. The

withdrawal resulted in annual cost savings of \$60.4 million.

Savings also occurred because of the one-year delay in implementing the Department of Energy's Ceiling Fan Light Rule. This delay helps small businesses who need more time to comply with the rule, and it resulted in cost savings of up to \$1.7 million.

Table 5.1 summarizes the cost savings from seven final actions at five federal agencies in FY 2018.

There were also successes throughout FY 2018 that were not easily quantifiable. On January 25, 2018, EPA reversed a policy known as "once-in always-in." This policy imposed the most stringent requirements on major sources of hazardous air pollutants, but it made no allowance for businesses that reduce their emissions to be reclassified to a less stringent category. The revised policy allows small businesses who have been classified as major sources to benefit from their pollution reduction efforts.

In another case, EPA's position that undeployed airbag modules and inflators are hazardous waste caused confusion among small businesses on how hazardous waste regulations and exemptions apply to the different types of modules and inflators. On July 19, 2018, EPA issued a memorandum that clarified the regulatory status of undeployed automotive airbag modules and inflators. These and other success stories are listed in Table 5.2 of this report.

Descriptions of Small Business Regulatory Cost Savings

Table 5.1 Summary of Small Business Regulatory Cost Savings, FY 2018

(Deregulatory actions shown in bold.)

| Agency | Rule | Initial cost savings (\$million) | Recurring cost savings (\$million) |
|---|--|----------------------------------|------------------------------------|
| Department of Agriculture | Organic Livestock and Poultry Practice¹ | 22.9 | 22.9 |
| Department of Energy | Ceiling Fan Light Kit Final Rule² | 1.7 | - |
| Department of the Interior | Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands; Rescission of a 2015 Rule³ | 34.7 | 34.7 |
| | Waste Prevention, Production Subject to Royalties, and Resource Conservation (Venting and Flaring)⁴ | 127 | 127 |
| Department of Labor | Exemption of Certain Recreational Companies from Executive Order Increasing the Minimum Wage for Federal Contractors⁵ | 3 | 3 |
| Environmental Protection Agency | CERCLA 108(b) Final Rulemaking Determination⁶ | 60.4 | 60.4 |
| | Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities; Amendments to the National Minimum Criteria⁷ | 5.6 | 5.6 |
| FY 2018 Total Small Business Regulatory Cost Savings | | \$255.3 million | |

Note: Advocacy generally bases its cost savings estimates on agency estimates. Cost savings estimates are derived independently for each rule from the agency's analysis, and accounting methods and analytical assumptions for calculating costs may vary by agency. Cost savings for a given rule are captured in the fiscal year in which the agency finalizes changes in the rule as a result of Advocacy's intervention. These are best estimates to illustrate reductions in regulatory costs to small businesses. Initial cost savings consist of capital or recurring costs foregone that may have been incurred in the rule's first year of implementation by small businesses. Recurring cost savings are listed where applicable as annual or annualized values as presented by the agency. The actions listed in this table include deregulatory actions such as delays and rule withdrawals.

Sources:

1. 83 Fed. Reg. 10775 (Mar. 13, 2018).
2. 83 Fed. Reg. 22587 (May 16, 2018).
3. 82 Fed. Reg. 61924 (Dec. 29, 2017).
4. 83 Fed. Reg. 49184 (Sept. 28, 2018).

5. 83 Fed. Reg. 48537 (Sept. 26, 2018).
6. 83 Fed. Reg. 7556 (Feb. 21, 2018).
7. 83 Fed. Reg. 36435 (Jul. 30, 2018).

Department of Agriculture, Agricultural Marketing Service

Repeal of the Final Rule on Organic Livestock and Poultry Practice

On January 19, 2017, the Department of Agriculture's Agricultural Marketing Service published a final rule amending the production requirements for organic livestock and poultry. The rule added provisions for living conditions, livestock handling, and transport for slaughter, and it clarified existing requirements for livestock care and production practices. On December 18, 2017, the agency proposed withdrawing the final rule. After a public comment period, the agency withdrew the 2017 rule on March 13, 2018, stating that the 2017 rule exceeds USDA's statuto-

ry authority. In addition the agency stated that the withdrawal was independently justified based on a review of an assessment of the regulatory burdens. Advocacy engaged in interagency review and communications regarding the proposed rule and withdrawal of the rule. Advocacy also published a regulatory alert and alerted stakeholders to comment on the repeal of the rule. **The final rule repealed the full burden of the 2017 rule, which results in estimated cost savings of up to \$22.9 million.**

Department of Energy

Delayed Implementation of the Ceiling Fan Light Kit Final Rule

Because of a law passed by Congress, the implementation date of the Department of Energy's Ceiling Fan Light Kit final rule is being delayed by one year. **This delay is expected to save industry, most of which are small businesses, up to \$1.7 million in compliance costs.** This figure is based on the 2016 rule's estimated cost to the industry, discounted by one year, and a specific small business cost estimate was not determined by the agency. Advocacy wrote

a comment letter to the Department of Energy's regulatory reform team indicating that the energy efficiency rule for ceiling fans was a concern for small businesses. Advocacy also conducted outreach to small businesses who indicated that they needed more time to comply with the rule.



Small Business Site Visit, Sheboygan, Wis.

Advocacy staff members toured Wigwam Mills to learn more about the concerns of apparel manufacturers. These on-site meetings help Advocacy gain a deeper understanding of the impact of federal regulations on daily operations.

Department of the Interior, Bureau of Land Management

Repeal of 2015 Rule, Hydraulic Fracturing on Federal and Indian Lands

On March 26, 2015, the Bureau of Land Management published a final rule entitled, Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands. The rule established new requirements for operator planning, drilling plans, surface use plans, enhanced record keeping requirements, and operational requirements.

Manufacturers and builders objected that states have long been the primary regulators of hydraulic fracturing and should remain in that role. They were concerned that federal regulations could harm potential gains from increased exploration of shale oil and gas. They believed that where there is a

perceived deficiency in any one state's regulatory mechanisms, the federal government should work with the state to fill in the gap rather than imposing one-size-fits-all federal rules on states where no deficiency exists.

On December 29, 2017, the agency published a final rule rescinding the 2015 rule. This eliminates the burden described by stakeholders and provides for consistency and clarity on the state-federal issue. **This results in an estimated up to \$34.7 million in annual small business savings as a result of the rulemaking.**

Venting and Flaring

On November 18, 2016, the U.S. Department of the Interior's Bureau of Land Management issued a final rule entitled Waste Prevention, Production Subject to Royalties, and Resource Conservation. The rule aimed to reduce waste of natural gas from venting, flaring, and leaks during oil and gas production on onshore federal and Indian lands. It also clarified situations in which gas lost through these activities would be subject to royalties and when production may be used royalty-free. The agency at that time prepared a final regulatory flexibility analysis, but it stated that the rule would not have a significant economic impact on a substantial number of small entities. On June 15, 2017, the agency published a notification of postponement of the compliance dates due to pending litigation in federal courts.

On December 8, 2017, the agency finalized a rule to delay and suspend certain requirements of the 2016 final rule. Following the delay and suspension, on February 22, 2018, the agency promulgated a rule to rescind and/or revise certain requirements of the 2016 final rule. This proposed rule was finalized on September 28, 2018. Advocacy was heavily involved in interagency review of these rules, and published regulatory alerts encouraging small businesses affected by the rule to comment. **The final rule to rescind or revise certain requirements estimated a reduction in compliance costs of approximately \$72,000 per firm. The industry includes an estimated 1,764 small firms, thus total cost savings amount to approximately \$127 million.**

Department of Labor

Exemption of Certain Recreational Companies from Executive Order Increasing the Minimum Wage for Federal Contractors

The minimum wage for federal contractors and subcontractors was raised to \$10.10 per hour as a result of Executive Order 13658 and a rule issued by the Labor Department. The rule also affected individuals with federal contracts in connection to leases

on federal property, lands, and military installations, including restaurants, retail enterprises, and outdoor recreational companies. Advocacy wrote a comment letter on the rule when it was proposed. In 2018, small businesses in the outdoor recreation

industry expressed concern with this rule, which required them to pay higher wages and overtime to workers who often lead weeklong backpacking trips in national parks. Advocacy set up a meeting with the Labor Department and stakeholders in the outdoor recreation industry to discuss possible regulatory reforms. On May 25, 2018, the Trump Administration issued Executive Order 13838, which created an exemption to the wage requirements for

recreational services on federal lands. The exempted seasonal recreational services include river running, hunting, fishing, horseback riding, camping, mountaineering activities, recreational ski services, and youth camps. **On September 26, 2018, DOL issued a final rule implementing EO 13838. The net annualized cost savings for small businesses under this action is \$3 million.**

Environmental Protection Agency

CERCLA 108(b) Final Rulemaking Determination

EPA proposed a rule in January 2017 requiring hardrock mining facilities to maintain instruments of financial responsibility (e.g., insurance) to address costs to remediate potential releases of hazardous substances from currently operating mining sites, under section 108(b) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also known as Superfund. Advocacy submitted comments in January 2017 asking EPA to withdraw the proposed rule, as being

unnecessary because current federal and state regulations already address this taxpayer risk. On December 1, 2017, EPA announced that this rule would not be promulgated. On February 21, 2018, EPA issued a final rule announcing its decision to not issue final regulations on its proposed regulations for financial requirements applicable to hard rock mining facilities that were published on January 11, 2017. **Annual savings to small businesses, using EPA data, is estimated at \$60.4 million per year.**

Disposal of Coals Combustion Residuals

On April 17, 2015, the Environmental Protection Agency published a final rule to regulate the disposal of coal combustion residuals (CCR) as solid waste under subtitle D of the Resource Conservation and Recovery Act. Small coal-fired power plants are concerned that the rule's deadlines require them to make irreversible decisions based on standards that may not be final. For example, under the existing regulations, some facilities will be required to close their coal ash impoundments (ponds containing coal ash), yet these may later be eligible for flexibilities via an approved state permit program.

Advocacy has worked with EPA on this issue. On March 15, 2018, EPA proposed a rulemaking to address some of the small business concerns including reducing the scope of the required closures. Advocacy submitted a comment letter to urge the agency to align the compliance deadlines with the anticipated reconsiderations of the rule's provisions and to

provide any flexibilities that would be available in a state permit program under the self-implementing rule. On July 30, 2018, the agency finalized part of its proposed rule. The final rule provided regulated entities flexibility with regard to complying with performance standards and allowed the additional time for compliance. As a result, small businesses will avoid significant CCR unit closure costs. **The total cost savings for small businesses is approximately \$5.6 million.**

Small Business Regulatory Success Stories

Table 5.2 Summary of Small Business Regulatory Success Stories, FY 2018

| Agency | Rule |
|---|---|
| Department of Health and Human Services, Centers for Medicare and Medicaid Services | ICD-9-CM Compliant Codes for Inpatient Rehabilitation Facilities; 60 Percent Rule ¹ |
| Department of the Interior, Fish and Wildlife Service | U.S. Fish and Wildlife Service Mitigation Policy ² Endangered and Threatened Wildlife and Plants; Endangered Species Act Compensatory Mitigation Policy ³ |
| Department of Labor | Companion Care Rule ⁴ |
| Departments of Labor and Homeland Security | H-2B Visa Program ⁵ |
| Department of Treasury | Estate Evaluation ⁶ |
| Environmental Protection Agency | Airbag Regulatory Status Under RCRA ⁷ Once-In, Always-In ⁸ Steam Electric Effluent Limitation Guidelines (ELG) ⁹ Small Business Size Standards, Fees Rule ¹⁰ |
| Federal Communications Commission | Removing Barriers to Wireless Infrastructure Deployment ¹¹ |

1. 82 Fed. Reg. 36238 (Aug. 3, 2017) (effective Oct. 1, 2017). www.federalregister.gov/documents/2017/08/03/2017-16291/medicare-program-inpatient-rehabilitation-facility-prospective-payment-system-for-federal-fiscal.

2. 83 Fed. Reg. 36472 (Jul. 30, 2018). www.federalregister.gov/documents/2018/07/30/2018-16172/us-fish-and-wildlife-service-mitigation-policy.

3. 83 Fed. Reg. 36469 (Jul. 30, 2018). www.federalregister.gov/documents/2018/07/30/2018-16171/endangered-and-threatened-wildlife-and-plants-endangered-species-act-compensatory-mitigation-policy.

4. U.S. Department of Labor, Field Assistance Bulletin No. 2018-4. www.dol.gov/whd/FieldBulletins/fab2018_4.htm.

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Department of Health and Human Services, Centers for Medicare and Medicaid Services

ICD-9 Diagnosis Codes for Inpatient Rehabilitation Facilities; 60 Percent Rule

The Centers for Medicare and Medicaid Services is transitioning from ICD-9 Medicare billing codes to ICD-10. The agency believes this will result in much greater specificity and clinical information, improved ability to measure health care services, and decreased need to include supporting documentation with claims. Advocacy received requests from attendees at regional roundtables and stakeholders submitting written regulatory reform comments, asking that CMS restore certain ICD-9 codes because some codes were inadvertently eliminated during the transition to ICD-10. This has resulted in financial penalties for late submission of patient assessments.

Advocacy has been following this issue for years. In fact the office filed a public comment letter on November 3, 2003, when CMS published the 75 percent rule affecting inpatient rehabilitation facilities, asking that CMS reduce the regulatory burden associated with the use of reimbursement codes. Recently, Advocacy communicated the stakeholders' ICD-9 regulatory reform suggestions to CMS. In the 2018 Inpatient Rehabilitation Facility Prospective Payment System rule, CMS reversed certain ICD-10 diagnosis codes and removed a 25 percent payment penalty for late patient assessment submissions. These changes provide the relief requested by the stakeholders in this situation.

Department of the Interior, Fish and Wildlife Service

Mitigation Policy; Compensatory Mitigation Policy for Endangered and Threatened Wildlife and Plants

On November 21, 2016, the Fish and Wildlife Service published an update to its Mitigation Policy. This policy guides its recommendations on addressing the adverse impacts of land and water developments on fish, wildlife, plants, and their habitats. The 2016 policy set a goal of net benefit for natural resources, or at a minimum, no net loss. The agency stated that it would apply a landscape-scale approach to mitigation, which would broadly inform more detailed guidance in other areas in the future. The goals and approach expressed in the umbrella policy were also embodied in the agency's policy on compensatory mitigation under the Endangered Species Act, which it published on December 27, 2016.

Small entities stated that both the umbrella mitigation policy and the Endangered Species Act policy would increase costs and limit their ability to start, expand, and operate their businesses due to costly permitting and new mitigation requirements. They stated that the guidance increased confusion and that the agency should withdraw it in favor of guidance that clarifies specific guidelines for conserva-

tion plans, streamlines the process, and does away with the untenable goal of no-net-loss for natural resources.

In response to executive orders to reduce the private sector regulatory burden, on November 6, 2017, the Fish and Wildlife Service requested public comment on these policies. On December 12, 2017, Advocacy held a webinar with the agency to encourage specific small business feedback. After reviewing the public comments, the agency announced on July 30, 2018, that it would be withdrawing both policies, restoring previous agency guidance, and removing the untenable goals for small businesses.

Department of Labor

Clarification of the Companion Care Rule

In 2015, the Department of Labor changed the companion-care services exemption to minimum wage and overtime requirements under the Fair Labor Standards Act. Under the new rule, only those employed by the family or household using these services could use the exemption, and home care agencies providing these services were required to pay minimum wage and overtime to their workers. Small businesses across the country told Advocacy that these changes would devastate their businesses, and they reported business losses in general hourly services. The rule made it almost impossible for small home care companies to provide live-in care.

In 2018, Advocacy facilitated meetings between the Department of Labor and small business representatives from the Private Care Association and the National Association for Home Care and Hospice. These organizations sought to repeal the 2015 final regulations. In addition, the Private Care Association asked the agency to provide guidance stating that registries are not employers under FLSA and subject to these requirements. (These registries are companies that facilitate matches between clients and caregivers.) On July 13, 2018, the agency issued Field Assistance Bulletin No. 2018-4, which reaffirmed its position that registries are typically not employers under the FLSA.

Departments of Labor and Homeland Security

H-2B Visa Program

The H-2B visa program allows employers facing a shortage of U.S workers to hire temporary foreign workers to complete non-agricultural jobs in seasonal businesses. At almost every Advocacy regional roundtable, small businesses have expressed concern with the statutory limit of 66,000 H-2B workers per year. In 2018, the Labor Department received over twice that many applications in the first half of the year.

In March 2018, President Trump signed into law a spending bill which included a provision to allow

the Departments of Labor and Homeland Security to raise the number of H-2B visas by over 60,000 extra workers. However, the agencies had to create rulemakings to implement these numbers.

On April 14, 2018, Advocacy wrote a comment letter to the agencies recommending that the agencies authorize this increase. In May 2018, the agencies published a final rule increasing the number of H-2B visas by 15,000 for one year, allowing more small businesses to take advantage of the program.

Department of Treasury, Internal Revenue Service

Estate Valuation

On August 4, 2016, the Internal Revenue Service published a notice of proposed rulemaking concerning estate, gift, and generation-skipping transfer taxes and restrictions on liquidation of an interest. The notice included the elimination of most of the valuation discounts for businesses operating under section 2704(b). On November 1, 2016, Advocacy submitted a public comment letter conveying

small business concerns about the estate valuation proposal. Small business stakeholders indicated to Advocacy that the proposed regulations would be such a large departure from current IRS policy and industry practice that expensive new business valuations would need to be completed for closely held businesses. Even more problematic for small business owners, by eliminating valuation dis-

counts, the proposed regulations would negatively affect succession planning for many small businesses. As an example, the proposed regulations would result in higher estate taxes on small family businesses, possibly forcing them to either liquidate the business or sell large or controlling interests to non-family members.

On October 4, 2017, the Treasury Department announced recommended actions to withdraw, partially revoke, or revise eight regulations identified as posing an undue burden on taxpayers, which included withdrawing the proposed regulations under section 2704 that would have eliminated valuation discounts.

Environmental Protection Agency

Airbag Regulatory Status Under RCRA

According to EPA, some undeployed airbag modules and airbag inflators are considered hazardous waste under the Resource Conservation and Recovery Act (RCRA) due to their reactive and ignitable characteristics. As such, they are subject to EPA's permit requirements regarding the treatment, storage and disposal of hazardous waste. According to EPA, the deployment of the airbag removes the reactivity and ignitability characteristics.

Defective or recalled airbags that have been removed from vehicles present problems under RCRA. Small businesses expressed confusion and frustration with EPA's position. Advocacy has engaged with the agency to address the small business concerns with the treatment of airbags under RCRA. On July 19, 2018, EPA issued a memorandum providing clarifi-

cation on the regulatory status of undeployed airbag modules and inflators. Also, in the memorandum, EPA contemplated a future rulemaking to exempt discarded airbag modules and airbag inflators from some RCRA regulatory requirements under certain conditions.

Advocacy anticipates working with EPA on the potential rulemaking to further address small business issues regarding defective or recalled airbags.



Site Visit, Florissant, Colo.

Advocacy staff members met with rangers from the National Park Service at the Florissant Fossil Beds National Monument in Colorado. This visit allowed Advocacy staff to better understand the on-the-ground perspectives of agency staff.

Once-In, Always-In

Under the Clean Air Act, the Environmental Protection Agency regulates the emissions of hazardous air pollutants (HAPs) from industrial sources. Generally, EPA imposes the most stringent requirements on major sources and less stringent requirements on smaller emitters, known as area sources. Many small businesses are classified as major sources, and under a 20-year-old EPA policy known as “once-in always-in,” a business has been unable to reduce its emissions and be reclassified as an area source.

Small businesses have complained that this policy imposes significant costs while discouraging inno-

vation and investment that could reduce air emissions. Small business representatives raised this as a problem in the SBREFA panels for the Mercury and Air Toxics Rule and the Brick Industry Hazardous Air Pollutants Rule, as well as in recent Advocacy regulatory reform roundtables.

On January 25, 2018, EPA reversed the policy. EPA expects to codify the policy change in a rulemaking in the near future. Small businesses will benefit from this change slowly, as they implement changes to their industrial processes to lower their uncontrolled emissions below the major source threshold.

Steam Electric Effluent Limitation Guidelines

The Steam Electric Effluent Limitation Guidelines affect hundreds of coal-fired power plants that are required to upgrade their units to address water pollution. Small businesses have raised this issue as a concern. In April 2017 Advocacy submitted a regulatory petition to the Environmental Protection Agency, asking it to reduce the stringency of the requirements for small plants whose compliance costs would be very high compared with the pollution reduction achieved. EPA granted the petition in August 2017. It subsequently extended the compliance

deadlines for the rule while it reconsiders the rule requirements. Rule revisions could save small firms hundreds of millions of dollars in annual costs.

Regional Regulatory Reform Roundtable, Casper, Wyo.

Advocacy staff members listen to small business feedback regarding the effects of federal agency regulations in Casper, Wyo. Small business owners expressed concerns about the impact that federal regulations have on the ability of rural states, like Wyoming, to grow their economies and keep existing businesses in the state.



Small Business Size Standards, Fees Rule

The Environmental Protection Agency uses its own small business definition for collecting fees and providing exemptions from recordkeeping requirements under the Toxic Substance Control Act (TSCA). EPA'S definitions do not match the industry-based small business standards established by the Small Business Administration and which most federal agencies use.

A recurring concern expressed by small businesses at Advocacy's regional roundtables was that inconsistent small business definitions among federal agencies create confusion and extra paperwork for no apparent benefit. In addition, small businesses

noted that EPA's definition for small manufacturers under TSCA was outdated and did not capture small businesses as they exist today.

Advocacy engaged with the EPA and SBA to revise EPA's small business size standards under TSCA. On September 27, 2018, EPA signed its final rule on the fee collecting rule under TSCA. The rule established a fee schedule for a business that is required to submit information to EPA under several sections of TSCA. In this rule, EPA revised its small business definition to align with the SBA's small business standards. The new definition will allow more small businesses to qualify for a reduced fee.

Federal Communications Commission

Removing Barriers to Wireless Infrastructure Deployment

Small wireless carriers have told Advocacy that the costs of certain environmental, historic, and tribal reviews make the widespread deployment of small-cell technology needed to launch 5G networks too costly. Under existing FCC regulations, a company would have to conduct the same reviews when installing a small-cell device as it would when building a macro-cell tower. Some industry analysts estimate that these reviews would impose over \$1.5 billion in costs related to small-cell deployment.

The FCC initiated a proceeding in 2017 seeking input on reducing barriers to infrastructure deployment. Advocacy submitted a letter to FCC highlighting these concerns and commending the agency's efforts to reduce barriers for small businesses and accelerate broadband deployment. In March 2018, the FCC finalized regulatory reforms that would exempt small-cell deployment from most of these reviews. This will help speed the deployment of next-generation wireless networks by reducing costs associated with deployment.

Text of the Regulatory Flexibility Act

The following text of the Regulatory Flexibility Act of 1980, as amended, is taken from Title 5 of the United States Code, sections 601–612. The Regulatory Flexibility Act was originally passed in 1980 (P.L. 96–354). The act was amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (P.L. 104–121), the Dodd–Frank Wall Street Reform and Consumer Protection Act (P.L. 111–203), and the Small Business JOBS Act of 2010 (P.L. 111–240).

Congressional Findings and Declaration of Purpose

(a) The Congress finds and declares that —

(1) when adopting regulations to protect the health, safety and economic welfare of the Nation, Federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public;

(2) laws and regulations designed for application to large scale entities have been applied uniformly to small businesses, small organizations, and small governmental jurisdictions even though the problems that gave rise to government action may not have been caused by those smaller entities;

(3) uniform Federal regulatory and reporting requirements have in numerous instances imposed unnecessary and disproportionately burdensome demands including legal, accounting and consulting costs upon small businesses, small organizations, and small governmental jurisdictions with limited resources;

(4) the failure to recognize differences in the scale and resources of regulated entities has in numerous instances adversely affected competition in the marketplace, discouraged innovation and restricted improvements in productivity;

(5) unnecessary regulations create entry barriers in many industries and discourage potential entrepreneurs from introducing beneficial products and processes;

(6) the practice of treating all regulated businesses, organizations, and governmental jurisdictions as equivalent may lead to inefficient use of regulatory agency resources, enforcement problems and, in some cases, to actions inconsistent with the legislative intent of health, safety, environmental and economic welfare legislation;

(7) alternative regulatory approaches which do not conflict with the stated objectives of applicable statutes may be available which minimize the significant economic impact of rules on small businesses, small organizations, and small governmental jurisdictions;

(8) the process by which Federal regulations are developed and adopted should be reformed to require agencies to solicit the ideas and comments of small businesses, small organizations, and small governmental jurisdictions to examine the impact of proposed and existing rules on such entities, and to review the continued need for existing rules.

(b) It is the purpose of this Act [enacting this chapter and provisions set out as notes under this section] to establish as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.

Regulatory Flexibility Act

- § 601 Definitions
- § 602 Regulatory agenda
- § 603 Initial regulatory flexibility analysis
- § 604 Final regulatory flexibility analysis
- § 605 Avoidance of duplicative or unnecessary analyses
- § 606 Effect on other law
- § 607 Preparation of analyses
- § 608 Procedure for waiver or delay of completion
- § 609 Procedures for gathering comments
- § 610 Periodic review of rules
- § 611 Judicial review
- § 612 Reports and intervention rights

§ 601. Definitions

For purposes of this chapter—

(1) the term “agency” means an agency as defined in section 551(1) of this title;

(2) the term “rule” means any rule for which the agency publishes a general notice of proposed rulemaking pursuant to section 553(b) of this title, or any other law, including any rule of general applicability governing Federal grants to State and local governments for which the agency provides an opportunity for notice and public comment, except that the term “rule” does not include a rule of particular applicability relating to rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services, or allowances therefor or to valuations, costs or accounting, or practices relating to such rates, wages, structures, prices, appliances, services, or allowances;

(3) the term “small business” has the same meaning as the term “small business concern” under section 3 of the Small Business Act, unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register;

(4) the term “small organization” means any not-for-profit enterprise which is independently owned and operated and is not dominant in its field,

unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register;

(5) the term “small governmental jurisdiction” means governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand, unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and which are based on such factors as location in rural or sparsely populated areas or limited revenues due to the population of such jurisdiction, and publishes such definition(s) in the Federal Register;

(6) the term “small entity” shall have the same meaning as the terms “small business,” “small organization” and “small governmental jurisdiction” defined in paragraphs (3), (4) and (5) of this section; and

(7) the term “collection of information” —

(A) means the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency, regardless of form or format, calling for either —

(i) answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, 10 or more persons, other than agencies, instrumentalities, or employees of the United States; or

(ii) answers to questions posed to agencies, instrumentalities, or employees of the United States which are to be used for general statistical purposes; and

(B) shall not include a collection of information described under section 3518(c)(1) of title 44, United States Code.

(8) Recordkeeping requirement — The term “recordkeeping requirement” means a requirement imposed by an agency on persons to maintain specified records.

§ 602. Regulatory agenda

(a) During the months of October and April of each year, each agency shall publish in the Federal Register a regulatory flexibility agenda which shall contain —

(1) a brief description of the subject area of any rule which the agency expects to propose or promulgate which is likely to have a significant economic impact on a substantial number of small entities;

(2) a summary of the nature of any such rule under consideration for each subject area listed in the agenda pursuant to paragraph (1), the objectives and legal basis for the issuance of the rule, and an approximate schedule for completing action on any rule for which the agency has issued a general notice of proposed rulemaking, and

(3) the name and telephone number of an agency official knowledgeable concerning the items listed in paragraph (1).

(b) Each regulatory flexibility agenda shall be transmitted to the Chief Counsel for Advocacy of the Small Business Administration for comment, if any.

(c) Each agency shall endeavor to provide notice of each regulatory flexibility agenda to small entities or their representatives through direct notification or publication of the agenda in publications likely to be obtained by such small entities and shall invite comments upon each subject area on the agenda.

(d) Nothing in this section precludes an agency from considering or acting on any matter not included in a regulatory flexibility agenda, or requires an agency to consider or act on any matter listed in such agenda.

§ 603. Initial regulatory flexibility analysis

(a) Whenever an agency is required by section 553 of this title, or any other law, to publish general notice of proposed rulemaking for any proposed rule, or publishes a notice of proposed rulemaking for an interpretative rule involving the internal revenue laws of the United States, the agency shall prepare and make available for public comment an initial regulatory flexibility analysis. Such analysis shall describe the impact of the proposed rule on small

entities. The initial regulatory flexibility analysis or a summary shall be published in the Federal Register at the time of the publication of general notice of proposed rulemaking for the rule. The agency shall transmit a copy of the initial regulatory flexibility analysis to the Chief Counsel for Advocacy of the Small Business Administration. In the case of an interpretative rule involving the internal revenue laws of the United States, this chapter applies to interpretative rules published in the Federal Register for codification in the Code of Federal Regulations, but only to the extent that such interpretative rules impose on small entities a collection of information requirement.

(b) Each initial regulatory flexibility analysis required under this section shall contain —

(1) a description of the reasons why action by the agency is being considered;

(2) a succinct statement of the objectives of, and legal basis for, the proposed rule;

(3) a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply;

(4) a description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;

(5) an identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule.

(c) Each initial regulatory flexibility analysis shall also contain a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities. Consistent with the stated objectives of applicable statutes, the analysis shall discuss significant alternatives such as —

(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;

(2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities;

(3) the use of performance rather than design standards; and

(4) an exemption from coverage of the rule, or any part thereof, for such small entities.

(d) (1) For a covered agency, as defined in section 609(d)(2), each initial regulatory flexibility analysis shall include a description of—

(A) any projected increase in the cost of credit for small entities;

(B) any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any increase in the cost of credit for small entities; and

(C) advice and recommendations of representatives of small entities relating to issues described in subparagraphs (A) and (B) and subsection (b).

(2) A covered agency, as defined in section 609(d)(2), shall, for purposes of complying with paragraph (1)(C)—

(A) identify representatives of small entities in consultation with the Chief Counsel for Advocacy of the Small Business Administration; and

(B) collect advice and recommendations from the representatives identified under subparagraph (A) relating to issues described in subparagraphs (A) and (B) of paragraph (1) and subsection (b).

§ 604. Final regulatory flexibility analysis

(a) When an agency promulgates a final rule under section 553 of this title, after being required by that section or any other law to publish a general notice of proposed rulemaking, or promulgates a final interpretative rule involving the internal revenue laws of the United States as described in section 603(a), the agency shall prepare a final regulatory flexibility analysis. Each final regulatory flexibility analysis shall contain —

(1) a statement of the need for, and objectives of, the rule;

(2) a statement of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a statement of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;

(3) the response of the agency to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration in response to the proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of the comments;

(4) a description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available;

(5) a description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;

(6) a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected;

(6)¹ for a covered agency, as defined in section 609(d)(2), a description of the steps the agency has taken to minimize any additional cost of credit for small entities.

(b) The agency shall make copies of the final regulatory flexibility analysis available to members of the public and shall publish in the Federal Register such analysis or a summary thereof.

1. So in original. Two paragraphs (6) were enacted.

§ 605. Avoidance of duplicative or unnecessary analyses

(a) Any Federal agency may perform the analyses required by sections 602, 603, and 604 of this title in conjunction with or as a part of any other agenda or analysis required by any other law if such other analysis satisfies the provisions of such sections.

(b) Sections 603 and 604 of this title shall not apply to any proposed or final rule if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. If the head of the agency makes a certification under the preceding sentence, the agency shall publish such certification in the Federal Register at the time of publication of general notice of proposed rulemaking for the rule or at the time of publication of the final rule, along with a statement providing the factual basis for such certification. The agency shall provide such certification and statement to the Chief Counsel for Advocacy of the Small Business Administration.

(c) In order to avoid duplicative action, an agency may consider a series of closely related rules as one rule for the purposes of sections 602, 603, 604 and 610 of this title.

§ 606. Effect on other law

The requirements of sections 603 and 604 of this title do not alter in any manner standards otherwise applicable by law to agency action.

§ 607. Preparation of analyses

In complying with the provisions of sections 603 and 604 of this title, an agency may provide either a quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed rule, or more general descriptive statements if quantification is not practicable or reliable.

§ 608. Procedure for waiver or delay of completion

(a) An agency head may waive or delay the completion of some or all of the requirements of section 603 of this title by publishing in the Federal Register, not later than the date of publication of the

final rule, a written finding, with reasons therefor, that the final rule is being promulgated in response to an emergency that makes compliance or timely compliance with the provisions of section 603 of this title impracticable.

(b) Except as provided in section 605(b), an agency head may not waive the requirements of section 604 of this title. An agency head may delay the completion of the requirements of section 604 of this title for a period of not more than one hundred and 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, with reasons therefor, that the final 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 from 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 has been completed by the agency.

§ 609. Procedures for gathering comments

(a) When any rule is promulgated which will have a significant economic impact on a substantial number of small entities, the head of the agency promulgating the rule or the official of the agency with statutory responsibility for the promulgation of the rule shall assure that small entities have been given an opportunity to participate in the rulemaking for the rule through the reasonable use of techniques such as—

(1) the inclusion in an advance notice of proposed rulemaking, if issued, of a statement that the proposed rule may have a significant economic effect on a substantial number of small entities;

(2) the publication of general notice of proposed rulemaking in publications likely to be obtained by small entities;

(3) the direct notification of interested small entities;

(4) the conduct of open conferences or public hearings concerning the rule for small entities including soliciting and receiving comments over computer networks; and

(5) the adoption or modification of agency procedural rules to reduce the cost or complexity of participation in the rulemaking by small entities.

(b) Prior to publication of an initial regulatory flexibility analysis which a covered agency is required to conduct by this chapter—

(1) a covered agency shall notify the Chief Counsel for Advocacy of the Small Business Administration and provide the Chief Counsel with information on the potential impacts of the proposed rule on small entities and the type of small entities that might be affected;

(2) not later than 15 days after the date of receipt of the materials described in paragraph (1), the Chief Counsel shall identify individuals representative of affected small entities for the purpose of obtaining advice and recommendations from those individuals about the potential impacts of the proposed rule;

(3) the agency shall convene a review panel for such rule consisting wholly of full time Federal employees of the office within the agency responsible for carrying out the proposed rule, the Office of Information and Regulatory Affairs within the Office of Management and Budget, and the Chief Counsel;

(4) the panel shall review any material the agency has prepared in connection with this chapter, including any draft proposed rule, collect advice and recommendations of each individual small entity representative identified by the agency after consultation with the Chief Counsel, on issues related to subsections 603(b), paragraphs (3), (4) and (5) and 603(c);

(5) not later than 60 days after the date a covered agency convenes a review panel pursuant to paragraph (3), the review panel shall report on the comments of the small entity representatives and its findings as to issues related to subsections 603(b), paragraphs (3), (4) and (5) and 603(c), provided that such report shall be made public as part of the rulemaking record; and

(6) where appropriate, the agency shall modify the proposed rule, the initial regulatory flexibility

analysis or the decision on whether an initial regulatory flexibility analysis is required.

(c) An agency may in its discretion apply subsection (b) to rules that the agency intends to certify under subsection 605(b), but the agency believes may have a greater than de minimis impact on a substantial number of small entities.

(d) For purposes of this section, the term “covered agency” means

(1) the Environmental Protection Agency,

(2) the Consumer Financial Protection Bureau of the Federal Reserve System, and

(3) the Occupational Safety and Health Administration of the Department of Labor.

(e) The Chief Counsel for Advocacy, in consultation with the individuals identified in subsection (b)(2), and with the Administrator of the Office of Information and Regulatory Affairs within the Office of Management and Budget, may waive the requirements of subsections (b)(3), (b)(4), and (b)(5) by including in the rulemaking record a written finding, with reasons therefor, that those requirements would not advance the effective participation of small entities in the rulemaking process. For purposes of this subsection, the factors to be considered in making such a finding are as follows:

(1) In developing a proposed rule, the extent to which the covered agency consulted with individuals representative of affected small entities with respect to the potential impacts of the rule and took such concerns into consideration.

(2) Special circumstances requiring prompt issuance of the rule.

(3) Whether the requirements of subsection (b) would provide the individuals identified in subsection (b)(2) with a competitive advantage relative to other small entities.

§ 610. Periodic review of rules

(a) Within one hundred and eighty days after the effective date of this chapter, each agency shall publish in the *Federal Register* a plan for the periodic review of the rules issued by the agency which have or will have a significant economic impact upon a substantial number of small entities. Such plan may

be amended by the agency at any time by publishing the revision in the *Federal Register*. The purpose of the review shall be to determine whether such rules should be continued without change, or should be amended or rescinded, consistent with the stated objectives of applicable statutes, to minimize any significant economic impact of the rules upon a substantial number of such small entities. The plan shall provide for the review of all such agency rules existing on the effective date of this chapter within ten years of that date and for the review of such rules adopted after the effective date of this chapter within ten years of the publication of such rules as the final rule. If the head of the agency determines that completion of the review of existing rules is not feasible by the established date, he shall so certify in a statement published in the *Federal Register* and may extend the completion date by one year at a time for a total of not more than five years.

(b) In reviewing rules to minimize any significant economic impact of the rule on a substantial number of small entities in a manner consistent with the stated objectives of applicable statutes, the agency shall consider the following factors—

- (1) the continued need for the rule;
- (2) the nature of complaints or comments received concerning the rule from the public;
- (3) the complexity of the rule;
- (4) the extent to which the rule overlaps, duplicates or conflicts with other Federal rules, and, to the extent feasible, with State and local governmental rules; and
- (5) the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule.

(c) Each year, each agency shall publish in the *Federal Register* a list of the rules which have a significant economic impact on a substantial number of small entities, which are to be reviewed pursuant to this section during the succeeding twelve months. The list shall include a brief description of each rule and the need for and legal basis of such rule and shall invite public comment upon the rule.

§ 611. Judicial review

(a)

(1) For any rule subject to this chapter, a small entity that is adversely affected or aggrieved by final agency action is entitled to judicial review of agency compliance with the requirements of sections 601, 604, 605(b), 608(b), and 610 in accordance with chapter 7. Agency compliance with sections 607 and 609(a) shall be judicially reviewable in connection with judicial review of section 604.

(2) Each court having jurisdiction to review such rule for compliance with section 553, or under any other provision of law, shall have jurisdiction to review any claims of noncompliance with sections 601, 604, 605(b), 608(b), and 610 in accordance with chapter 7. Agency compliance with sections 607 and 609(a) shall be judicially reviewable in connection with judicial review of section 604.

(3) (A) A small entity may seek such review during the period beginning on the date of final agency action and ending one year later, except that where a provision of law requires that an action challenging a final agency action be commenced before the expiration of one year, such lesser period shall apply to an action for judicial review under this section.

(B) In the case where an agency delays the issuance of a final regulatory flexibility analysis pursuant to section 608(b) of this chapter, an action for judicial review under this section shall be filed not later than—

- (i) one year after the date the analysis is made available to the public, or
- (ii) where a provision of law requires that an action challenging a final agency regulation be commenced before the expiration of the 1-year period, the number of days specified in such provision of law that is after the date the analysis is made available to the public.

(4) In granting any relief in an action under this section, the court shall order the agency to take corrective action consistent with this chapter and chapter 7, including, but not limited to —

(A) remanding the rule to the agency, and

(B) deferring the enforcement of the rule against small entities unless the court finds that continued enforcement of the rule is in the public interest.

(5) Nothing in this subsection shall be construed to limit the authority of any court to stay the effective date of any rule or provision thereof under any other provision of law or to grant any other relief in addition to the requirements of this section.

(b) In an action for the judicial review of a rule, the regulatory flexibility analysis for such rule, including an analysis prepared or corrected pursuant to paragraph (a)(4), shall constitute part of the entire record of agency action in connection with such review.

(c) Compliance or noncompliance by an agency with the provisions of this chapter shall be subject to judicial review only in accordance with this section.

(d) Nothing in this section bars judicial review of any other impact statement or similar analysis required by any other law if judicial review of such statement or analysis is otherwise permitted by law.

§ 612. Reports and intervention rights

(a) The Chief Counsel for Advocacy of the Small Business Administration shall monitor agency compliance with this chapter and shall report at least annually thereon to the President and to the Committees on the Judiciary and Small Business of the Senate and House of Representatives.

(b) The Chief Counsel for Advocacy of the Small Business Administration is authorized to appear as *amicus curiae* in any action brought in a court of the United States to review a rule. In any such action, the Chief Counsel is authorized to present his or her views with respect to compliance with this chapter, the adequacy of the rulemaking record with respect to small entities and the effect of the rule on small entities.

(c) A court of the United States shall grant the application of the Chief Counsel for Advocacy of the Small Business Administration to appear in any such action for the purposes described in subsection (b).

Executive Order 13272: Proper Consideration of Small Entities in Agency Rulemaking

Executive Order of August 13, 2002

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:²

Section 1. General Requirements. Each agency shall establish procedures and policies to promote compliance with the Regulatory Flexibility Act, as amended (5 U.S.C. 601 et seq.) (the “Act”). Agencies shall thoroughly review draft rules to assess and take appropriate account of the potential impact on small businesses, small governmental jurisdictions, and small organizations, as provided by the Act. The Chief Counsel for Advocacy of the Small Business Administration (Advocacy) shall remain available to advise agencies in performing that review consistent with the provisions of the Act.

Sec. 2. Responsibilities of Advocacy. Consistent with the requirements of the Act, other applicable law, and Executive Order 12866 of September 30, 1993, as amended, Advocacy:

(a) shall notify agency heads from time to time of the requirements of the Act, including by issuing notifications with respect to the basic requirements of the Act within 90 days of the date of this order;

(b) shall provide training to agencies on compliance with the Act; and

(c) may provide comment on draft rules to the agency that has proposed or intends to propose the rules and to the Office of Information and Regula-

tory Affairs of the Office of Management and Budget (OIRA).

Sec. 3. Responsibilities of Federal Agencies. Consistent with the requirements of the Act and applicable law, agencies shall:

(a) Within 180 days of the date of this order, issue written procedures and policies, consistent with the Act, to ensure that the potential impacts of agencies’ draft rules on small businesses, small governmental jurisdictions, and small organizations are properly considered during the rulemaking process. Agency heads shall submit, no later than 90 days from the date of this order, their written procedures and policies to Advocacy for comment. Prior to issuing final procedures and policies, agencies shall consider any such comments received within 60 days from the date of the submission of the agencies’ procedures and policies to Advocacy. Except to the extent otherwise specifically provided by statute or Executive Order, agencies shall make the final procedures and policies available to the public through the Internet or other easily accessible means;

(b) Notify Advocacy of any draft rules that may have a significant economic impact on a substantial number of small entities under the Act. Such notifications shall be made (i) when the agency submits a draft rule to OIRA under Executive Order 12866 if that order requires such submission, or (ii) if no submission to OIRA is so required, at a reasonable time prior to publication of the rule by the agency; and

² 67 FR 53461. www.federalregister.gov/documents/2002/08/16/02-21056/proper-consideration-of-small-entities-in-agency-rulemaking

(c) Give every appropriate consideration to any comments provided by Advocacy regarding a draft rule. Consistent with applicable law and appropriate protection of executive deliberations and legal privileges, an agency shall include, in any explanation or discussion accompanying publication in the Federal Register of a final rule, the agency's response to any written comments submitted by Advocacy on the proposed rule that preceded the final rule; provided, however, that such inclusion is not required if the head of the agency certifies that the public interest is not served thereby.

Agencies and Advocacy may, to the extent permitted by law, engage in an exchange of data and research, as appropriate, to foster the purposes of the Act.

Sec. 4. Definitions. Terms defined in section 601 of title 5, United States Code, including the term "agency," shall have the same meaning in this order.

Sec. 5. Preservation of Authority. Nothing in this order shall be construed to impair or affect the authority of the Administrator of the Small Business Administration to supervise the Small Business Administration as provided in the first sentence of section 2(b)(1) of Public Law 85-09536 (15 U.S.C. 633(b)(1)).

Sec. 6. Reporting. For the purpose of promoting compliance with this order, Advocacy shall submit a report not less than annually to the Director of the Office of Management and Budget on the extent of compliance with this order by agencies.

Sec. 7. Confidentiality. Consistent with existing law, Advocacy may publicly disclose information that it receives from the agencies in the course of carrying out this order only to the extent that such information already has been lawfully and publicly disclosed by OIRA or the relevant rulemaking agency.

Sec. 8. Judicial Review. This order is intended only to improve the internal management of the Federal Government. This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or equity, against the

United States, its departments, agencies, or other entities, its officers or employees, or any other person.

George W. Bush

THE WHITE HOUSE,
August 13, 2002.

Filed 08-15-02; 8:45 am]
[FR Doc. 02-21056

Billing code 3195-01-P

Executive Order 13771: Reducing Regulation and Controlling Regulatory Costs

Executive Order of January 30, 2017

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Budget and Accounting Act of 1921, as amended (31 U.S.C. 1101 et seq.), section 1105 of title 31, United States Code, and section 301 of title 3, United States Code, it is hereby ordered as follows:³

Section 1. Purpose. It is the policy of the executive branch to be prudent and financially responsible in the expenditure of funds, from both public and private sources. In addition to the management of the direct expenditure of taxpayer dollars through the budgeting process, it is essential to manage the costs associated with the governmental imposition of private expenditures required to comply with Federal regulations. Toward that end, it is important that for every one new regulation issued, at least two prior regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process.

Sec. 2. Regulatory Cap for Fiscal Year 2017. (a) Unless prohibited by law, whenever an executive department or agency (agency) publicly proposes for notice and comment or otherwise promulgates a new regulation, it shall identify at least two existing regulations to be repealed.

(b) For fiscal year 2017, which is in progress, the heads of all agencies are directed that the total incremental cost of all new regulations, including repealed regulations, to be finalized this year shall be no greater than zero, unless otherwise required

by law or consistent with advice provided in writing by the Director of the Office of Management and Budget (Director).

(c) In furtherance of the requirement of subsection (a) of this section, any new incremental costs associated with new regulations shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations. Any agency eliminating existing costs associated with prior regulations under this subsection shall do so in accordance with the Administrative Procedure Act and other applicable law.

(d) The Director shall provide the heads of agencies with guidance on the implementation of this section. Such guidance shall address, among other things, processes for standardizing the measurement and estimation of regulatory costs; standards for determining what qualifies as new and offsetting regulations; standards for determining the costs of existing regulations that are considered for elimination; processes for accounting for costs in different fiscal years; methods to oversee the issuance of rules with costs offset by savings at different times or different agencies; and emergencies and other circumstances that might justify individual waivers of the requirements of this section. The Director shall consider phasing in and updating these requirements.

Sec. 3. Annual Regulatory Cost Submissions to the Office of Management and Budget. (a) Beginning with the Regulatory Plans (required under Executive Order 12866 of September 30, 1993, as amended, or any successor order) for fiscal year 2018, and for each fiscal year thereafter, the head of each agency shall

³ 82 FR 9339. www.federalregister.gov/documents/2017/02/03/2017-02451/reducing-regulation-and-controlling-regulatory-costs

identify, for each regulation that increases incremental cost, the offsetting regulations described in section 2(c) of this order, and provide the agency's best approximation of the total costs or savings associated with each new regulation or repealed regulation.

(b) Each regulation approved by the Director during the Presidential budget process shall be included in the Unified Regulatory Agenda required under Executive Order 12866, as amended, or any successor order.

(c) Unless otherwise required by law, no regulation shall be issued by an agency if it was not included on the most recent version or update of the published Unified Regulatory Agenda as required under Executive Order 12866, as amended, or any successor order, unless the issuance of such regulation was approved in advance in writing by the Director.

(d) During the Presidential budget process, the Director shall identify to agencies a total amount of incremental costs that will be allowed for each agency in issuing new regulations and repealing regulations for the next fiscal year. No regulations exceeding the agency's total incremental cost allowance will be permitted in that fiscal year, unless required by law or approved in writing by the Director. The total incremental cost allowance may allow an increase or require a reduction in total regulatory cost.

(e) The Director shall provide the heads of agencies with guidance on the implementation of the requirements in this section.

Sec. 4. Definition. For purposes of this order the term "regulation" or "rule" means an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe

law or policy or to describe the procedure or practice requirements of an agency, but does not include:

(a) regulations issued with respect to a military, national security, or foreign affairs function of the United States;

(b) regulations related to agency organization, management, or personnel; or

(c) any other category of regulations exempted by the Director.

Sec. 5. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Donald J. Trump

THE WHITE HOUSE,
January 30, 2017.

Filed 2-2-17; 11:15 am]
[FR Doc. 2017-02451

Billing code 3295-F7-P

Executive Order 13777: Enforcing the Regulatory Reform Agenda

Executive Order of February 24, 2017

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to lower regulatory burdens on the American people by implementing and enforcing regulatory reform, it is hereby ordered as follows:⁴

Section 1. Policy. It is the policy of the United States to alleviate unnecessary regulatory burdens placed on the American people.

Sec. 2. Regulatory Reform Officers. (a) Within 60 days of the date of this order, the head of each agency, except the heads of agencies receiving waivers under section 5 of this order, shall designate an agency official as its Regulatory Reform Officer (RRO). Each RRO shall oversee the implementation of regulatory reform initiatives and policies to ensure that agencies effectively carry out regulatory reforms, consistent with applicable law. These initiatives and policies include:

- (i) Executive Order 13771 of January 30, 2017 (Reducing Regulation and Controlling Regulatory Costs), regarding offsetting the number and cost of new regulations;
- (ii) Executive Order 12866 of September 30, 1993 (Regulatory Planning and Review), as amended, regarding regulatory planning and review;
- (iii) section 6 of Executive Order 13563 of January 18, 2011 (Improving Regulation and Regulatory Review), regarding retrospective review; and
- (iv) the termination, consistent with applicable law, of programs and activities that derive from or implement Executive Orders, guidance documents, policy memoranda, rule interpretations, and similar documents, or relevant portions thereof, that have been rescinded.

(b) Each agency RRO shall periodically report to the agency head and regularly consult with agency leadership.

Sec. 3. Regulatory Reform Task Forces. (a) Each agency shall establish a Regulatory Reform Task Force composed of:

- (i) the agency RRO;
- (ii) the agency Regulatory Policy Officer designated under section 6(a)(2) of Executive Order 12866;
- (iii) a representative from the agency's central policy office or equivalent central office; and
- (iv) for agencies listed in section 901(b)(1) of title 31, United States Code, at least three additional senior agency officials as determined by the agency head.

(b) Unless otherwise designated by the agency head, the agency RRO shall chair the agency's Regulatory Reform Task Force.

(c) Each entity staffed by officials of multiple agencies, such as the Chief Acquisition Officers Council, shall form a joint Regulatory Reform Task Force composed of at least one official described in subsection (a) of this section from each constituent agency's Regulatory Reform Task Force. Joint Regulatory Reform Task Forces shall implement this order in coordination with the Regulatory Reform Task Forces of their members' respective agencies.

(d) Each Regulatory Reform Task Force shall evaluate existing regulations (as defined in section 4 of Executive Order 13771) and make recommendations to the agency head regarding their repeal, replacement, or modification, consistent with applicable

⁴ 82 FR 12285. www.federalregister.gov/documents/2017/03/01/2017-04107/enforcing-the-regulatory-reform-agenda

law. At a minimum, each Regulatory Reform Task Force shall attempt to identify regulations that:

- (i) eliminate jobs, or inhibit job creation;
- (ii) are outdated, unnecessary, or ineffective;
- (iii) impose costs that exceed benefits;
- (iv) create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies;
- (v) are inconsistent with the requirements of section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note), or the guidance issued pursuant to that provision, in particular those regulations that rely in whole or in part on data, information, or methods that are not publicly available or that are insufficiently transparent to meet the standard for reproducibility; or
- (vi) derive from or implement Executive Orders or other Presidential directives that have been subsequently rescinded or substantially modified.

(e) In performing the evaluation described in subsection (d) of this section, each Regulatory Reform Task Force shall seek input and other assistance, as permitted by law, from entities significantly affected by Federal regulations, including State, local, and tribal governments, small businesses, consumers, non-governmental organizations, and trade associations.

(f) When implementing the regulatory offsets required by Executive Order 13771, each agency head should prioritize, to the extent permitted by law, those regulations that the agency's Regulatory Reform Task Force has identified as being outdated, unnecessary, or ineffective pursuant to subsection (d)(ii) of this section.

(g) Within 90 days of the date of this order, and on a schedule determined by the agency head thereafter, each Regulatory Reform Task Force shall provide a report to the agency head detailing the agency's progress toward the following goals:

- (i) improving implementation of regulatory reform initiatives and policies pursuant to section 2 of this order; and

- (ii) identifying regulations for repeal, replacement, or modification.

Sec. 4. *Accountability.* Consistent with the policy set forth in section 1 of this order, each agency should measure its progress in performing the tasks outlined in section 3 of this order.

(a) Agencies listed in section 901(b)(1) of title 31, United States Code, shall incorporate in their annual performance plans (required under the Government Performance and Results Act, as amended (see 31 U.S.C. 1115(b))), performance indicators that measure progress toward the two goals listed in section 3(g) of this order. Within 60 days of the date of this order, the Director of the Office of Management and Budget (Director) shall issue guidance regarding the implementation of this subsection. Such guidance may also address how agencies not otherwise covered under this subsection should be held accountable for compliance with this order.

(b) The head of each agency shall consider the progress toward the two goals listed in section 3(g) of this order in assessing the performance of the Regulatory Reform Task Force and, to the extent permitted by law, those individuals responsible for developing and issuing agency regulations.

Sec. 5. *Waiver.* Upon the request of an agency head, the Director may waive compliance with this order if the Director determines that the agency generally issues very few or no regulations (as defined in section 4 of Executive Order 13771). The Director may revoke a waiver at any time. The Director shall publish, at least once every 3 months, a list of agencies with current waivers.

Sec. 6. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

- (i) the authority granted by law to an executive department or agency, or the head thereof; or
- (ii) the functions of the Director relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Donald J. Trump

THE WHITE HOUSE,
February 24, 2017.

Filed 2-28-17; 11:15 am]
[FR Doc. 2017-04107

Billing code 3295-F7-P

Appendix D

RFA Training, Case Law, and SBREFA Panels

Federal Agencies Trained in RFA Compliance, 2003–2018

Executive Order 13272 directed the Office of Advocacy to provide training to federal agencies in RFA compliance. RFA training began in 2003, and since that time Advocacy has conducted training for 18 cabinet-level departments and agencies, 79 separate component agencies and offices within these departments, 23 independent agencies, and various special groups including congressional staff, business organizations and trade associations. The following agencies have participated in RFA training since its inception in 2003.

Cabinet Agencies

Department of Agriculture

- Animal and Plant Health Inspection Service
- Agricultural Marketing Service
- Forest Service
- Grain Inspection, Packers, and Stockyards Administration
- Livestock, Poultry, and Seed Program
- National Organic Program
- Rural Utilities Service
- Office of Budget and Program Analysis
- Office of the General Counsel

Department of Commerce

- Bureau of Industry and Security
- National Oceanic and Atmospheric Administration
- National Telecommunications and Information Administration
- Office of Manufacturing Services
- Patent and Trademark Office

Department of Defense

- Defense Acquisition Regulations System
- Defense Logistics Agency
- Department of the Air Force
- Department of the Army, Training and Doctrine Command
- U.S. Strategic Command

Department of Education

- Office of Elementary and Secondary Education
- Office of Post-Secondary Education
- Office of Special Education and Rehabilitative Services
- Office of the General Counsel

Department of Energy

Department of Health and Human Services

- Center for Disease Control and Prevention
- Center for Medicare and Medicaid Services
- Center for Tobacco Products
- Food and Drug Administration
- Indian Health Service
- Office of Policy
- Office of Regulations

Department of Homeland Security

- Federal Emergency Management Agency
- National Protection and Programs Directorate
- Office of the Chief Procurement Officer
- Office of the General Counsel
- Office of Small and Disadvantaged Business Utilization
- Transportation Security Administration
- U.S. Citizenship and Immigration Service
- U.S. Coast Guard
- U.S. Customs and Border Protection
- U.S. Immigration and Customs Enforcement

Department of Housing and Urban Development

- Office of Community Planning and Development
- Office of Fair Housing and Equal Opportunity
- Office of Manufactured Housing
- Office of Public and Indian Housing

Department of the Interior

- Bureau of Indian Affairs
- Bureau of Land Management
- Bureau of Ocean Energy Management, Regulation and Enforcement
- Fish and Wildlife Service
- National Park Service
- Office of Surface Mining Reclamation and Enforcement

Department of Justice
Bureau of Alcohol, Tobacco, and Firearms
Drug Enforcement Administration
Federal Bureau of Prisons

Department of Labor
Employee Benefits Security Administration
Employment and Training Administration
Employment Standards Administration
Mine Safety and Health Administration
Occupational Safety and Health Administration
Office of Federal Contract Compliance Programs

Department of State

Department of Transportation
Federal Aviation Administration
Federal Highway Administration
Federal Motor Carrier Safety Administration
Federal Railroad Administration
Federal Transit Administration
Maritime Administration
National Highway Traffic Safety Administration

Pipeline and Hazardous Materials Safety
Administration
Research and Special Programs Administration

Department of the Treasury
Alcohol, Tobacco, Tax, and Trade Bureau
Bureau of Fiscal Services
Financial Crimes Enforcement Network
Financial Management Service
Internal Revenue Service
Office of the Comptroller of the Currency
Office of the General Counsel
Surface Transportation Board

Department of Veterans Affairs
National Cemetery Administration

Office of the Director of National Intelligence

Office of Management and Budget
Office of Federal Procurement Policy

Small Business Administration
Office of the General Counsel

Independent Federal Agencies

Access Board
Consumer Financial Protection Bureau
Consumer Product Safety Commission
Commodity Futures Trading Commission
Environmental Protection Agency
Farm Credit Administration
Federal Communications Commission
Federal Deposit Insurance Corporation
Federal Election Commission
Federal Energy Regulatory Commission
Federal Housing Finance Agency
Federal Maritime Commission

Federal Reserve System
Federal Trade Commission
General Services Administration / FAR Council
National Aeronautics and Space Administration
National Credit Union Administration
National Endowment for the Arts
National Endowment for the Humanities
Nuclear Regulatory Commission
Pension Benefit Guaranty Corporation
Securities and Exchange Commission
Trade and Development Agency

RFA-Related Case Law, FY 2018

Courts across the country have decided various issues regarding the Regulatory Flexibility Act through litigation. This section notes pertinent cases in which the courts discussed the RFA. Both cases reach unique interpretations of the prudential standing requirements of small entities under the RFA. This section does not reflect the Office of Advocacy's opinion of the cases and is intended to provide the reader with information on what the courts have held regarding agency compliance with the RFA in FY 2018.

Cal. Cattlemen's Ass'n v. United States Fish and Wildlife Service¹

California ranchers and farmers challenged the United States Fish and Wildlife Service's designation of nearly 2 million acres as critical habitat for certain amphibian species. The plaintiffs alleged that the agency violated the RFA by issuing proposed and final critical habitat designations under the Endangered Species Act without conducting sufficient regulatory flexibility analysis of the impact that the designations will have on small business. Among other justiciability arguments, the agency sought dismissal on the ground that plaintiffs do not have prudential standing to sue—that is, the plaintiffs do not fall within the zone of interests that the RFA is designed to protect. The agency argued that because the rule merely requires consultation between federal agencies, the plaintiffs are not directly regulated; as such, they do not fall within the statute's zone of interests.

The court rejected the agency's argument, distinguishing this matter from *Mid-Tex Electric Cooperative Inc. v. FERC*, 773 F.2d 327 (D.C. Cir. 1985) (concluding that the scope of the RFA analysis requirements apply to impacts to entities directly regulated by the applicable rule). Here, the final rule requires consultation between agencies about the impact on the land use, and the "ultimate impact of the consultation will be felt by small entities like the

plaintiffs." The court concluded that the involvement of many federal agencies does not "break[] the chain of RFA causation" and it would be contrary to the purpose of the RFA to allow an agency to escape regulatory flexibility analysis by "ordering a sister agency to implement the rule on its behalf." Because the court found that plaintiffs are the type of entities that the RFA was designed to protect, the court denied the agency's motion to dismiss. Currently, this case is still open in the District Court for the District of Columbia and there are motions for summary judgment pending.

U.S. Citrus Sci. Council v. United States Department of Agriculture²

In *U.S. Citrus Sci. Council v. USDA*, plaintiffs challenged a rule allowing for the importation of lemons from Argentina, claiming RFA and other statutory violations. Defendants requested that the court reconsider its position that plaintiffs have standing under the RFA, arguing that plaintiffs are only indirectly regulated by the rule. Plaintiffs sought summary judgment under the RFA arguing that the agency's assessment of the economic impacts of the rule was arbitrary and capricious.

First, the court found that the RFA requires an agency to consider the effect of an agency action to small entities only directly regulated by the final rule. Here, a rule lifting a ban on lemons from Argentina does not directly apply to small entities and no provision in the rule is being enforced against small entities. Second, the court found that even if the plaintiffs had standing to sue under the RFA, the agency's regulatory flexibility analysis was not arbitrary and capricious. The court found that although the agency's estimate of the volume of lemons imported as a result of the lift on the ban was lower than that of a representative of the Argentine Citrus Federation, the agency's estimate "was based on sound reasoning" and not on irrational or arbitrary actions of the agency.

1. *Cal. Cattlemen's Ass'n v. U.S. Fish and Wildlife Serv.*, 315 F. Supp. 3d 282 (D.D.C., May 29, 2018).

2. *U.S. Citrus Sci. Council v. USDA*, 312 F. Supp. 3d 884 (E.D. Cal., Feb. 27, 2018).

SBREFA Panels Convened Through FY 2018

Table D.1 SBREFA Panels Convened Through FY 2018

| Rule | Date Convened | Date Completed | Notice of Proposed Rulemaking | Final Rule Published |
|---|---------------|----------------|-------------------------------|--|
| Consumer Financial Protection Bureau | | | | |
| Debt Collection | 08/25/16 | 10/19/16 | | |
| Arbitration Clauses | 10/20/15 | 12/11/15 | 05/24/16 | Rule published 07/19/17. Repealed under Congressional Review Act, 10/24/17 |
| Limit Certain Practices for Payday, Vehicle Title, and Similar Loans | 04/27/15 | 06/25/15 | 07/22/16 | 11/17/17 |
| Home Mortgage Disclosure Act | 02/27/14 | 04/24/14 | 08/29/14 | 10/15/15 |
| Loan Originator Compensation Requirements under Regulation Z | 05/09/12 | 07/12/12 | 09/07/12 | 02/15/13 |
| Mortgage Servicing under the Real Estate Settlement Procedures Act (RESPA or Regulation X) and Truth in Lending Act (TILA or Regulation Z) | 04/09/12 | 06/11/12 | 09/17/12 | 02/14/13 |
| Integrated Mortgage Disclosures under the Real Estate Settlement Procedures Act (RESPA or Regulation X) and Truth in Lending Act (TILA or Regulation Z) | 02/21/12 | 04/23/12 | 08/23/12 | 12/31/13 |
| Department of Labor, Occupational Safety and Health Administration | | | | |
| Telecommunications Towers | 08/15/18 | 10/11/18 | | |
| Process Safety Management Standard | 06/02/16 | 08/01/16 | | |
| Occupational Exposure to Infectious Diseases in Healthcare and Other Related Work Settings | 10/14/14 | 12/22/14 | | |
| Occupational Exposure to Diacetyl and Food Flavorings Containing Diacetyl | 05/05/09 | 07/02/09 | | |
| Occupational Exposure to Beryllium | 09/17/07 | 01/15/08 | 08/07/15 | |
| Cranes and Derricks in Construction | 08/18/06 | 10/17/06 | 10/09/08 | 08/09/10 |
| Occupational Exposure to Hexavalent Chromium | 01/30/04 | 04/20/04 | 10/04/04 | 02/28/06 |
| Occupational Exposure to Crystalline Silica | 10/20/03 | 12/19/03 | 09/12/13 | 03/25/16 |
| Confined Spaces in Construction | 09/26/03 | 11/24/03 | 11/28/07 | |
| Electric Power Generation, Transmission, and Distribution | 04/01/03 | 06/30/03 | 06/15/05 | 04/11/14 |
| Ergonomics Program Standard | 03/02/99 | 04/30/99 | 11/23/99 | 11/14/00 |

Table D.1 SBREFA Panels Convened Through FY 2018

| Rule | Date Convened | Date Completed | Notice of Proposed Rulemaking | Final Rule Published |
|--|---------------|--|-------------------------------|----------------------------------|
| Safety and Health Program Rule | 10/20/98 | 12/19/98 | | |
| Tuberculosis | 09/10/96 | 11/12/96 | 10/17/97 | Withdrawn 12/31/03 |
| Environmental Protection Agency | | | | |
| Financial Responsibility Requirements for Hard Rock Mining | 08/24/16 | 12/01/16 | 12/01/16 | Withdrawn December 2017 |
| Regulation of Trichloroethylene for Vapor Degreasers under Section 6(a) of the Toxic Substances Control Act | 06/01/16 | 09/26/16 | 01/19/17 | |
| Regulation of N-Methylpyrrolidone and Methylene Chloride in Paint and Coating Removal under Section 6(a) of the Toxic Substances Control Act | 06/01/16 | 09/26/16 | 01/19/17 | |
| Risk Management Program Modernization | 11/04/15 | 02/19/16 | 03/14/16 | 01/13/17 |
| Emission Standards for New and Modified Sources in the Oil and Natural Gas Sector | 06/16/15 | 08/13/15 | 09/18/15 | 06/3/16 |
| Federal Plan for Regulating Greenhouse Gas Emissions from Electric Generating Units | 04/30/15 | 07/28/15 | 10/23/15 | Withdrawn 04/03/17 |
| Greenhouse Gas Emissions Standards for Medium- and Heavy-Duty Vehicles | 10/22/14 | 01/15/15 | 07/13/15 | 10/25/2016 |
| PCB (Polychlorinated Biphenyls) Use Authorizations Update Rule | 02/07/14 | 04/07/14 | | |
| Review of New Source Performance Standards and Amendments to Emission Guidelines for Municipal Solid Waste Landfills | 12/05/13 | 07/21/15 | 07/17/14 08/27/15 | 08/29/16 |
| National Emissions Standards for Hazardous Air Pollutants (NESHAP): Brick and Structural Clay Products and Clay Products | 06/12/13 | 01/16/14 | 12/18/14 | 10/26/15 |
| Long Term Revisions to the Lead and Copper Rule | 08/14/12 | 08/16/13 | - | - |
| Petroleum Refinery Sector Risk and Technology Review and New Source Performance Standards | 08/04/11 | Rule proposed rule w/o completion of SBREFA panel report | 06/30/14 | 12/01/15 |
| Control of Air Pollution from Motor Vehicles: Tier 3 Motor Vehicle Emission and Fuel Standards | 08/04/11 | 10/14/11 | 05/21/13 | 04/28/14 |
| Greenhouse Gas Emissions from Electric Utility Steam Generating Units | 06/09/11 | Rule proposed rule w/o completion of SBREFA panel report | 04/14/13 | 04/13/12 01/08/14 06/02/14 |

Table D.1 SBREFA Panels Convened Through FY 2018

| Rule | Date Convened | Date Completed | Notice of Proposed Rulemaking | Final Rule Published |
|--|---------------|----------------|-------------------------------|-----------------------|
| National Emission Standards for Hazardous Air Pollutants (NESHAP) Risk and Technology Review for the Mineral Wool and Wool Fiberglass Industries | 06/02/11 | 10/26/11 | 11/12/11 | 07/29/15 |
| Formaldehyde Emissions from Pressed Wood Products | 02/03/11 | 04/04/11 | 06/10/13 | 07/27/16 |
| Stormwater Regulations Revision to Address Discharges from Developed Sites | 12/06/10 | 10/04/11 | - | Withdrawn 07/06/17 |
| National Emission Standards for Hazardous Air Pollutants for Coal- and Oil-fired Electric Utility Steam Generating Units | 10/27/10 | 03/02/11 | 05/03/11 | 02/16/12 |
| Revision of New Source Performance Standards for New Residential Wood Heaters | 08/04/10 | 10/26/11 | 02/03/14 | 03/16/15 |
| Pesticides; Reconsideration of Exemptions for Insect Repellents | 11/16/09 | 01/15/10 | | |
| National Emission Standards for Hazardous Air Pollutants for Industrial, Commercial, and Institutional Boilers: Major and Area Sources | 01/22/09 | 03/23/09 | 06/04/10 | 03/21/11 |
| Pesticides; Certification of Pesticide Applicators (Revisions) | 09/04/08 | 11/03/08 | 08/24/15 | 01/04/17 |
| Pesticides; Agricultural Worker Protection Standard Revisions | 09/04/08 | 11/03/08 | 03/19/14 | 09/28/15 |
| Renewable Fuel Standards 2 | 07/09/08 | 09/05/08 | 05/26/09 | 03/26/10 |
| Total Coliform Monitoring | 01/31/08 | 01/31/08 | 07/14/10 | |
| Non-Road Spark-Ignition Engines/Equipment | 08/17/06 | 10/17/06 | 05/18/07 | 10/08/08 |
| Mobile Source Air Toxics | 09/07/05 | 11/08/05 | 03/29/06 | 02/26/07 |
| Federal Action Plan for Regional Nitrogen Oxide/Sulfur Dioxide (2005 Clean Air Interstate Rule) | 04/27/05 | 06/27/05 | 08/24/05 | 04/28/06 |
| Section 126 Petition (2005 Clean Air Interstate Rule) | 04/27/05 | 06/27/05 | 08/24/05 | 04/28/06 |
| Cooling Water Intake Structures Phase III Facilities | 02/27/04 | 04/27/04 | 11/24/04 | 06/15/06 |
| Nonroad Diesel Engines – Tier IV | 10/24/02 | 12/23/02 | 05/23/03 | 06/29/04 |
| Lime Industry – Air Pollution | 01/22/02 | 03/25/02 | 12/20/02 | 01/05/04 |
| Aquatic Animal Production Industry | 01/22/02 | 06/19/02 | 09/12/02 | 08/23/04 |
| Construction and Development Effluent Limitations Guidelines | 07/16/01 | 10/12/01 | 06/24/02 | Withdrawn 04/26/04 |
| Nonroad Large Spark Ignition Engines, Recreation Land Engines, Recreation Marine Gas Tanks and Highway Motorcycles | 05/03/01 | 07/17/01 | 10/05/01 08/14/02 | 11/08/02 |

Table D.1 SBREFA Panels Convened Through FY 2018

| Rule | Date Convened | Date Completed | Notice of Proposed Rulemaking | Final Rule Published |
|---|---------------|----------------|-------------------------------|-----------------------|
| Stage 2 Disinfectant Byproducts; Long Term 2 Enhanced Surface Water Treatment | 04/25/00 | 06/23/00 | 08/11/03 08/18/03 | 01/04/06 01/05/06 |
| Reinforced Plastics Composites | 04/06/00 | 06/02/00 | 08/02/01 | 04/21/03 |
| Concentrated Animal Feedlots | 12/16/99 | 04/07/00 | 01/12/01 | 02/12/03 |
| Metals Products and Machinery | 12/09/99 | 03/03/00 | 01/03/01 | 05/13/03 |
| Lead Renovation and Remodeling Rule | 11/23/99 | 03/03/00 | 01/10/06 | 04/22/08 |
| Diesel Fuel Sulfur Control Requirements | 11/12/99 | 03/24/00 | 06/02/00 | 01/18/01 |
| Recreational Marine Engines | 06/07/99 | 08/25/99 | 10/05/01 08/14/02 | 11/08/02 |
| Arsenic in Drinking Water | 03/30/99 | 06/04/99 | 06/22/00 | 01/22/01 |
| Light Duty Vehicles/Light Duty Trucks Emissions and Sulfur in Gas | 08/27/98 | 10/26/98 | 05/13/99 | 02/10/00 |
| Filter Backwash Recycling | 08/21/98 | 10/19/98 | 04/10/00 | 06/08/01 |
| Long Term 1 Enhanced Surface Water Treatment | 08/21/98 | 10/19/98 | 04/10/00 | 01/14/02 |
| Radon in Drinking Water | 07/09/98 | 09/18/98 | 11/02/99 | |
| Section 126 Petitions | 06/23/98 | 08/21/98 | 09/30/98 | 05/25/99 |
| Federal Action Plan for Regional Nitrogen Oxide Reductions | 06/23/98 | 08/21/98 | 10/21/98 | 04/28/06 |
| Ground Water | 04/10/98 | 06/09/98 | 05/10/00 | 11/08/06 |
| Underground Injection Control (UIC) Class V Wells | 02/17/98 | 04/17/98 | 07/29/98 | 12/07/99 |
| Centralized Waste Treatment Effluent Guideline | 11/06/97 | 01/23/98 | 09/10/03 01/13/99 | 12/22/00 |
| Transportation Equipment Cleaning Effluent Guidelines | 07/16/97 | 09/23/97 | 06/25/98 | 08/14/00 |
| Stormwater Phase II | 06/19/97 | 08/07/97 | 01/09/98 | 12/08/99 |
| Industrial Laundries Effluent Guidelines | 06/06/97 | 08/08/97 | 12/17/97 | Withdrawn 08/18/99 |
| Nonroad Diesel Engines | 03/25/97 | 05/23/97 | 09/24/97 | 10/23/98 |

See Appendix G for abbreviations.

Appendix E

Sample of Letters to Agency Heads

Advocacy sent 26 letters to the heads of federal agencies reflecting the input received at the Regional Regulatory Reform Roundtables. A sample of these letters is reproduced here. These letters are online on Advocacy's web-page: <https://advocacy.sba.gov/regulatory-reform/regulatory-reform-follow-up>. See Chapter 3 to learn more.



October 4, 2017

VIA ELECTRONIC CORRESPONDENCE

The Honorable R. Alexander Acosta
Secretary
U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

Dear Secretary Acosta:

As a result of President Trump's Executive Orders, 13771 and 13777, the Office of Advocacy (Advocacy) has begun an effort to hear first-hand from small businesses across the country about specific federal regulatory burdens facing their businesses. As you know, under the Regulatory Flexibility Act (RFA), agencies are required to consider the impact of their regulations on small entities when promulgating federal regulations.¹ We believe the RFA and consideration of small business economic impacts is a good place to start when an agency is selecting rules that are being reviewed for reform or elimination.

We recently hosted roundtables in Baton Rouge and New Orleans, Louisiana; Boise and Coeur d'Alene, Idaho; Cincinnati, Cadiz, and Cleveland, Ohio; Lexington, Kentucky; St. Louis, Missouri; and Overland Park, Kansas. Advocacy also invited small businesses who could not attend the roundtables to submit their comments on Advocacy's website. Advocacy would like to inform you of the specific concerns and regulations that we heard about from small businesses in these regions, and comments we received from our website as we hope they will be of help to your agency as you comply with the aforementioned executive orders.

¹ Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The RFA, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives. 5 U.S.C. § 601 et seq.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy. The agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so. Small Business Jobs Act of 2010 (PL 111-240) § 1601.

Summary of Concerns from Roundtables and Website

Employee Benefits Security Administration

- **Definition of the Term “Fiduciary” - Conflict of Interest Rule - Retirement Investment Advice.**

Small business owners and representatives expressed concerns about the costs and burdens imposed by the new Fiduciary Rule and the rule’s related exemptions.

Employment and Training Administration

- **H-2A Visa Program**

One small dairy business recommended that the dairy industry be allowed to utilize the H-2A visa program for temporary agricultural foreign workers, as this industry is struggling to obtain the necessary workforce for their operation. Advocacy realizes that this would require a statutory change.

- **H-2B Visa Program**

Small businesses have commented on the importance of this program to obtain temporary non-agricultural foreign workers for their seasonal businesses; and recommend that the agency continue this program and approve any opportunities to increase the worker capacity under this program. Some small businesses cited concern with recent Executive Orders that have specifically targeted this program for reform and potential cuts.

Office of Federal Contract Compliance Programs

- **Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals with Disabilities**

Small business representatives were concerned with the paperwork costs and hiring goals for individuals with disabilities for federal contractors, particularly in certain industries like construction.

- **Federal Paid Sick Leave for Government Contractors**

Small businesses were concerned about this final rule that requires parties that contract with the Federal Government to provide their employees with up to seven days of paid sick leave annually. Small businesses from the construction industry commented that this rule is difficult to implement in their project-based character of their work; others have had a hard time incorporating their current paid time off programs with the requirements of this rule. This rule has also been problematic for concessionaires and lease holders in

federal and military buildings; they cannot recover the costs from the federal government. Advocacy has written a comment letter on this issue.²

- **Moratorium on Enforcement of Federal Contractor Requirements Against Hospitals**

Small business representatives recommend that OFCCP extend the moratorium on enforcement of federal contractor requirements against hospitals receiving TRICARE and other federal health care reimbursement programs. Federal contractor status imposes affirmative action recordkeeping and reporting burdens on small hospitals.

Office of Labor-Management Standards

- **Persuader Rule - Interpretation of the Advice Exemption in the 203(c) of the Labor-Management Reporting and Disclosure Act**

Small businesses were concerned about this final rule that expands the reportable activity that employers and their outside consultants file when they provide advice on unionizing and collective bargaining. Small businesses have stated that this rule would have resulted in paperwork costs and would have deterred these entities from seeking legal advice. In June 2017, DOL published a proposed rule that proposes to rescind this final rule.

Occupational Safety and Health Administration (OSHA)

- **Communication Tower Safety**

Small business representatives from the communication tower construction and maintenance industry would like OSHA to adopt the new industry consensus standards for communication tower safety, but are concerned that OSHA will exceed industry standards and promulgate a rule that is unduly costly and burdensome.

- **Electronic Recordkeeping and Reporting**

Small businesses representatives have complained that OSHA is now requiring the electronic submission of injury and illness data by certain businesses and that OSHA is planning to make that data publicly (which they oppose because they say it can create a false impression of the safety record at a company). Other sectors, such as automobile dealers, have complained that they are required to report to OSHA for the first time even though their injury and illness rates continue to decline.

² Comment Letter from Daryl DePriest, Chief Counsel for Advocacy and Janis C. Reyes, Assistant Chief Counsel, SBA Office of Advocacy to the Honorable Thomas E. Perez, Secretary, U.S. Department of Labor (April. 6, 2016), <https://www.sba.gov/advocacy/4-6-2016-establishing-paid-sick-leave-federal-contractors-proposed-rule>.

- **Occupational Exposure to Beryllium**

Small businesses representatives complained that construction and shipyards (except abrasive blasting) were not represented in OSHA’s SBREFA panel on beryllium and should not have been included in OSHA’s final beryllium rule. They also expressed concern that OSHA lacks sufficient information about the health risks from naturally-occurring beryllium in soil, stone, and other construction materials.³

- **Occupational Exposure to Respirable Crystalline Silica**

Small business representatives – particularly in the foundry and construction industries - have complained that OSHA’s new silica rule is not based on a demonstration of significant risk and is not technically or economically feasible to comply with. Small business representatives from the construction industry also complained that Table 1 of the construction standard is not workable in its current form and needs substantial revision.⁴

- **OSHA Inspection and Enforcement Policies**

Small business representatives from both the manufacturing and construction industries have complained that OSHA’s inspection and enforcement policies are unduly rigid and unfair. They recommended that OSHA provide greater flexibility and focus more on compliance assistance than fines and penalties.

- **Severe Violator Enforcement Program**

Small business representatives have complained that the removal criteria for OSHA’s Severe Violator Enforcement Program is unfair and unduly complicated, which can result in companies being unable to be removed from the program despite abating hazards and improving their safety and health programs. Others complained about OSHA’s increasing use of corporate-wide settlement agreements in enforcement actions.

Mine Safety and Health Administration (MSHA)

- **Examinations of Working Places in Metal and Nonmetal Mines**

Small business representatives have stated that MSHA should amend the agency’s final rule on Examinations of Working Places in Metal and Nonmetal Mines that was

³ Comment Letter from Major L. Clark, III, Acting Chief Counsel for Advocacy, and Bruce E. Lundegren, Assistant Chief Counsel, SBA Office of Advocacy to William Perry, Director, Directorate of Standards and Guidance, Occupational Safety and Health Administration, U.S. Department of Labor (August 28, 2017), <https://www.sba.gov/advocacy/08-28-17-comments-oshas-proposed-occupational-exposure-beryllium-and-beryllium-compounds>.

⁴ Comment Letter from Winslow Sargeant, PhD, Chief Counsel for Advocacy, and Bruce E. Lundegren, Assistant Chief Counsel, SBA Office of Advocacy to The Honorable David Michaels, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor (February 11, 2014), <https://www.sba.gov/content/2112014-comments-ohsa%E2%80%99s-proposed-occupational-exposure-respirable-crystalline-silica-rule>.

published in January 2017 to provide mine operators with additional flexibility in managing their safety and health programs and reduce regulatory burdens while retaining adequate safety protections afforded to miners.

Wage and Hour Division (WHD)

- **Application of the Executive, Administrative, Professional, Outside Sales and Computer Employees (EAP Exemption) under the Fair Labor Standards Act (FLSA)**

Small businesses are concerned with a DOL final rule that increases the salary threshold under the EAP exemption to minimum wage and overtime under the FLSA to \$47,476 stating that this rule would have added significant compliance costs and paperwork burdens. In response to a DOL Request for Information, Advocacy recommended that DOL adopt a lower level national salary threshold adjusted to minimize small business impacts to the most adversely affected low wage regions and industries.⁵

- **Application of the Fair Labor Standards Act to Domestic Service**

In 2015, DOL changed the companion care services exemption to minimum wage and overtime under the FLSA, limiting the use of this exemption to those employed by the family or household using those services. Small businesses providing these services could no longer claim this exemption, and reported business losses in live-in care services and general hourly services due to increased costs. These businesses recommend reform of this rule. Advocacy has written a comment letter on this issue.⁶

- **All Agency Memorandum (AAM) No. 212- Applicability of Davis-Bacon Act labor standards to members of survey crews**

Small businesses in the surveying industry were concerned with DOL's 2013 AAM No. 212, which reversed long standing labor policy and determined that survey crews working on Federal projects were "laborers and mechanics" subject to the Davis-Bacon Act and prevailing wages. Small businesses stated that this imposed paperwork burdens and increased the compliance costs to these firms and the government agencies that contract for these services.

- **Tip Regulations under the Fair Labor Standards Act**

Small businesses in the restaurant industry were concerned about a DOL regulation that restricted an employer's ability to pool employee tips; this is regardless of whether the employer takes a tip credit or pays tipped employees the full minimum wage. These

⁵ Comment Letter from Major L. Clark III, Acting Chief Counsel for Advocacy and Janis C. Reyes, Assistant Chief Counsel, SBA Office of Advocacy to the Honorable R. Alexander Acosta, Secretary, U.S. Department of Labor (Sept. 22, 2017), <https://www.sba.gov/advocacy/9-22-17-re-request-information-defining-and-delimiting-exemptions-executive-administrative>.

⁶ Comment Letter from Winslow Sargeant, Ph.D., Chief Counsel for Advocacy and Janis C. Reyes, Assistant Chief Counsel, SBA Office of Advocacy to the Honorable Hilda Solis, Secretary, U.S. Department of Labor (March 12, 2012), <https://www.sba.gov/content/letter-dated-3122012-department-labor-wage-and-hour-division>.

businesses were encouraged and supported efforts by the current DOL to rescind this regulation in the current regulatory agenda.

The Office of Advocacy looks forward to working with your agency to reduce the burden of federal regulations on behalf of the small businesses that have asked us to be their voice in this regulatory reform process. We hope that you will include these specific rules when you compile your list of rules to review. Advocacy would be happy to meet with you or your representative so that we may detail the concerns and help suggest less burdensome alternatives for small business as rules are being considered for revision. I have provided the contact information for Assistant Chief Counsels **Janis Reyes**, **Bruce Lundegren** and **Dillon Taylor** below.

As we continue to hear from small businesses across the country at our regional regulatory reform roundtables or through our outreach from our regulatory reform website, we will update you with additional summaries from those locations. Thank you for considering small business impacts as a vital part of your regulatory reform efforts and for including the Office of Advocacy as an important part of the process.

Sincerely,



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History of the Regulatory Flexibility Act

Shortly after the Office of Advocacy was founded in 1976, the first White House Conference on Small Business engaged small business representatives from across the United States in national brainstorming sessions. One recurring concern was the difficulty that “one-size-fits-all” regulations created for small businesses trying to compete in U.S. markets. President Jimmy Carter, a one-time small business owner himself, understood the necessity for greater protections for small businesses in the regulatory process and helped facilitate administrative and legislative changes. In 1979, President Carter issued a memorandum to the heads of all executive agencies, instructing them to “make sure that federal regulations [would] not place unnecessary burdens on small businesses and organizations,” and more specifically, to apply regulations “in a flexible manner, taking into account the size and nature of the regulated businesses.”¹ He asked Advocacy to ensure that the agencies’ implementation would be consistent with government-wide regulatory reform.

In 1980, Congress enacted the Regulatory Flexibility Act (RFA), which elevated aspects of this memorandum to the level of federal statute.² The new law mandated that agencies consider the impact of their regulatory proposals on small businesses, analyze

proposed regulations for equally effective alternatives, and make their analyses of equally effective alternatives available for public comment. This new approach to federal rulemaking was viewed as a remedy for the disproportionate burden placed on small businesses by one-size-fits-all regulation, “without undermining the goals of our social and economic programs.”³

RFA Requirements

Under the RFA, when an agency proposes a rule that would have a “significant economic impact on a substantial number of small entities,” the rule must be accompanied by an impact analysis (an initial regulatory flexibility analysis or IRFA) when it is published for public comment.⁴ Following that, should the agency publish a final rule, that agency must publish a final regulatory flexibility analysis (FRFA) as well.⁵ If a federal agency determines that a proposed rule would not have a “significant economic impact on a substantial number of small entities,” the head of that agency may “certify” the rule and bypass the IRFA and FRFA requirements.⁶

During a November 2015 interview, Frank Swain, chief counsel for advocacy from 1981 to 1989, noted that “The RFA is the only regulatory reform that is

1. Jimmy Carter, *Regulation of Small Businesses and Organizations Memorandum from the President*, (Nov. 16, 1979), www.presidency.ucsb.edu/ws/?pid=31709.

2. 5 U.S.C. § 601 et seq.

3. Carter, *supra* note 1.

4. 5 U.S.C. § 603.

5. 5 U.S.C. § 604.

6. 5 U.S.C. § 605(b).

statutorily required. Most of the regulatory reforms are largely executive orders.” Executive orders frequently expire at the end of a president’s term. “The RFA, because of its statutory basis, is going to be around indefinitely,” Swain said. As such, the RFA continues to be an important check on burdensome regulation in an era where regulatory reform is an Administration priority.

Interpreting and Strengthening the RFA

During the first half of the 1980s, the federal courts were influential in developing the RFA’s role in the regulatory process. One question that required the courts’ intervention was whether a federal agency had to consider a proposed rule’s indirect effects on small businesses, in addition to its direct effects. In *Mid-Tex Electric Cooperative, Inc. v. Federal Energy Regulatory Commission (FERC)*, the D.C. Circuit found that “Congress did not intend to require that every agency consider every indirect effect that any regulation might have on small businesses in any stratum of the national economy.”⁷ This interpretation—that federal agencies must only consider the direct effects on small businesses within the jurisdiction of the rule—has continued to be the judicial interpretation of the RFA, even after subsequent amendments.⁸

The following year, in the run-up to the second White House Conference on Small Business in 1986, conference planners noted that “the effectiveness of the RFA largely depends on small business’ awareness of proposed regulations and [their] ability to effectively voice [their] concerns to regulatory agencies.”⁹ They also voiced concern that at the time “the courts’ ability to review agency compliance with the law is limited.” Eight years later, the Government Accounting Office reported that agency compliance with the RFA varied widely across the

federal government, a condition that likely impaired efforts to address the disproportionate effect of federal regulation on small business.

Advocacy was statutorily required to report annually on federal agency compliance, but given that compliance with the RFA was not itself reviewable by the courts at the time, the effectiveness of such reporting was limited. The RFA did allow the chief counsel for advocacy to appear as *amicus curiae* (friend of the court) in any action to review a rule, expanding the chief counsel’s role in representing small business interests in policy development. However, given that Courts did not review compliance with the RFA, any challenge to regulation would need to be primarily under the Administrative Procedure Act.

After the third White House Conference on Small Business in 1995 renewed the call for strengthening the RFA, Congress and President Bill Clinton did so by enacting the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). SBREFA provided new checks on federal agency compliance with the RFA’s requirements, as well as additional procedures specifically addressing small business concerns regarding environmental and occupational safety and health regulations. The SBREFA amendments also made a federal agency’s compliance with certain sections of the RFA judicially reviewable, allowing challenges to regulations based on the agency’s failure to supply a FRFA or sufficient reason for certification.

After amending the RFA to allow for judicial review of agency compliance, the courts again provided guidance regarding the RFA’s requirements for federal agencies. In *Southern Offshore Fishing Associations v. Daley*, the court held that the National Marine Fisheries Service failed to make a “reasonable, good-faith effort” to inform the public about the potential impacts of a proposed rule imposing fishing quotas and to consider less harmful

7. *Mid-Tex Elec. Coop. v. FERC*, 773 F.2d 327, 341 (D.C. Cir. 1985).

8. See *American Trucking Ass’ns v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999).

9. *The Small Business Advocate* newsletter, U.S. Small Business Administration, Office of Advocacy, September 2005.

alternatives.¹⁰ The agency had published a FRFA with its final rule, but had not published an IRFA when the rule was proposed. The court’s holding established that an IRFA must precede a FRFA for an agency to have “undertak[en] a rational consideration of the economic effects and potential [regulatory] alternatives.”¹¹

SBREFA Panels

The SBREFA amendments also required the Environmental Protection Agency and the Occupational Safety and Health Administration to convene small business advocacy review panels whenever the agency proposes a rule that may have a significant impact on a substantial number of small entities. These panels consist of officials from the promulgating agency, the Office of Information and Regulatory Affairs, and the Office of Advocacy. Their task is to consult with small business representatives on the agency’s regulatory proposals to ensure that the agency has identified and considered regulatory alternatives that could attain the policy objectives while minimizing the impacts on small businesses. After each collaborative panel has concluded, the panel issues a report of its findings and any recommendations for providing flexibility for small entities.

The innovation of SBREFA panels has allowed for greater consideration of small business alternatives for federal rules. Jere W. Glover, chief counsel for advocacy during the passage of SBREFA, made two key observations about the rulemaking process. First, “If you get to the agency early in the process, they are more likely to change their mind.” And second, the mission of these efforts is to “make the regulation work for the industry,” not to “kill the regulation.” Glover’s perspective comes not only from his tenure as chief counsel from 1994 to 2001; he was also present at the creation of the RFA as

deputy to Milton Stewart, the first chief counsel for advocacy.

Executive Order 13272

As the President George W. Bush’s administration began to consider small business priorities, improved RFA compliance was one key goal. To this end, President Bush issued Executive Order 13272, “Proper Consideration of Small Entities in Agency Rulemaking” in 2002.¹² This order tasked Advocacy with training federal agencies and other stakeholders on the RFA. The training sessions helped apprise agencies of their responsibilities under the RFA and educated agency officials on the best RFA compliance practices. In addition, E.O. 13272 required Advocacy to track agency compliance with these education requirements and report on them annually to the White House Office of Management and Budget.

E.O. 13272 also instituted new procedures to help facilitate a collaborative relationship between agencies and the Office of Advocacy. First, it required agencies to notify Advocacy of any draft proposed rule that would impose a significant impact on a substantial number of small entities. Second, it required agencies to provide a response in the *Federal Register* to any written comment on the proposed rule from the Office of Advocacy when the final rule was published.

Thomas M. Sullivan, chief counsel for advocacy during the Bush administration, discussed E.O. 13272’s pivotal role in furthering RFA compliance. He noted that, because of the executive order, “Advocacy became a part of the fabric of federal rulemaking.” The aspect most responsible for this evolution in Sullivan’s view was federal agency training. “Training really helped accomplish this,” he said. “The goal is to create regulations that meet

10. *Southern Offshore Fishing Ass’ns v. Daley*, 995 F.Supp 1411, 1437 (M.D. Fla. 1998).

11. *Id.*

12. E.O. 13272, “Proper Consideration of Small Entities in Agency Rulemaking,” www.gpo.gov/fdsys/pkg/FR-2002-08-16/pdf/02-21056.pdf, (Aug. 13, 2002).

the regulatory purpose and are sensitive to small business requirements.” Sullivan added that “The biggest misperception is how hard it is to work with an agency for a win-win solution as opposed to just being critical of regulation.”

Eight years and one presidential administration later, Congress and President Barack Obama enacted the Small Business Jobs Act of 2010,¹³ which codified some of the procedures introduced in E.O. 13272. That same year, the Dodd-Frank Wall Street Reform and Consumer Protection Act became law.¹⁴ The new law created the Consumer Financial Protection Bureau and required that the new agency’s major rules come under the SBREFA panel provisions of the RFA.

The Obama administration looked to Advocacy for ways of encouraging economic activity. Again, the RFA was an important part of the answer. Executive Order 13563, “Improving Regulation and Regulatory Review,”¹⁵ signed in 2011, directed agencies to heighten public participation in rulemaking, consider overlapping regulatory requirements and flexible approaches, and conduct ongoing regulatory review. President Obama concurrently issued a memorandum to all federal agencies, reminding them of the importance of the RFA and of reducing the regulatory burden on small businesses through regulatory flexibility. In this memorandum, President Obama directed agencies to increase transparency by providing written explanations of any decision not to adopt flexible approaches in their regulations. The following year, President Obama further attempted to reduce regulatory burdens with Executive Order 13610, “Identifying and Reducing Regulatory Burdens,”¹⁶ which placed greater focus on initiatives

aimed at reducing unnecessary regulatory burdens, simplifying regulations, and harmonizing regulatory requirements imposed on small businesses.

Executive Orders 13563 and 13610 bolstered the retrospective review requirements of the RFA by requiring all executive agencies to conduct periodic retrospective review of existing rules. President Obama also issued an administrative action, Executive Order 13579, which recommended that all independent agencies do the same.¹⁷ This emphasis on the principles of regulatory review and the sensitivity to small business concerns in the federal rulemaking process further increased federal agency compliance.

Dr. Winslow Sargeant, chief counsel for advocacy from 2010 to 2015, stressed that these executive orders sought to “make federal regulation more clear, predictable, and transparent.” Sargeant identified two key areas, “retrospective review of existing regulation and deregulation when rules are no longer needed,” as important future challenges for regulatory improvement.

New Horizons: Small Business and International Trade

With the enactment of the Trade Facilitation and Trade Enforcement Act of 2015, Advocacy’s duties to small business expanded beyond our borders. Under the Act, the chief counsel for advocacy must convene an interagency working group whenever the president notifies Congress that the administration intends to enter into trade negotiations with another country. The working group conducts small

13. *Small Business Jobs Act*, Pub. L. 111-240 (2010).

14. *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub. L. 111-203 (2010).

15. E.O. 13563, “Improving Regulation and Regulatory Review,” www.gpo.gov/fdsys/pkg/FR-2011-01-21/pdf/2011-1385.pdf (Jan. 18, 2011).

16. E.O. 13610, “Identifying and Reducing Regulatory Burdens,” www.whitehouse.gov/sites/default/files/docs/microsites/omb/eo_13610_identifying_and_reducing_regulatory_burdens.pdf (May 10, 2012).

17. E.O. 13579, “Regulation and Independent Regulatory Agencies,” www.gpo.gov/fdsys/pkg/FR-2011-07-14/pdf/2011-17953.pdf (July 11, 2011).

business outreach in manufacturing, services, and agriculture sectors and gather input on the trade agreement's potential economic effects. Informed by these efforts, the working group is charged with identifying the most important priorities, opportunities, and challenges affecting these industry sectors in a report to Congress.

With the inauguration of President Donald J. Trump in January 2017, the regulatory process would see its most dramatic reform yet. Shortly after the beginning of his administration, President Trump issued two executive orders aimed at substantially ameliorating the regulatory burden faced by the private sector. The first, E.O. 13771, "Reducing Regulation and Controlling Regulatory Costs," commonly known as "one-in, two-out," required that any new regulations be balanced by the reduction of at least two other regulations—and that the incremental cost of new regulations be entirely offset by elimination of existing costs of other regulations. The second, E.O. 13777, "Enforcing the Regulatory Reform Agenda," set a framework for implementing this vision of regulatory reform, requiring *inter alia* each agency appoint a Regulatory Reform Officer to supervise the process of regulatory reform going forward. These measures are another opportunity for small business regulatory reform, and the challenge to Advocacy going forward is to match both the letter and spirit of these measures with vigor. Agency implementation of these executive orders offers significant opportunities for regulatory relief targeted to small businesses. FY 2017 offers the first instance of how the RFA functions in a deregulatory environment.

Since its passage in 1980, the RFA has demonstrated remarkable staying power. It has helped establish small business consideration as a necessary part of federal rulemaking.

Appendix G

Abbreviations

| | | | |
|-----------|--|----------|--|
| RFA | Regulatory Flexibility Act | HAPs | hazardous air pollutants |
| SBREFA | Small Business Regulatory Enforcement Fairness Act | HCBD | hexachlorobutadiene |
| SBAR | small business advocacy review | ILECs | incumbent local exchange carriers |
| IRFA | initial regulatory flexibility analysis | IRFA | initial regulatory flexibility analysis |
| FRFA | final regulatory flexibility analysis | IRIS | Integrated Risk Inventory System |
| | | IRS | Internal Revenue Service |
| | | JOBS Act | Jumpstart Our Business Startups |
| ABS | Annual Business Survey | MSHA | Mine Safety and Health Administration |
| ACA | Affordable Care Act | NESHAP | national emission standards for hazardous air pollutants |
| ADA | Americans with Disabilities Act | NPRM | notice of proposed rulemaking |
| AMS | Agricultural Marketing Service | OIRA | Office of Information and Regulatory Affairs |
| ANPRM | advance notice of proposed rulemaking | OMB | Office of Management and Budget |
| CCR | coal combustion residuals | OSHA | Occupational Safety and Health Administration |
| CERCLA | Comprehensive Environmental Response, Compensation and Liability Act of 1980 | OSPP | OSHA Strategic Partnership Program |
| CFPB | Consumer Financial Protection Bureau | PBT | persistent, bioaccumulative, and toxic chemicals |
| CORPS | Army Corps of Engineers | PCB | polychlorinated biphenyls |
| CPSC | Consumer Product Safety Commission | PCTP | pentachlorothiophenol |
| DecaBDE | decabromodiphenyl ethers | PI | proprietary information |
| DOD | Department of Defense | RCRA | Resource Conservation and Recovery Act |
| DOE | Department of Energy | RESPA | Real Estate Settlement Procedures Act |
| DOI | Department of the Interior | RFA | Regulatory Flexibility Act |
| DOJ | Department of Justice | RMP | risk management program |
| DOL | Department of Labor | SBA | Small Business Administration |
| DOT | Department of Transportation | SBREFA | Small Business Regulatory Enforcement Fairness Act |
| E.O. | executive order | SHARP | Safety and Health Achievement Recognition Program |
| ELD | electronic logging devices | TILA | Truth in Lending Act |
| ELG | effluent limitations guideline | TSCA | Toxic Substances Control Act |
| EPA | Environmental Protection Agency | U.S.C. | United States Code |
| FAR | Federal Acquisition Regulation Council | UIC | Underground Injection Control |
| FCC | Federal Communications Commission | USCIS | U.S. Citizenship and Immigration Services |
| FDA | Food and Drug Administration | VPP | Voluntary Protection Programs |
| Fed. Reg. | Federal Register | | |
| FLSA | Fair Labor Standards Act | | |
| FRFA | final regulatory flexibility analysis | | |
| GSA | General Services Administration | | |

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