



Testimony of

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United States Senate
Committee on Small Business and Entrepreneurship
and
Committee on Homeland Security and Government Affairs,
Subcommittee on Regulatory Affairs and Federal Management

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Topic: Reauthorization of the SBA Office of Advocacy



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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 Congress, the White House, federal agencies, federal courts, and state policy makers. The office relies on economic research, policy analysis, and small business outreach to identify issues of small business concern. Twelve regional and national advocates around the country and an independent office in Washington, D.C., support the Chief Counsel's efforts.

For more information about the Office of Advocacy, visit advocacy.sba.gov, or call (202) 205-6533.

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Chairman Rubio, Ranking Member Cardin, Members of the Committee on Small Business and Entrepreneurship, as well as Chairman Lankford, Ranking Member Sinema, and Members of the Homeland Security and Government Affairs Subcommittee on Regulatory Affairs and Federal Management, I am honored to be here today on behalf of the Office of Advocacy (Advocacy) to present testimony to you about our office and the federal rulemaking process. Advocacy is an independent office that speaks on behalf of the small business community before federal agencies, Congress, and the White House. The views in my testimony do not necessarily reflect the views of the Administration or the Small Business Administration (SBA), and this statement has not been circulated to the Office of Management and Budget for clearance.

I. The Independent Office of Advocacy

First, as the Acting Chief Counsel for Advocacy, and on behalf of the entire Advocacy team, we would like to thank both committees for the tremendous support you have shown the office over the years.

There was early recognition by Congress of the importance of small businesses to our nation's economy. The Office of Advocacy was created by Congress in 1976 to be an independent voice for small business within the federal government. Title II of Public Law 94-305 and the Regulatory Flexibility Act confer responsibilities and authorities on Advocacy. Both laws are standing, non-expiring legislation and have been amended over the years.

An important theme leading to Public Law 94-305 was the need for an independent voice within the federal government to represent the interests of small business. The law provides that the Chief Counsel is to be appointed from civilian life by the President with the advice and consent of the Senate, and Advocacy employees serve at the pleasure of the Chief Counsel. Further, the law authorized the Chief Counsel to prepare and publish reports as deemed appropriate and the reports "shall not be submitted to the Office of Management and Budget (OMB) or to any other Federal agency or executive department for any purpose prior to transmittal to the Congress and the President."¹ For this reason, Advocacy does not circulate its work product for clearance with the SBA Administrator, OMB, or any other federal

¹ § 206, Public L. No. 94-305, 15 U.S.C. § 634f.

agency prior to publication. Since 2010, Advocacy has also had independent budget authority.²

However, Advocacy still encounters challenges with maintaining its independence from SBA. The fact that the words “Small Business Administration” remain a part of Advocacy’s name continues to confuse the public and even some federal agencies. To avoid this confusion, the committees might consider changing Advocacy’s name to clarify that Advocacy is not a program within the Small Business Administration, but rather a separate, independent office representing small businesses.

That said, Advocacy is a relatively small operation and continues to rely on SBA for a variety of administrative support services, ranging from office space, equipment, IT, communications support, human resources support, and acquisitions, which are outlined in a Memorandum of Understanding between SBA and Advocacy. Advocacy’s administrative support staff “plug in” to SBA’s systems to keep Advocacy functioning at a high level of productivity.

It is also important to note the other ways in which Advocacy and SBA interact. Of special importance is the work of Advocacy’s economic research team that is widely used by SBA offices. For example, the number of small businesses in the United States is a common statistic used by SBA and other agencies, but is calculated by Advocacy’s research team.³ Advocacy also works closely with the SBA Ombudsman and prides itself on the level of cooperation and assistance that its professionals provide to all SBA program and policy staff.

II. Small Business Research

Public Law 94-305 made economic research a core mission of the Office of Advocacy. This mission includes the documentation of the role of small businesses and entrepreneurship in the economy and the examination of various issues of relevance to small business owners. These elements of Advocacy’s mission are the primary responsibility of the Office of Economic Research (OER). OER specializes in the following areas: small business

² The Small Business Jobs Act of 2010 established a separate appropriations account for Advocacy, in addition to a requirement that SBA provide operating support for Advocacy. Advocacy’s funds are to remain available until expended. Pub. L. No. 111-240, title I, § 1601(b) (Sept. 27, 2010), 124 Stat. 2551, 15 U.S.C. § 634g. These provisions became operational with Advocacy’s budget request for Fiscal Year 2012. Since then, Advocacy’s annual Congressional Budget Justification and its accompanying Annual Performance Report have appeared in a separate budget appendix following the main SBA budget request.

³ There are 30.7 million small businesses in the United States. U.S. SMALL BUS. ADMIN. OFFICE OF ADVOCACY, 2019 SMALL BUSINESS PROFILE: UNITED STATES, 1 (2019), available at <https://advocacy.sba.gov/wp-content/uploads/2019/04/2019-Small-Business-Profiles-US.pdf>. Advocacy calculates small business statistics using the most recent data available from government sources.

economy, small firm dynamics, small business finance, regulatory policy, international small business issues, barriers to entrepreneurship, and ownership of businesses by demographic groups such as veterans, women, and minorities. OER economists work with federal statistical agencies to acquire and analyze data on small businesses, conduct in-house research, and manage contract research projects. OER economists and work closely with the legal team in Advocacy's Office of Interagency Affairs to assess the economic impacts of proposed federal rules on small businesses and alternative regulatory approaches that would reduce economic burden. The economists and attorneys collaborate to train federal agency staff on analyzing regulatory impacts on small businesses in accordance with the Regulatory Flexibility Act and Executive Order 13272.

Advocacy uses its economic research funds for two primary purposes: 1) to sponsor the development and continuation of small business data series and special data tabulations on specific small business topics from federal statistical agencies; and 2) to fund contract research on specialized small business issues through the federal procurement process. Advocacy publishes issue-specific research as well as periodic reports. OER publications take many forms, including traditional publications such as reports, bulletins, frequently asked questions, and state economic profiles, along with newer products such as issue briefs, fact sheets, topic-linked research series, and infographics. Additionally, OER economists give presentations on small business research and statistics at various conferences, forums, events, roundtables, and meetings.

Advocacy sponsors issue-specific research on a wide variety of topics of interest to Advocacy stakeholders within Advocacy's research mandate. Advocacy welcomes suggestions for small business research topics from many sources in order to identify and validate important topics, including input from congressional offices, other federal agencies, small business organizations, advocacy groups, and small businesses themselves. Advocacy staff and leadership also seek to identify areas where new research is needed and feasible given the state of existing data. Subject to the availability of resources, Advocacy periodically solicits research proposals on topics of interest according to the federal procurement process administered by SBA's Acquisition Division. Each awarded contract research project is monitored by an Advocacy staff member serving as the Contracting Officer's Representative for the project. In 2015, Advocacy improved controls over its research process, including strengthening its peer review process. OER continuously assesses and refines its research process in order to best carry out the special responsibility of being the only federal office tasked with producing small business research and statistics.

OER publishes an annual report detailing its research activity for the year, including a listing of publications, small business economic research forums held, and an overview and update of the most widely used publicly available data series on small businesses. In FY 2018,

OER released 20 publications. OER's annual report for FY 2018 is still in development, and the FY 2017 report can be accessed on our website.⁴

III. The Regulatory Flexibility Act and Advocacy's Role in the Federal Rulemaking Process

Federal regulations can have a disproportionate impact on small businesses. Because of this, the Regulatory Flexibility Act (RFA),⁵ enacted in September 1980, requires federal agencies to consider the impact of their regulatory proposals on small entities, analyze effective alternatives that minimize small entity impacts, and make their analyses available for public comment. The RFA applies to a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions.

Advocacy continues to emphasize that the RFA “does not seek preferential treatment for small entities, nor does it require agencies to adopt regulations that impose the least burden on them, or mandate exemptions for them. Rather, it requires agencies to examine public policy issues using an analytical process that identifies barriers to small business competitiveness and seeks a level playing field for small entities, not an unfair advantage.”⁶

Under the RFA, when an agency proposes a regulation that would have a “significant economic impact on a substantial number of small entities,” the regulation must be accompanied by an impact analysis known as an initial regulatory flexibility analysis (IRFA), when the rule is published for public comment.⁷ When the final rule is published, it must be accompanied by a final regulatory flexibility analysis (FRFA).⁸ These analyses must describe, among other things, 1) the reasons why the regulatory action is being considered; 2) the small entities to which the proposed rule will apply and, where feasible, an estimate of their number; 3) the projected reporting, recordkeeping, and other compliance requirements; and 4) any significant alternatives to the rule that would accomplish the statutory objectives while minimizing the impact on small entities. The consideration of significant alternatives is the key to the RFA.

⁴ U.S. SMALL BUS. ADMIN. OFFICE OF ADVOCACY, ANNUAL REPORT OF THE OFFICE OF ECONOMIC RESEARCH: FY 2017, *available at* https://www.sba.gov/sites/default/files/OER_2017_Annual_Report.pdf.

⁵ 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).

⁶ U.S. SMALL BUS. ADMIN. OFFICE OF ADVOCACY, A GUIDE FOR GOVERNMENT AGENCIES: HOW TO COMPLY WITH THE REGULATORY FLEXIBILITY ACT, 1 (Aug. 2017), *available at* <https://www.sba.gov/sites/default/files/advocacy/How-to-Comply-with-the-RFA-WEB.pdf> [hereinafter RFA COMPLIANCE GUIDE].

⁷ 5 U.S.C. § 603.

⁸ 5 U.S.C. § 604.

Alternatively, if a federal agency determines that a proposed rule would not have a significant impact on a substantial number of small entities, the head of that agency may “certify” the rule and bypass the IRFA and FRFA requirements.⁹ This is commonly referred to as a “certification” and requires the agency to provide a factual basis for its determination that the rule will not have a significant economic impact on a substantial number of small entities.

In addition, the Environmental Protection Agency (EPA), Occupational Safety and Health Administration (OSHA), and the Consumer Financial Protection Bureau (CFPB) are required to convene a small business advocacy review panel (also referred to as a SBREFA panel) whenever they are developing a rule that is expected to have a significant economic impact on a substantial number of small entities.¹⁰ These agencies must notify Advocacy prior to the publication of an IRFA and provide information on the potential impacts of the proposed rule. The SBREFA panels consist of representatives of the Chief Counsel for Advocacy, the Administrator of OMB’s Office of Information and Regulatory Affairs (OIRA), and the agency proposing the rule.¹¹ The panel reviews materials related to the proposal, and, importantly, the advice and recommendation of small entity representatives (SERs) on the rule’s potential effects and possible mitigation strategies. The panel then issues a report on the comments of the SERs and on its own findings related to RFA issues. The agency is then required to consider the panel report findings and, where appropriate, modify the proposed rule and/or its IRFA.¹²

Section 610 of the RFA also requires agencies to review their existing rules that have or will have a significant impact on a substantial number of small entities within ten years of their promulgation.¹³ The purpose of the review is 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 small entities.

The elements of the RFA are the primary responsibility of Advocacy’s Office of Interagency Affairs. Interagency is Advocacy’s largest operational division in terms of staff, and the team of attorneys monitor federal regulatory and other activity with potential small entities impacts. They also work with agencies to help them develop less burdensome rules,

⁹ 5 U.S.C. § 605(b).

¹⁰ A list of all SBREFA panels that have been convened can be found in our annual report to Congress, and in Appendix A of this testimony.

¹¹ In limited circumstances, the Chief Counsel may waive the requirement for a SBREFA panel.

¹² 5 U.S.C. § 609.

¹³ 5 U.S.C. § 610.

both by providing small entity input early in the regulatory process, while still achieving the agencies' regulatory goals. The team utilizes numerous methods of communication to present the concerns of small entities to federal officials promulgating new regulations. For example, Advocacy holds meetings with officials, participates in OIRA-led review of upcoming rules, writes comment letters to agency directors, conducts outreach to small entities through roundtables and other methods, and holds training sessions on RFA compliance to help facilitate meaningful participation by all interested parties.

One of the important functions of this team is confidential interagency communications. Advocacy's goal is to participate in the regulatory development process as early as possible, both to counsel agencies on potential effects of their actions on small business and to provide RFA compliance expertise as needed. Advocacy believes it is essential that agency policymakers and regulatory development staff have confidence that they can share pre-proposal information with Advocacy staff. Such disclosure could have a variety of adverse consequences, and, depending on what is disclosed to whom, could in some cases violate law. Fortunately, Advocacy's track record in this regard has been exemplary, and the trust that Interagency has built with regulatory agencies is evident, as these agencies are increasingly asking for Advocacy guidance early in the pre-proposal phase of the rule development process. Because of the confidential nature of most such communications, it is difficult for Advocacy to document the precise regulatory cost savings to small businesses that flow from this important work.

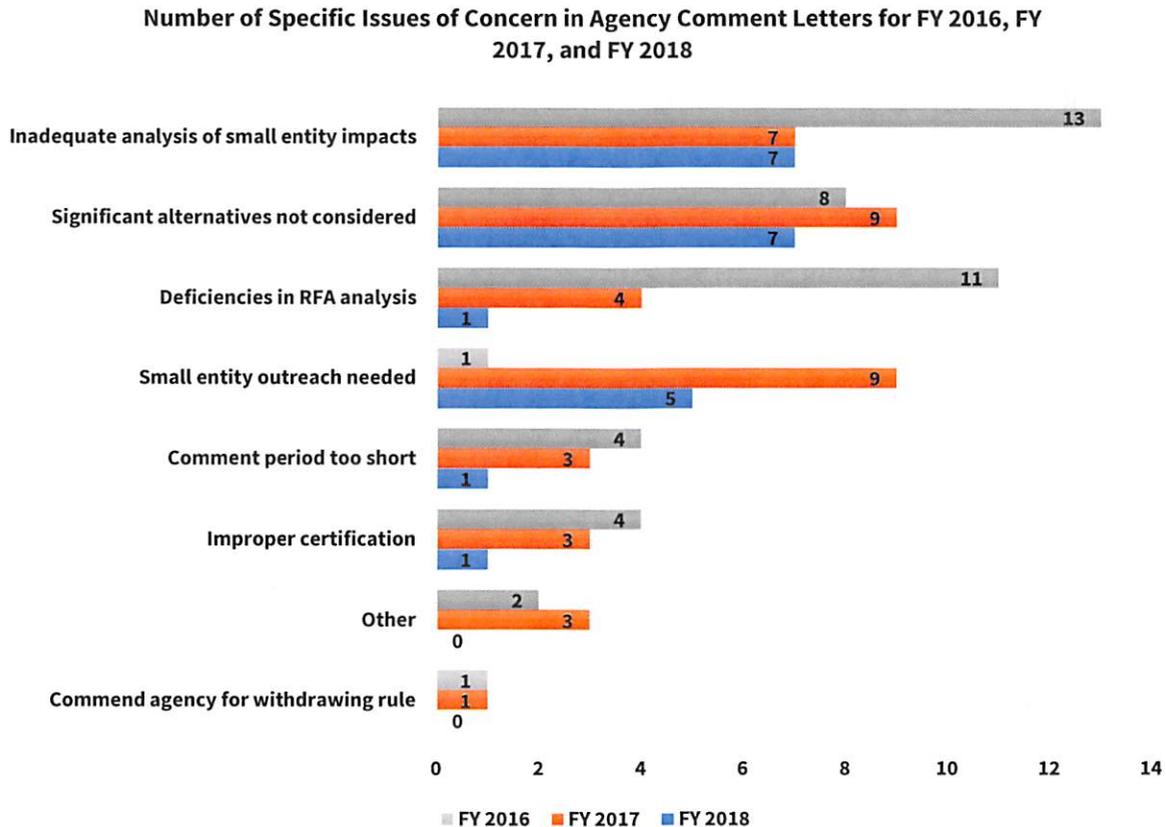
IV. Agency Compliance with the Regulatory Flexibility Act

In addition to the RFA's requirements that agencies consider how their regulations will impact small businesses and consider less burdensome alternatives, the RFA also requires the Office of Advocacy to monitor and report on how well federal agencies are complying with the law. In addition, Executive Order 13272, "Proper Consideration of Small Entities in Agency Rulemaking," which was signed by President George W. Bush in 2002, requires Advocacy to educate federal agency officials on compliance with the RFA, to provide resources to facilitate continued compliance, and to report to OMB on agency compliance with it.¹⁴ Every year, Advocacy reports to Congress and OMB on agencies' compliance with the RFA and E.O. 13272. Advocacy's report for FY 2018¹⁵ was published in April 2019 and was sent to these Committees, and I would like to highlight some important items.

¹⁴ Exec. Order No. 13,272, 67 Fed. Reg. 53,461 (Aug. 13, 2002).

¹⁵ U.S. SMALL BUS. ADMIN. OFFICE OF ADVOCACY, REPORT ON THE REGULATORY FLEXIBILITY ACT, FY 2018 (Apr. 2019), available at <https://s3.amazonaws.com/advocacy-prod.sba.fun/wp-content/uploads/2019/04/02160024/RFA-Annual-Report-FY-2018.pdf> [hereinafter RFA FY 2018 REPORT].

From FY 2016 through FY 2018, Advocacy has submitted 61 formal comment letters to regulatory agencies. The most frequent concerns were that agencies had an inadequate analysis of small entity impacts (27 letters); significant alternatives were not considered (24 letters); and deficiencies in the RFA analysis (16 letters). The figure below summarizes Advocacy's issues of concern from comment letters during FYs 2016 to 2018.



Advocacy also engages with small business stakeholders through a variety of other mechanisms, ensuring that the lines of communication remain open and that small business concerns are heard by the appropriate contacts within the federal agencies. Part of this engagement is through issue roundtables, which focus on small business regulatory topics. Advocacy holds issue roundtables across the country and often provides opportunities for small business stakeholders to participate remotely by phone. In addition to our daily engagement with small entities, in FY 2018, Advocacy hosted 12 issue roundtables on a variety of regulatory issues.¹⁶

¹⁶ The list and descriptions of the roundtables can be found in Chapter 3 of our RFA FY 2018 Report.

V. Advocacy's Regulatory Reform Efforts

In response to Executive Orders 13771 and 13777, which commit this administration to regulatory reform and burden reduction, on March 30, 2017, Advocacy sent a memorandum to federal agencies recommending that they consider small entity interests in implementing E.O. 13771 and in subsequent deregulatory actions.¹⁷ Advocacy works to ensure that small businesses are included in the regulatory reform effort by conducting small business outreach at roundtables to gather small business regulatory reform priorities to channel back to federal agencies.

Advocacy's Regional Regulatory Reform Roundtables have been a means of gathering practical input on small business burdens around the country. These roundtables are open to the public, and small businesses from a wide area are invited. Advocacy also invites federal agency officials to attend, so they can hear feedback and suggestions firsthand, and provide agency perspectives, if they so choose. Congressional representatives have also attended these roundtables to hear their constituents' regulatory issues.

The roundtables have two goals:

1. To identify small business regulatory issues to assist agencies with their regulatory reform plans (as directed by Executive Orders 13771 and 13777). This entails gathering firsthand information on small business regulatory burdens across the nation and identifying specific recommendations for regulatory change to submit to agencies.
2. To educate small businesses and stakeholders on the ways that Advocacy can help them meet their goals.

Since June 2017, Advocacy has conducted 36 Regional Regulatory Reform Roundtables in 25 states, and over 1,500 small businesses have participated. While traveling to these events, Advocacy staff also made at least 84 site visits in 22 states through September 2018. In addition, the office's regional and national advocates held small business forums in 244 cities, and small business owners submitted hundreds of comments through an online portal. Locations span rural and urban areas, geographic regions, and a range of industries. The geographical diversity provides an up-close perspective of how a single federal rule can have varying economic impacts on different types of small businesses.

¹⁷ The memorandum can be found in Appendix B of this testimony.

In December 2018, Advocacy published a progress report which covers the first 16 months of the office's Regional Regulatory Reform Roundtables.¹⁸ The report provides details about small businesses' regulatory challenges through our firsthand accounts of roundtables and site visits across the country through September 2018. It also outlines the first steps toward progress in alleviating some of these burdens, which includes follow-up efforts with federal agencies. Advocacy looks forward to continuing progress toward regulatory reform for small businesses.

VI. Legislative Proposals to Amend the RFA

Advocacy's broad experience with the RFA since its original enactment in 1980, together with a growing body of case law, give Advocacy a unique perspective on the RFA's implementation. Over the years, previous Chief Counsels have identified areas they believed needed legislative attention if the RFA is to provide small entities with the full consideration that Congress originally intended.

Because Advocacy currently does not have a Senate-confirmed Chief Counsel that can lobby before Congress for legislative solutions, the office has not updated its legislative priorities since 2016. Advocacy acknowledges that these proposals will require more carefully crafted legislative language and analysis to ensure they are appropriately implemented, and our staff is happy to provide technical assistance on legislative proposals concerning the RFA. The 2016 legislative priorities can be found in Appendix C of this testimony, and are briefly explained below:

a. Indirect effects

Under the RFA, agencies are not currently required to consider the impact of a proposed rule on small businesses that are not directly regulated by the rule, even when the impacts are foreseeable and often significant. Advocacy believes that indirect effects should be part of the RFA analysis, but that the definition of indirect effects should be specific and limited so that the analytical requirements of the RFA remain reasonable.¹⁹

¹⁸ U.S. SMALL BUS. ADMIN. OFFICE OF ADVOCACY, WHAT SMALL BUSINESSES ARE SAYING AND WHAT ADVOCACY IS DOING ABOUT IT: PROGRESS REPORT ON THE OFFICE OF ADVOCACY'S REGIONAL REGULATORY REFORM ROUNDTABLES, JUNE 2017 – SEPTEMBER 2018 (Dec. 2018), available at <https://s3.amazonaws.com/advocacy-prod.sba.fun/wp-content/uploads/2018/12/20091536/What-Small-Businesses-Are-Saying-What-Advocacy-Is-Doing.pdf>.

¹⁹ Advocacy's RFA Compliance Guide states that agencies "should examine the reasonably foreseeable effects on small entities that purchase products or services from, sell products or services to, or otherwise conduct business with entities directly regulated by the rule." RFA COMPLIANCE GUIDE, *supra* note 6, at 23.

b. Scope of the RFA

Currently, the requirements of the RFA are limited to those rulemakings that are subject to notice and comment. Section 553 of the Administrative Procedure Act (APA), which sets out the general requirements for rulemaking, does not require notice and comment for interim final rulemakings, so agencies may impose a significant economic burden on small entities through these rulemakings without even conducting an Initial Regulatory Flexibility Analysis (IRFA) or Final Regulatory Flexibility Analysis (FRFA). Advocacy believes the definition of a rule under the RFA needs to be expanded to include interim final rulemakings that have the potential to impose economic burden on small entities.

In the past, the IRS has regularly promulgated rules that were costly and complicated for small businesses. Generally, the IRS contended that it had no discretion in implementing legislation and that the agency had little authority to consider less costly alternatives under the RFA. Therefore, the IRS often did not analyze the cost of its rules to small businesses under the RFA.²⁰

Finally, the RFA has its own definition of information collection. However, this definition is identical to the Paperwork Reduction Act (PRA). A cross-reference to the PRA would allow Advocacy to rely on OMB's existing implementing regulations and guidance.

c. Quality of Analysis

The Office of Advocacy has been concerned that some agencies are not providing the information required in the IRFA and FRFA in a transparent and easy-to-access manner.²¹ This hinders the ability of small entities and the public to comment meaningfully on the impacts on small entities and possible regulatory alternatives. Agencies should be required to include an estimate of the cost savings to small entities in the FRFA. In addition, agencies should have a single section in the preamble of the notice of proposed rulemaking and notice of final rulemaking that lays out clearly the substantive contents of the IRFA or FRFA, including a specific narrative for each of the required elements.

²⁰ On April 11, 2018, the Department of the Treasury and OMB signed a Memorandum of Agreement outlining the general terms for OIRA within OMB to review tax regulatory actions under Executive Order 12866. The MOA went into immediate affect with the exception of the additional information required under section 6(a)(3)(C) of E.O. 12866 pertaining to tax regulatory actions that would have an annual non-revenue effect on the economy of \$100 million or more, measured against a no-action baseline, which went into effect in April 2019.

²¹ Advocacy believes the information should be at the level of detail necessary to understand the rule's impact on all affected entities, such as identifying all of the different types of affected small businesses by industry and accessing the rule's impact on each type of affected small business.

d. Quality of Certification

Some agencies' improper certifications under the RFA have been based on a lack of information in the record about small entities, rather than data showing that there would not be a significant impact on a substantial number of small entities. A clear requirement for threshold analysis would be a stronger guarantee of the quality of the certifications.²²

e. SBREFA Panels

The Department of Interior's Fish and Wildlife Service consistently promulgates regulations without proper economic analyses. Advocacy believes the rules promulgated by this agency would benefit from being added as a covered agency subject to Small Business Advocacy Review Panels.

Advocacy also believes that some recent SBREFA panels have been convened prematurely. SBREFA panels work best when small entity representatives have sufficient information to understand the purpose of the potential rule, likely impacts, and preliminary assessments of the costs and benefits of various alternatives. With this information small entities are better able to provide meaningful input on the ways in which an agency can minimize impacts on small entities consistent with the agency mission. Therefore the RFA should be amended to require that prior to convening a panel, agencies should be required to provide, at a minimum, a clear description of the goals of the rulemaking, the type and number of affected small entities, a preferred alternative, a series of viable alternatives, and projected costs and benefits of compliance for each alternative.

f. Retrospective Review

In addition to the existing required periodic review, agencies should accept and prioritize petitions for review of final rules. They should be required to provide a timely and effective response in which they demonstrate that they have considered alternative means of achieving the regulatory objective while reducing the regulatory impact on small entities. This demonstration should take the form of an analysis similar to a FRFA.

Conclusion

Thank you for the opportunity to testify today. Advocacy looks forward to continuing to work with you and other Members of Congress to be the voice for small businesses in the

²² Advocacy's RFA Compliance Guide walks through the certification in detail and the items that should be included in any certification, including the requirements of a factual basis for the certification. RFA COMPLIANCE GUIDE, *supra* note 6, at 11-30.

federal government and work with agencies to reduce small businesses' regulatory burdens during the rulemaking process. I would be happy to answer any questions you may have.



Appendix A

SBREFA Panels Convened Through FY 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 B

Memorandum from Major L. Clark, III, Acting Chief Counsel for Advocacy, U.S. Small Business Administration, to Heads of Agencies re Implementation of Executive Orders 13771, “Reducing Regulation and Controlling Regulatory Costs,” and 13777, “Enforcing the Regulatory Reform Agenda” (March 30, 2017)

MEMORANDUM

TO: Heads of Agencies

FROM: *M.L.C.*
Major L. Clark, III Acting Chief Counsel for Advocacy, U.S. Small Business Administration

DATE: March 30, 2017

SUBJECT: Implementation of Executive Orders 13771, "Reducing Regulation and Controlling Regulatory Costs," and 13777, "Enforcing the Regulatory Reform Agenda"

As required by Executive Order (EO) 13272¹, I am writing to advise you of the activities of the Office of Advocacy (Advocacy) related to recent Executive Orders on the reduction of regulatory burdens and offer additional assistance related to these new policies. Advocacy strongly endorses the principles and policies of these Executive Orders and urges that they be implemented consistent with the Regulatory Flexibility Act (RFA)² in order to reduce the regulatory burdens and the disproportionate impacts of regulations on small entities.

Congress established the Office of Advocacy under Pub. L. No. 94-305 to advocate the views of small entities before federal agencies and Congress. Because Advocacy is an independent office within the U.S. Small Business Administration (SBA), the views expressed by Advocacy do not necessarily reflect the position of the Administration or the SBA.³ The RFA, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), gives small entities (businesses, organizations, and local governments) a voice in the federal rulemaking process and requires agencies to consider the impacts of their rulemakings on small entities. Under EO 13272, Advocacy provides training to agencies on the RFA.

Over the coming months, Advocacy will be making available additional assistance and tools to implement Executive Orders 13771 and 13777 and engaging in outreach to small entities to identify opportunities to reduce burdens on small entities. Advocacy will also be seeking additional opportunities to train policy officials and regulatory staff on the RFA and its importance in the implementation of these EOs.

¹ Executive Order 13272, signed August 13, 2002 (67 Fed. Reg. 53,461 (August 16, 2002)). Section 2(a) requires the Chief Counsel for Advocacy to "notify agency heads from time to time of the requirements of the [Regulatory Flexibility] Act."

² 5 U.S.C. § 601, *et. seq.*

³ 15 U.S.C. § 634a, *et. seq.*



To initiate Advocacy assistance to your agency in the implementation of EO 13771, EO 13777, and the Regulatory Flexibility Act, please provide me with the names of the officials you have designated as the Regulatory Policy Officer, named under EO 12866, section 6(a)(2), and the Regulatory Reform Officer, named under EO 13777, section 2(a).

This information should be sent to Charles Maresca, Director of Interagency Affairs, SBA Office of Advocacy, Charles.Maresca@sba.gov, as it is available. Please also contact me or Mr. Maresca if you have any questions about this memorandum or your agency's compliance with the RFA.

Thank you for your consideration of these requests. I look forward to a productive effort to reduce the regulatory burdens on small entities.

cc: Dominic Mancini, Acting Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget

U.S. SMALL BUSINESS ADMINISTRATION
OFFICE OF ADVOCACY

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Appendix C

Office of Advocacy Legislative Priorities for Chief
Counsel Darryl L. DePriest



Office of Advocacy

Legislative Priorities for Chief Counsel Darryl L. DePriest

Indirect Effects

Under the RFA, agencies are not currently required to consider the impact of a proposed rule on small businesses that are not directly regulated by the rule, even when the impacts are foreseeable and often significant. Advocacy believes that indirect effects should be part of the RFA analysis, but that the definition of indirect effects should be specific and limited so that the analytical requirements of the RFA remain reasonable.

- Amend section 601 of the RFA to define “impact” as including the reasonably foreseeable effects on small entities that purchase products or services from, sell products or services to, or otherwise conduct business with entities directly regulated by the rule; are directly regulated by other governmental entities as a result of the rule; or are not directly regulated by the agency as a result of the rule but are otherwise subject to other agency regulations as a result of the rule.

Scope of the RFA

Currently, the requirements of the RFA are limited to those rulemakings that are subject to notice and comment. Section 553 of the Administrative Procedure Act (APA), which sets out the general requirements for rulemaking, does not require notice and comment for interim final rulemakings, so agencies may impose a significant economic burden on small entities through these rulemakings without conducting an Initial Regulatory Flexibility Analysis (IRFA) or Final Regulatory Flexibility Analysis (FRFA). Advocacy believes the definition of a rule needs to be expanded to include interim final rulemakings that have the potential to impose economic burden on small entities.

Further, the IRS regularly promulgates rules that are costly and complicated for small businesses. However, the IRS contends that it has no discretion in implementing legislation and that the agency has little authority to consider less costly alternatives under the RFA. Therefore, the IRS often does not analyze the cost of its rules to small business under the RFA. In the absence of the IRS considering the impact of its rules under the RFA, Congress should require the Congressional Budget Office (CBO) to provide small business cost and paperwork burden estimates for pending tax legislation. This would help ensure that tax writers and the public are aware of the compliance burden in addition to the fiscal consequences.

Finally, the RFA has its own definition of information collection. However, this definition is identical to the Paperwork Reduction Act (PRA) (35 USC 3501, et. seq.). A cross-reference to the PRA would allow Advocacy to rely on OMB’s existing implementing regulations (5 CFR 1320) and guidance.

- Require RFA analysis for all interim final rulemakings with a significant economic impact on a substantial number of small entities.

- Require CBO to score proposed tax legislation for the estimated costs and paperwork burden to small business.
- Amend the conditions for IRS rulemakings to require an IRFA/FRFA to reference the PRA.

Quality of Analysis

The Office of Advocacy is concerned that some agencies are not providing the information required in the IRFA and FRFA in a transparent and easy-to-access manner. This hinders the ability of small entities and the public to comment meaningfully on the impacts on small entities and possible regulatory alternatives. Agencies should be required to include an estimate of the cost savings to small entities in the FRFA. In addition, agencies should have a single section in the preamble of the notice of proposed rulemaking and notice of final rulemaking that lays out clearly the substantive contents of the IRFA or FRFA, including a specific narrative for each of the required elements.

- Require agencies to develop cost savings estimates.
- Require a clearly delineated statement of the contents of the IRFA and FRFA in the preamble of the proposed and final rule.

Quality of Certification

Some agencies' improper certifications under the RFA have been based on a lack of information in the record about small entities, rather than data showing that there would not be a significant impact on a substantial number of small entities. A clear requirement for threshold analysis would be a stronger guarantee of the quality of certifications.

- Require agencies to publish a threshold analysis, supported by data in the record, as part of the factual basis for the certification.

SBREFA Panels

The Department of Interior's Fish and Wildlife Service consistently promulgates regulations without proper economic analyses. Advocacy believes the rules promulgated by this agency would benefit from being added as a covered agency subject to Small Business Advocacy Review Panels.

Advocacy also believes that some recent SBREFA panels have been convened prematurely. SBREFA panels work best when small entity representatives have sufficient information to understand the purpose of the potential rule, likely impacts, and preliminary assessments of the costs and benefits of various alternatives. With this information small entities are better able to provide meaningful input on the ways in which an agency can minimize impacts on small entities consistent with the agency mission. Therefore the RFA should be amended to require that prior to convening a panel, agencies should be required to provide, at a minimum, a clear description of the goals of the rulemaking, the type and number of affected small entities, a preferred alternative, a series of viable alternatives, and projected costs and benefits of compliance for each alternative.

- Require SBREFA panels under RFA Section 609(b) for the Department of the Interior's Fish and Wildlife Service.
- Require better disclosure of information including at a minimum, a clear description of the goals of the rulemaking, the type and number of affected small entities, a preferred alternative, a series of viable alternatives, and projected costs and benefits of compliance for each alternative to the small entity representatives.

Retrospective Review

In addition to the existing required periodic review, agencies should accept and prioritize petitions for review of final rules. They should be required to provide a timely and effective response in which they demonstrate that they have considered alternative means of achieving the regulatory objective while reducing the regulatory impact on small businesses. This demonstration should take the form of an analysis similar to a FRFA.

- Strengthen section 610 retrospective review to prioritize petitions for review that seek to reduce the regulatory burden on small business and provide for more thorough consideration of alternatives.

The Office of Advocacy was established by Public Law 94-305 to represent the views of small businesses before federal agencies and the U.S. 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.