

Report on the Regulatory Flexibility Act FY 2010



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

February 2011

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To the President and the Congress of the United States

I am pleased to present to the President and Congress the fiscal year (FY) 2010 *Report on the Regulatory Flexibility Act*. In this report, the U.S. Small Business Administration's Office of Advocacy provides the status of federal agencies' compliance with the Regulatory Flexibility Act of 1980 (RFA) and Executive Order 13272. Thirty years ago, Congress enacted the RFA, which required federal agencies to review proposed regulations that would have a significant impact on small entities—small businesses, small governmental jurisdictions, and small nonprofits. Federal agencies were also required to consider significant alternatives that would minimize the impacts on small entities. In the past three decades, the RFA has been significantly and quantifiably effective in reducing the regulatory burden on small businesses. The Office of Advocacy (Advocacy) continues to make steady progress in its efforts to improve federal agencies' compliance with the RFA.

Advocacy has taken a proactive approach to assist federal agencies in meeting their regulatory goals while reducing the disproportionate burden of regulations on small entities. Advocacy accomplishes this through comment letters, providing testimony to Congress, RFA compliance training, participation in Small Business Advocacy Review (SBAR) panels, advocacy for legislative reform, and vital research on small business issues. It is important that our actions on behalf of small businesses are accessible to both government and nongovernmental entities. Advocacy use of web-based tools such as RSS feeds, email alerts, blogs, Regulatory Alerts, and the newsletter, *The Small Business Advocate*, are some of the ways we communicate with our stakeholders about rules that will have a significant economic impact on a substantial number of small entities.

In FY 2010, Advocacy's work to bring small entity concerns to rulemaking saved nearly \$15 billion in regulatory costs. This was accomplished without undermining the goals outlined by federal agencies. In the current economic climate, as small businesses are called upon to be the job creators and to lead in providing innovative new products and services to the American economy, minimizing unnecessary regulatory burden on the economic sector will continue to be a high priority for Advocacy.

In 2010, as part of the Dodd-Frank Act, Advocacy saw an additional covered agency added to the SBAR process. The Consumer Financial Protection Bureau (CFPB) joined the ranks of the Environmental Protection Agency and the Occupational Safety and Health Administration. We look forward to working with CFPB to help it comply with its RFA obligations.

Advocacy is also mindful that not all agencies seek consultations with small businesses prior to publishing or finalizing proposed rules. The challenges associated with RFA compliance deficiencies are noted in Section 3.

As we celebrate the RFA's thirty-year anniversary, my office and I will work to make sure federal agencies recognize that rules and regulations are stronger when small businesses are part of the rulemaking process. In FY 2011, Advocacy will continue to support federal agencies seeking to reduce the impact of their regulations on small entities by providing further training and conducting more outreach to the small firm communities affected by federal regulations. For small business issues to be relevant, small businesses must have a strong Advocate. We will continue to be the watchdog of the RFA.



Winslow Sargeant, Ph.D.
Chief Counsel for Advocacy

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1 History and Overview of the Regulatory Flexibility Act

In September 2010, the Office of Advocacy commemorated the 30th anniversary of the enactment of the Regulatory Flexibility Act (RFA). Since it was passed in 1980, the law has been amended several times, most notably by the Small Business Regulatory Enforcement Fairness Act in 1996. Today, the RFA continues to give small business entrepreneurs an important role in the development of a regulatory environment that is more conducive to starting and growing small businesses.

The First Ten Years

In 1980, the first White House Conference on Small Business was held. *The Report to the*

President of that first conference noted the “explosive” growth of government regulation, issued by 90 agencies adding thousands of new rules each year. Following that conference and report, and after several hearings on Capitol Hill, Congress passed the RFA in 1980. In passing the RFA, Congress told the nation that the federal agencies must “fit regulatory and informational requirements to the scale of businesses.” To make this happen, the agencies must

“consider flexible regulatory proposals” and ensure that “such proposals are given serious consideration.”

Several years later, the 1986 White House Conference on Small Business, however, noted that the RFA’s provisions lacked the “effectiveness” Congress had hoped for. The conference report noted that “the courts’ ability to review agency compliance with the law is limited.”

The Second Decade

By the time the third and most recent White House Conference on Small Business was held in 1995, the General Accounting Office had noted that agency compliance with the RFA varied from agency to agency, and that Advocacy had no authority to compel agencies’ compliance. The administration’s National Performance Review had recommended that agency compliance be subject to judicial review. The Conference Report asked for specific provisions to include small firms in the rulemaking process, and for judicial review of agency compliance.

In 1996, President Clinton signed Public Law 104-121, the Small Business Regulatory Enforcement Fairness Act (SBREFA). The new law made agency compliance with the RFA subject to judicial review.¹ It also required that the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA) convene small business advocacy review panels to consult with small entities early on regulations expected to have a significant economic impact on small entities. Finally, the law reaffirmed the authority of the chief counsel for advocacy to file friend of the court briefs in cases brought by small entities challenging final agency actions.

The Third Decade

In 2002, President Bush signed Executive Order 13272, which strengthened the Office of Advocacy by enhancing its relationship with the Office of Management and Budget’s Office of Information and Regulatory Affairs (OIRA). The executive order told the agencies to work closely with

“Having an advocate for small businesses within the government is a gift, and is the first instance I have seen of a government entity bringing accountability to another government agency.”

—Peter Moore, Northern Pelagic Group, LLC (NORPEL)

¹ See Table A.2 on p. 39, as well as a brief discussion of RFA judicial review in the October-November 2010 newsletter on p. 67 of this report.

Advocacy in properly considering the impact of their regulations on small business. Under the executive order, agencies had to establish written procedures and policies on how they measure the impact of their regulatory proposals on small entities; they were also required to notify Advocacy before publishing proposed rules expected to have a significant impact on a substantial number of small entities. Agencies were required by the executive order to publish a response to any written comments submitted by Advocacy.

The executive order also required Advocacy to train the agencies in how to comply with the requirements of the act. Over the past eight years Advocacy has trained more than 2,000 employees at almost 50 agencies on the requirements of the RFA, and has encouraged the agencies to consider the impact of their draft regulations on small entities. The demand for this training continues and the need for consistent understanding of the requirements of RFA compliance has not diminished. At a minimum, agency employees leave the training session with the basic understanding of the purpose of the RFA and who they can contact for additional assistance within the Office of Advocacy. These important tools, coupled with the understanding that better rule-making occurs with early intervention and small business input, are what make Advocacy's RFA training course successful at many agencies. RFA training during fiscal year 2010 is discussed in Section 2 of this report.

In 2010, the U.S. Congress passed the Small Business Jobs Act (SBJA) and the Dodd-Frank Wall Street Reform and Consumer Protection Act. The SBJA included a codification of section 3(c) of Executive Order 13272, which requires agencies to give appropriate consideration to Advocacy's written comments on regulations. Agencies are now also required to give a detailed statement of changes made in the rule in response to Advocacy's comments. This will help Advocacy address the problem of initial regulatory flexibility analyses or IRFAs (required by

section 603 of the RFA) that lack one or more of the required elements.

The Dodd-Frank Act, among other objectives, created the Consumer Financial Protection Bureau (CFPB) and made its rules subject to the requirements of section 609 of the RFA, which requires covered agencies to convene small business advocacy review (SBAR) panels whenever they seek to promulgate a rule that will require an IRFA. The CFPB has the additional charge to consider the impact of its regulations on the cost of credit to small business. Chapter 2 provides more detail.

High Regulatory Costs Show Ongoing Need for RFA

At the 30th anniversary symposium, Advocacy released the newest update of the *Impact of Regulatory Costs on Small Firms* by Dr. Mark Crain and Nicole Crain. That study showed that, per employee, the cost of compliance with federal regulations is 36 percent higher for the smallest businesses—those with 20 or fewer employees—compared with larger firms. This disproportionate impact of the federal regulatory burden is why the small business regulatory analysis required by the RFA is so important today.

In his remarks at the symposium, Cass Sunstein, administrator of OIRA, noted that “If regulatory choices are based on careful analysis, and subject to public scrutiny and review, we will be able to identify new and creative approaches designed to maintain and to promote entrepreneurship, innovation, competitiveness, and economic growth. These points have special importance in a period in which it is crucial to consider the effects of regulation on small business—and to ensure, in accordance with the first declaration of purpose in the Regulatory Flexibility Act, that agencies ‘seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public.’ ”

2 The RFA and E.O.13272: Compliance and the Role of the Office of Advocacy

The Office of Advocacy has been given the responsibility to oversee compliance with both the Regulatory Flexibility Act and Executive Order 13272, signed in August 2002. The provisions of E.O. 13272 have given Advocacy and federal agencies additional tools for implementing the RFA, and as noted, parts of the executive order have recently been codified.

Executive Order 13272 Implementation

Under E.O. 13272, federal agencies must inform the public of their plans to take small businesses and the RFA into account when promulgating regulations. Most agencies have done this at the departmental level by making their RFA policies and procedures available on their website.

The E.O. also requires agencies to send Advocacy a copy of any draft regulations that may have a significant economic impact on a substantial number of small entities. This must be done at the same time a draft rule is sent to the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) or at a reasonable time prior to publication in the *Federal Register*. Agencies are asked to utilize Advocacy's dedicated email address to fulfill this notification requirement instead of sending the draft regulation through the mail. This method is not used as frequently as the Office of Advocacy would like; however, some agencies have become regular email system users.

A final agency requirement of E.O. 13272 is to give appropriate consideration to Advocacy's public comments on a proposed rule and to address the comments in the final rule published in the *Federal Register*. This section of the E.O. was

adopted into law in 2010 as an amendment to the RFA by the Small Business Jobs Act. Most agencies complied with this provision in FY 2010.

Agency compliance with these three provisions of E.O. 13272 is generally good; however, a few agencies ignore the requirements and fail to provide Advocacy with copies of their draft regulations. A summary of agency compliance with E.O. 13272 can be found in this section.

The Office of Advocacy was also given three duties under E.O. 13272. First, Advocacy was required to notify agencies of how to comply with the RFA. This was accomplished in 2003 through the publication of *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act*. A revised version of this guide was provided to agencies in 2009 and another version will be created in the next fiscal year to incorporate amendments to the RFA. The guide is also available on Advocacy's website at <http://www.sba.gov/sites/default/files/rfaguide.pdf>. Second, Advocacy must report annually to OIRA on agency compliance with the three required agency provisions. This information is included in the third section of this report. Finally, E.O. 13272 requires Advocacy to train federal regulatory agencies in how to comply with the RFA.

In fiscal year 2010, Advocacy trained nearly 200 agency employees in RFA compliance, a substantial increase over the previous fiscal year. As new staff members are hired, agencies continue to request these important training sessions. Agencies that have had numerous RFA trainings are more willing to work with Advocacy during the rulemaking process and have a clearer understanding of the nuances of RFA compliance. Advocacy continues to work with the regulatory agencies to encourage them to

consider the impact of their regulations on small entities from the beginning of rule development.

Interagency Communications

Advocacy has continued to reach out to agencies on behalf of small businesses through meetings, roundtables, and its training program. Advocacy's participation in the interagency review of

draft rules has increased as the effect of Advocacy's training program grows and as agencies become more open to the assistance the Office of Advocacy can lend. In FY 2010, Advocacy communicated with agencies through a variety of means including more than 35 formal comment letters (Chart 2.1 and Table 2.1).

Interagency cooperation often results in effective regulations that avoid excessive burdens on small businesses. See, for example, the discus-

sion of cooperation between Advocacy and the Department of Justice on the 2010 update of the Americans with Disabilities Act rules.² On the other hand, interagency discussion failed to reach an agreement between Advocacy and the EPA, which has published regulations on greenhouse gas emissions without benefit of a Section 609 Small Business Advocacy Review panel.³

Roundtables

To encourage dialogue between the various agencies and the small business community, the Office of Advocacy continues to expand the number

of small business roundtables it coordinates each year. In FY 2010, Advocacy convened roundtables on tax and pension issues, the environment, workplace safety, aviation, transportation, and telecommunications.

Roundtables are a useful way for agencies to engage with small businesses, even on contentious regulations. Agencies benefit by hearing firsthand how their regulations are perceived by the small business community, and small businesses benefit by having an opportunity to directly inform the federal agency about how a rule would affect their operations. At Advocacy roundtables, agencies routinely receive information or perspectives on regulatory alternatives that have the potential to reduce the impact of their rules.

A New Agency is Added to the SBAR Panel Process

The new Consumer Financial Protection Bureau, created by the Dodd-Frank Act, is the third agency to be required to comply with section 609 of the RFA. CFPB must comply with the small business advocacy review panel requirement and convene a 60-day panel process whenever it decides that a draft rule may have a significant economic impact on a substantial number of small entities. Advocacy is working closely with the CFPB as it develops its staff in an effort to ensure that efficient and effective operating principles will be in place in time for CFPB's first regulatory action.

The SBAR panel process has been developed at the Environmental Protection Agency and the Occupational Safety and Health Administration since the panel requirement for those agencies became law in 1996. Since that time, Advocacy has participated in nearly 50 panels at EPA and OSHA (see Table A.3 in the appendix).

“Advocacy provided assistance to NRECA and the American Public Power Association in preparing a request to EPA that it convene an SBAR Panel to examine impacts of the proposed coal ash rule on small entities.”

—Jim Stine, The National Rural Electric Cooperative Association (NRECA)

² See the Department of Justice discussion on p. 25 of this report.

³ See the Environmental Protection Agency discussion on p. 31 of this report.

Chart 2.1 Advocacy Comments by Key RFA Compliance Issue, FY 2010

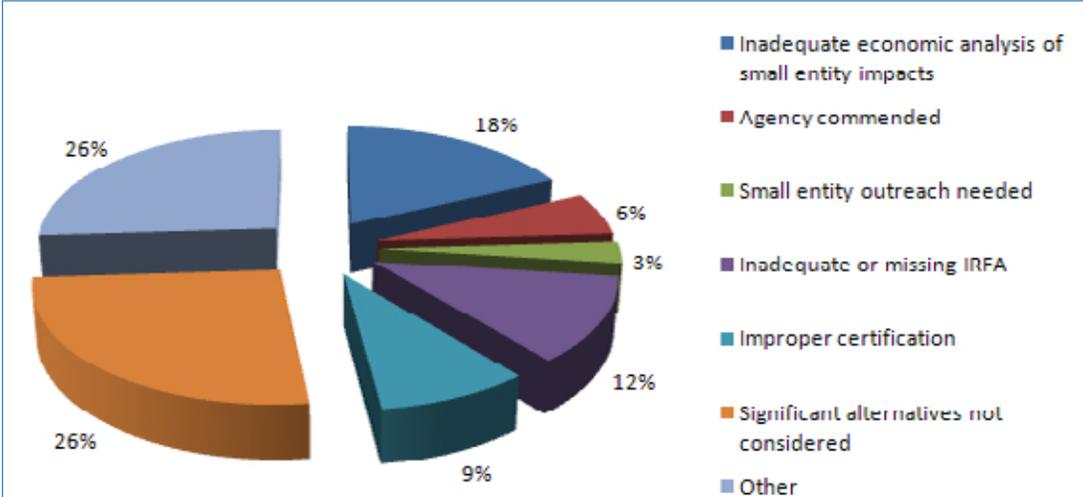


Chart 2.1 illustrates the most common concerns raised in Advocacy's comment letters and highlights areas in need of continued improvement based on Advocacy's analysis of its FY 2010 comment letters.

This experience will be of great benefit to CFPB as it develops its procedures. For Advocacy the addition of CFPB is a perfect opportunity to represent small business in the SBAR panel process. Advocacy will continue to work with CFPB as the new agency moves closer to regulatory development in the coming year.

Regulatory Review

Section 610 of the RFA requires federal agencies to examine existing rules for their regulatory burden on small entities. To help address this requirement, the Office of Advocacy has encouraged small businesses and others to highlight rules in particular need of reform so that federal agencies can begin to address their concerns.

Until this year, Federal Acquisition Regulation 52.232.10 required a retainage of 10 percent on federal contracts for architecture and engineering services. This rule was brought to Advocacy's attention by small businesses as potentially ripe for regulatory reform. With Advocacy's encouragement, the FAR Council agreed and published a final rule that made this mandatory

retainage discretionary. This rule is discussed in more detail later in Section 3 of this report.⁴

Judicial Review

In FY 2010, no significant federal cases involving a claim under the RFA have been reported.

Advocacy and the RFA in FY 2010

As a result of improvements to the RFA, Advocacy's work on behalf of small businesses has required greater and greater involvement in the federal rulemaking process. As agencies have become more familiar with the role of Advocacy and have adopted the cooperative approach Advocacy encourages, the office has had more success in urging burden-reducing alternatives. In FY 2010, this more cooperative approach yielded \$14.9 billion in foregone regulatory costs (Tables 2.2 and 2.3).

⁴ See the FAR discussion in Table 2.2 on p. 11 and the text on p.33.

Table 2.1 Regulatory Comment Letters Filed by the Office of Advocacy, FY 2010

Date	Agency	Comment Subject
10/21/09	FAA	Comments regarding the advance notice of proposed rulemaking on Safety Management System, <i>74 Fed. Reg.</i> 36414.
10/30/09	NOAA	Comments regarding a proposed rule addressing the administration and operations of the regional fishery management councils, <i>74 Fed. Reg.</i> 13386.
11/10/09	NOAA	Comments regarding the reduction in total allowable catch of Atlantic herring.
11/20/09	State	Comments regarding a proposed rule to impose new requirements on designated program sponsors that coordinate Exchange Visitor Programs, <i>74 Fed. Reg.</i> 48177.
11/27/09	EPA	Comments regarding the amendment to the opt out and recordkeeping provisions in the renovation, repair, and painting program, <i>74 Fed. Reg.</i> 55506.
12/04/09	HHS	Comments regarding the implementation of standards for living organisms in ships' ballast water discharged in U.S. waters, <i>74 Fed. Reg.</i> 44631.
12/11/09	FDA	Comments assisting FDA in the preparation of an initial regulatory flexibility analysis for future proposed rules promulgated under the Family Smoking Prevention and Tobacco Control Act, <i>74 Fed. Reg.</i> 31457.
12/16/09	OSMRE	Comments regarding the notice of advanced rulemaking concerning the stream buffer zone and related rules, <i>73 Fed. Reg.</i> 62663.
12/23/09	HUD	Comments regarding the proposed rule to implement procedures to streamline, modernize, and strengthen the mortgage insurance functions and responsibilities of FHA, <i>74 Fed. Reg.</i> 62521.
12/23/09	FRS	Comments regarding a proposed rule to revise the rules for disclosure of closed-end credit secured by real property or a consumer's dwelling, <i>74 Fed. Reg.</i> 43231.

Date	Agency	Comment Subject
12/23/09	OMB	Comments regarding improving implementation of the Paperwork Reduction Act, <i>74 Fed. Reg. 55269</i> .
12/23/09	EPA	Comments regarding the prevention of significant deterioration and Title V greenhouse gas tailoring rules, <i>74 Fed. Reg. 55292</i> .
01/28/10	SBA	Comments regarding SBA's proposed rule seeking to provide regulatory revisions to its 8(a) and socially and economically disadvantaged business programs, <i>74 Fed. Reg. 20666</i> .
02/19/10	DHS-TSA	Comments regarding a proposed rule to require domestic and foreign repair stations to implement a standard security program, <i>74 Fed. Reg. 59873</i> .
03/05/10	FCC	Comments urging that the FCC start the process of redefining size standards with the SBA for the National Broadband Plan, GN Docket. No. 09-51.
03/11/10	FWS	Comments regarding the designation of critical habitat for bull trout, <i>75 Fed. Reg. 2269</i> .
03/12/10	DOT	Comments regarding the proposed regulation of the transport of lithium batteries, <i>75 Fed. Reg. 1302</i> .
03/15/10	HHS	Comments regarding Medicare and Medicaid's electronic health record incentive program, <i>75 Fed. Reg. 1844</i> .
04/20/10	EPA	Comments regarding effluent limitations guidelines and standards for the construction and development point source category, <i>74 Fed. Reg. 62995</i> .
05/03/10	SBA	Comments regarding the Women-owned Small Business Federal Contract Program, <i>75 Fed. Reg. 10029</i> .
05/10/10	FWS	Comments regarding the listing of the boa constrictor, four python species, and four anaconda species as injurious reptiles, <i>75 Fed. Reg. 11808</i> .
05/10/10	DOL	Comments regarding a proposed regulation requiring that federal service contractors offer qualified employees a right of first refusal of employment, <i>75 Fed. Reg. 13381</i> .

Date	Agency	Comment Subject
05/10/10	FSIS	Comments regarding the FSIS letter and attached agency guidance concerning the validation requirements for meat and poultry establishments.
05/11/10	FCC	Comments regarding a petition for rulemaking requesting that the FCC amend and supplement its retransmission consent rules, MB Docket No. 10-71.
05/20/10	DOL	Comment commending the Employee Benefits Security Administration for taking into account the concerns of the small business community in its announcement regarding a new e-signature option for Forms 5500, Release Number 10-680-NAT, May 13, 2010.
06/01/10	OMB	Comments regarding Work Reserved for Performance by Federal Government Employees, <i>75 Fed. Reg.</i> 16188.
06/02/10	EPA	Reply to the notification letter regarding a Small Business Advocacy Review Panel for the forthcoming regulatory proposal, New Source Performance Standards: Residential Wood Heaters.
06/09/10	EPA	Comments regarding the adoption of the 2010 draft report submitted by the Inorganic Arsenic Cancer Review Work Group.
07/08/10	CPSC	Comments regarding imposition of safety standards for bassinets and cradles, <i>75 Fed. Reg.</i> 22303.
07/09/09	OCC, FRB, OTS, NCUA, FCA, FDIC	Comments on the joint proposed rulemaking on Registration of Mortgage Loan Originators, <i>74 Fed. Reg.</i> 27385.
07/30/10	EPA	Comments regarding the identification of nonhazardous secondary materials that are solid waste, <i>75 Fed. Reg.</i> 31843.
08/09/10	HHS	Comments regarding a proposed rule limiting the use of subcontractors in the response to or recovery from a natural disaster or act of terrorism or other manmade disaster, <i>75 Fed. Reg.</i> 32723.
08/19/10	OSHA	Comments regarding a proposed rule imposing standards intended to reduce the number of fall-related employee injuries and fatalities, <i>75 Fed. Reg.</i> 28861.

Date	Agency	Comment Subject
08/20/10	PTO	Comments regarding the Enhanced Examination Timing Control Initiative, <i>75 Fed. Reg.</i> 31763.
08/23/10	EPA	Comments regarding national emission standards for hazardous air pollutants for major and area sources, <i>75 Fed. Reg.</i> 32006, <i>75 Fed. Reg.</i> 31896.
09/01/10	EPA	Reply to the notification letter regarding a Small Business Advocacy Review Panel for the forthcoming regulatory proposal for storm-water regulations to address discharges from developed sites.
09/08/10	ED	Comments regarding the definition of gainful employment, <i>75 Fed. Reg.</i> 43615.
09/09/10	HHS	Comments regarding modifications to the HIPAA privacy, security, and enforcement rules under the Health Information Technology for Economic and Clinical Health Act, <i>75 Fed. Reg.</i> 40867.
09/14/10	HHS	Comments regarding changes in certification requirements for home health agencies and hospices, <i>75 Fed. Reg.</i> 43235.

Table 2.2 Regulatory Cost Savings, FY 2010

Agency	Subject Description	Cost Savings/ Impact Measures
EPA	<p><i>Hazardous Pollution Rule for Prepared Animal Feed Manufacturing.</i> On January 5, 2010, the Environmental Protection Agency (EPA) published its final rule. The rule requires animal feed manufacturers to install new pollution controls and implement work practices to limit air toxics such as manganese and chromium. Based in part on Advocacy’s recommendation, EPA has decided not to require manufacturers with average daily feed production levels below 50 tons per day to install and operate particulate control devices, known as cyclones. Also, control devices will be required only for pelleting and pellet cooling operations, not for other parts of the operation.</p>	<p>Because the control device requirements are limited to larger operations, anticipated first-year cost savings are \$7 million, with annual cost savings of \$9 million per year.</p>
FAA	<p><i>Certification Procedures and Identification Requirements for Aviation Parts and Articles.</i> On October 16, 2009, the Federal Aviation Administration (FAA) finalized a rule that amends its certification procedures. The rule updates and standardizes requirements for production approval holders, revises export airworthiness approval requirements to facilitate global manufacturing, consolidates parts marking rules, and amends the identification requirements for parts and articles. Advocacy discussed FAA’s proposed rule at its regular aviation safety roundtable and then hosted a conference call on January 29, 2007, for interested small business representatives and aviation parts manufacturers to obtain their input and discuss small business concerns with the proposed rule. In response to Advocacy’s comments, FAA revised the final rule to eliminate several provisions, including a requirement for airworthiness approvals (Form 8130-3) for all foreign and domestic shipments of aviation parts and for marking all components and subcomponents within an assembly.</p>	<p>According to FAA, these revisions eliminated \$327.1 million or 99.1 percent of the (undiscounted) cost of the rule, most going to small firms. In addition, FAA followed Advocacy’s recommendation by clarifying that the requirements for quality systems were scalable to the size and complexity of the business, resulting in additional, but unquantified savings to small business.</p>

Agency Subject Description

Cost Savings/ Impact Measures

EPA	<p><i>Construction and Development Final Rule.</i> On February 26, 2009, Advocacy filed comments with EPA regarding the construction and development storm water proposed rule. This rule, promulgated in November 2009, regulates sediment discharges from construction sites. Advocacy recommended two regulatory alternatives to protect water quality at a considerably lower cost for small construction firms. One of those two alternatives was a passive treatment system. In the final rule, EPA adopted the passive treatment system option, saving, according to EPA, an estimated \$3.913 billion per year for the affected construction firms. (EPA November 2009 Economic Analysis, Table 2-1.)</p>	<p>Based on data from EPA’s economic analysis, Advocacy estimates that approximately one-half of the savings accrue to small firms, or \$1.957 billion annually.</p>
FAR	<p><i>Federal Acquisition Regulation; FAR case 2008-015, Payments Under Fixed-price Architect Engineer Contracts.</i> The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council published a final rule on March 19, 2010, to revise a clause applied to federal contracts for architecture and engineering (A&E) services that mandated that 10 percent of fees be withheld or retained from a firm, regardless of the quality of the firm’s performance. FAR Case 2008-015 amends the clause at FAR 52.232-10, “Payments under Fixed-price Architect-Engineer Contracts.” This final rule revises paragraph (b) of the contract clause at FAR 52.232-10 to state that contracting officers shall withhold up to 10 percent of the payment due only if the contracting officer determines that such a withholding is necessary to protect the government’s interest and ensure satisfactory completion of the contract. The amount of withholding shall be determined based upon the contractor’s performance record. This final rule also makes several related editorial changes including one that clarifies that the contractor will be paid any unpaid balance, including withheld amounts, at the successful completion of the A&E services work.</p>	<p>Advocacy has been able to quantify only the up-to clause. Anticipated first-year cost savings are \$335 million, with annual cost savings of \$335 million.</p>

Agency	Subject Description	Cost Savings/ Impact Measures
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EPA	<p><i>National Emission Standards for Hazardous Air Pollutants Reciprocating Internal Combustion Engines, 75 Fed. Reg. 9648 (March 3, 2010).</i> In June 2009, Advocacy submitted comments on the EPA proposed rule, National Emission Standards for Hazardous Air Pollutants for Reciprocating Internal Combustion Engines. This rule affects hundreds of thousands of small businesses that employ engines for a variety of purposes. These engines are used at facilities such as power plants and chemical and manufacturing plants to generate electricity and to power pumps and compressors. Such small businesses include those in oil and gas production, natural gas pipeline companies, and agriculture (e.g., for irrigation pumps). In March 2010, EPA promulgated the final rule affecting diesel (compression ignition or CI) engines. The agency plans to complete the rulemaking for spark ignition engines.</p>	<p>Through a variety of concessions by the agency, first-year cost savings total \$291 million, with annual cost savings of \$291 million.</p>
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EPA	<p><i>Clean Air Act Greenhouse Gas Regulations.</i> On June 3, 2010, EPA published a final rule that defers Clean Air Act greenhouse gas (GHG) requirements for many small businesses for up to six years. The “tailoring” rule sets thresholds for GHG emissions that define when businesses must obtain a permit to modify or construct under the Prevention of Significant Deterioration (PSD) program or a permit to operate under the Title V permit program. The rule defers the requirements of these permitting programs to limit which facilities will immediately be required to obtain PSD and Title V permits. Existing small businesses with potential carbon dioxide emissions (or equivalent emissions of other GHGs) of less than 75,000 tons per year will not be subject to PSD and Title V permitting requirements until at least July 1, 2013. Advocacy recommended in a June 2009 public comment letter that EPA adopt an applicability threshold of at least 25,000 tons/year of CO₂. Advocacy subsequently recommended a 100,000 ton/year CO₂ threshold in a December 2009 public comment letter.</p>	<p>EPA estimates that the permitting deferrals contained in the final rule will yield one-year cost savings for small entities of \$9.1 billion.</p>
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Agency Subject Description

Cost Savings/
Impact Measures

SEC

Section 404(b) of the Sarbanes-Oxley Act of 2002 (SOX). As required by SOX, the U.S. Securities and Exchange Commission (SEC) published final rules on June 18, 2003, that would require thousands of small businesses that raise funds from public investors to report on internal controls and audit procedures, and to obtain costly outside auditor evaluations and attestations of their reports. However, once the rules were in effect for larger companies, it became clear that they would cost much more. Actual compliance costs for smaller public companies with less than \$75 million in market capitalization turned out to be closer to \$1 million per firm. Advocacy urged the SEC to delay the first and subsequent compliance deadlines for the rules for small entities, and to form a smaller public company advisory committee to study the problem and make recommendations. The SEC acted decisively to avoid unintended harm to small entities, implementing temporary delays. In 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) permanently exempted public companies with a market capitalization of less than \$75 million from the external audit of internal control requirements of SOX section 404(b).

According to the data collected by industry on actual compliance costs, the Dodd-Frank Act exemption could save small public companies nearly \$2.9 billion in first-year compliance costs, and \$2.9 billion in annual compliance costs.

Agency	Subject Description	Cost Savings/ Impact Measures
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SBA	<p><i>Women-owned Small Business Contract Program.</i> In 2000, Congress established the Women-owned Small Business program as a tool to enable contracting officers to identify and establish a sheltered market for competition among women owned small businesses (WOSB) for the provision of goods and services. Over the 10-year period, the Office of Advocacy has reviewed and provided comments to SBA on the economic impact of the various proposed regulatory ideas. The final regulation made great progress in trying to reduce the economic cost of compliance for small women-owned businesses while staying within the framework of the authorizing statute that created the WOSB program. Cost savings are the result of SBA agreeing to have a self-certification process for WOSBs and removing the requirement for WOSBs to be re-certified every three years. In addition to the cost savings to WOSBs shown below, SBA attempted to calculate the cost to agencies of determining if there has been discrimination against WOSBs or economically disadvantaged WOSBs in the designated industry groups. Given the dearth of data, SBA has offered as an estimate its costs to fund a governmentwide study by the Rand Corporation. The study, conducted to identify the industries in which WOSBs were underrepresented, cost approximately \$250,000. SBA estimates that similar studies that would have been conducted by agencies in this regard should not exceed that figure, if they must seek outside assistance to make their determinations.</p>	<p>As a result of efforts by SBA, anticipated cost savings to WOSBs will approximate \$34.9 million in first-year compliance costs and \$3.5 million per year in later year re-certification costs.</p>
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**Table 2.3 Summary of Cost Savings, FY 2010¹
(dollars)**

Rule/ Intervention	First-year Costs	Annual Costs
Hazardous Air Pollution Rule for Prepared Animal Feed Manufacturing (EPA) ²	7,000,000	9,000,000
Certification Procedures and Identification Requirements for Aviation Parts and Articles (FAA) ³	327,100,000	
Construction and Development Final Rule (EPA) ⁴	1,957,000,000	1,957,000,000
FAR Case 2008-015, Payments under Fixed-price Architect Engineer Contracts (FAR) ⁵	335,000,000	335,000,000
Reciprocating Internal Combustion Engines (EPA) ⁶	291,000,000	291,000,000
Clean Air Act Greenhouse Gas Regulations GHG “tailoring” (EPA) ⁷	9,143,099,941	
Women-owned Small Business ⁸	34,875,000	3,487,500
Sarbanes-Oxley ⁹	2,899,500,000	2,899,500,000
TOTAL	14,994,574,941	5,494,987,500

1. The Office of Advocacy generally bases its cost savings estimates on agency estimates. Cost savings for a given rule are captured in the fiscal year in which the agency agrees to changes in the rule as a result of Advocacy’s intervention. Where possible, Advocacy limits the savings to those attributable to small business. These are best estimates. First-year cost savings consist of either capital or annual costs that would be incurred in the rule’s first year of implementation. Recurring annual cost savings are listed where applicable.

2. Source: EPA.

3. Source: FAA.

4. Source: EPA November 2009 Economic Analysis, Table 2-1.

5. Source: FPDS-NG Data.

6. Source: EPA RIA Feb 2010, Table 4-4.

7. Source: EPA RIA, Table 4-7.

8. Source: SBA.

9. Source: FERF Survey.

3 Advocacy Review of Agency RFA Compliance in Fiscal Year 2010

Since the enactment of the Regulatory Flexibility Act in 1980, the Office of Advocacy has worked consistently with federal agencies to examine the effects of their proposed regulations on small entities. Advocacy demonstrates its commit-

“It’s a relief to realize that someone in government is paying attention to the plight of independent fishermen and processors. It puts a little faith back in my perception of our process.”

—Jeff Reichle, Lunds Fish

ment to working with agencies to reduce the burden of federal regulations on small entities by providing written interagency communications, public comments, RFA training, and congressional testimony, and by hosting RFA panels and roundtables. Over the years, communication and coordination between other federal agencies and

the Office of Advocacy has increased in the effort to address small business concerns in policy deliberations. The following section provides an overview of RFA and E.O. 13272 compliance by agency in fiscal year 2010.

Department of Agriculture

E.O. 13272 Compliance

The U.S. Department of Agriculture (USDA) has complied with section 3(a) of E.O. 13272 by making its policies for considering small business impacts when promulgating regulations publicly available on the website. The following agencies within USDA generally comply with section 3(b) of E.O. 13272 by notifying Advocacy of rules that may have a significant economic impact on a substantial number of small entities: the Animal and Plant Health Inspection Service (APHIS), the Agricultural Marketing Service, the Grain Inspection, Packers, and Stockyards Administration, and the Forest Service. The U.S.

Forest Service has consistently reached out to Advocacy to increase its understanding of the RFA and continues to contact Advocacy well in advance of publishing rules that could have a significant economic impact on a substantial number of small entities. Advocacy did not file any public comments with the Forest Service in FY 2010; therefore, compliance with section 3(c) cannot be assessed. Advocacy provided RFA training to APHIS on January 13, 2010.

Department of Commerce

E.O. 13272 Compliance

The Department of Commerce (DOC) continues to comply with the requirements of E.O. 13272. Its RFA policies are publicly available in compliance with section 3(a) of E.O. 13272, and DOC’s agencies notify Advocacy of draft rules as required by section 3(b) of E.O. 13272. For example, the National Marine Fisheries Service (NMFS) not only notifies Advocacy of its draft rules, but also routinely submits them to the Office of Advocacy for interagency review. Similarly, in the last year, the U.S. Patent and Trademark Office (PTO) complied with section 3(b) of E.O. 13272 by notifying Advocacy of its draft rules and submitting them to Advocacy. In general, DOC and its agencies comply with section 3(c) of E.O. 13272 by giving appropriate consideration to comments made by Advocacy during the rulemaking process.

National Oceanic and Atmospheric Administration

Issue: Modification of the Herring Midwater Trawl Gear Authorization Letter. On September 4, 2009, NMFS published a proposed rule on fisheries of the Northeastern United States;

Modification of the Gulf of Maine/Georges Bank Herring Midwater Trawl Gear Authorization Letter. For vessels fishing in Closed Area I (CA I), the proposed rule modifies the requirements for midwater trawl vessels that have been issued Atlantic herring limited access permits for all areas and/or Areas 2 and 3. To fish in CA I, midwater trawl vessels with these permits would be required to carry a NMFS-approved observer and to bring the entire catch aboard the vessel, unless specific conditions are met, so that it is available to the observer for sampling. The proposed changes to the Gulf of Maine/Georges Bank Herring Midwater Trawl Gear Letter of Authorization would be effective indefinitely, until changed by a subsequent action.

NMFS certified that the rule would not have a significant economic impact on a substantial number of small entities. However, after talking to industry representatives, Advocacy staff concluded that the rule's impacts may be significant. On September 24, 2009, Advocacy filed comments on the proposed rule. Advocacy advised NMFS that certification may be inappropriate and that an IRFA may be warranted. Advocacy recommended that NMFS consider alternatives such as lifting the prohibition on fishing without an observer if no observer is available, clarifying the phrase "unless the fish has been brought aboard the vessel" to prevent fishers from being penalized unnecessarily, giving full consideration to the industry's rewritten version of the dogfish exemption, and allowing a vessel to discontinue fishing in Closed Area I but keep the fish if it has to discontinue a trip due to a mechanical failure or safety concern.

NMFS published the final rule in November 2009. In the final rule, NMFS modified the proposed rule on Closed Area I access and allowed vessels to continue fishing in other areas if they leave Closed Area I for a mechanical failure or safety reason, as Advocacy and the industry requested. Also, NMFS incorporated some of the suggestions regarding exemptions.

Issue: Herring Stock Assessment. On November 10, 2009, the Office of Advocacy submitted a

letter to the National Oceanic and Atmospheric Administration regarding the specifications for the Atlantic herring fishery. In June 2009, the Transboundary Resources Assessment Committee (TRAC) performed a stock assessment. As a result of the TRAC report, the Science and Statistical Committee (SSC) set the acceptable biological catch (ABC) at 90,000 metric tons, which reduced the current ABC by more than 50 percent. However, the SSC recognized that there was substantial uncertainty in the June 2009 assessment; the New England Fishery Management Council (NEFMC) stated that the herring fishery was not overfished and that the data from the TRAC assessment were questionable. Advocacy asserted that reducing the ABC by greater than 50 percent may have a devastating effect on small businesses in the herring fishery, the lobster fishers who rely on herring for bait, and the small communities from New Jersey to Maine that are dependent on the fish stock for economic vitality. Advocacy stated that employing a wider range of scientific information is necessary to ensure that unnecessary economic harm is not visited on small entities. The office encouraged NMFS to perform a new benchmark assessment for the Atlantic herring fishery. Advocacy further encouraged NMFS to extend the 2009 specifications to 2010 in the meantime and to utilize maximum flexibility in considering alternatives.

The NEFMC met in mid-November to talk about herring. In the end, they voted to recommend that the allowable catch for herring be 106,000 MT rather than 90,000 MT. The 106,000 MT limit was based on the three-year average catch from 2006-2008.

This is an example of how Advocacy is involved early in the process. There was no proposed rule. The letter was in reference to the science that will be used for proposed herring catch rules for the next two years. By addressing the issue of the science early on, the chances of

NMFS considering less burdensome alternatives for small entities will increase.

Issue: Regional Fishery Management Councils. On October 30, 2009, the Office of Advocacy submitted a comment on the NMFS proposed rule on the Magnuson-Stevens Fishery Conservation and Management Act; Regional Fishery Management Councils; Operations. Although the agency complied with the RFA in the proposal, Advocacy submitted comments because of the impact the proposal would have on future activities that will affect small entities.

The proposed rule addressed the administration and operations of the regional fishery management councils and made changes to the regulations requiring councils to provide procedures for proposed regulations, clarifying restrictions on lobbying, and clarifying timing in the council nomination process. Advocacy commended NMFS for proposing a rule that will increase the transparency of the process. While many of the initiatives will benefit small entities, Advocacy noted, some areas of the proposal could be improved.

The proposal required the councils to post their Statement of Organization, Practices and Procedures (SOPPs) on the Internet. Advocacy supported that aspect of the proposal and encouraged NMFS to continue to allow the public to request a copy by mail or in person to ensure access for all. The proposal also required each council to establish clear internal procedures for proposed regulations and to make them available to the public to inform the public of how it operates. Advocacy encouraged NMFS to provide more guidance on the substance of the procedures and to establish a minimum set of standards for information available on a council's website.

The proposed rule also specified a revised means for announcing meetings of a council, scientific and statistical committees, advisory panels, other committees, and the council coordination committee. The revised regulations allow for notice of regular, emergency, and closed meetings by any means that will result in wide publicity in the major fishing ports of the region and other ports with an interest in any of the fisheries likely to be addressed in the proceedings. Advocacy supported this aspect of the proposal. Finally, the proposal further required members of SSCs to file financial disclosures. Advocacy encouraged NMFS to include grants, income, and other forms of compensation in the disclosure of financial interests from the groups that are listed.

NMFS finalized most of the rule on September 27, 2010, noting that the elements on stipends for SSCs and advisory panels needed additional review. Among other things, in the final rule, NMFS concurred that SOPPs should be made available in print form as well as on the Internet. NMFS also stated that councils are to maintain in the council office copies of documents that are too large to place on the website and that meeting notices should be provided in advance and through the use of media including industry publications. NMFS also agreed that transparency and consistency are important. Each NMFS regional office, the council, the council attorney advisor from NOAA, NOAA's Office of the General Counsel, and the General Counsel for Fisheries will collaborate to ensure that the procedures are efficient, responsive to specific regional needs, consistent with the Magnuson Stevens Act, and transparent from the public's perspective. NMFS further stated that it is revising the financial disclosure form to clarify what sources and types of income are reportable.

U.S. Patent and Trademark Office

Issue: Enhanced Examination Timing Control Initiative. On June 4, 2010, the United States Patent and Trademark Office (PTO) published a

“Time and time again, Advocacy has stood by small business fishermen, proving itself to be an invaluable resource for this highly regulated industry.”

—Shaun M. Gehan, Kelley Drye & Warren, LLP

notice and request for comments on a proposed initiative that would provide applicants with the ability to choose between three “tracks” for the timing of examination of their applications. These include a prioritized track for rapid examination, examination under the current procedure, and a track allowing for up to a 30-month delay. Advocacy submitted public comments on the proposal, which, while expressing general support for the agency’s efforts to create a faster and more efficient patent review process, urged the agency to consider concerns of small businesses and their representatives. These concerns included fees and other requirements associated with the election of the rapid examination track and the delayed track. The agency has not proceeded with rulemakings to implement this proposal in FY 2010.

Department of Defense

E.O. 13272 Compliance

The Federal Acquisition Regulation Council (FAR Council) promulgates procurement regulations that are governmentwide and affect small businesses. The FAR Council statutorily includes representation from the Department of Defense (DOD), the General Services Administration, and the National Aeronautics and Space Administration (NASA). The DOD regulations, called the Defense Federal Acquisition Regulation Supplement, are specific to DOD and can only supplement the FAR Council regulations. The FAR Council and DOD regulatory processes are interrelated and DOD’s procedures comply with section 3(a) of E.O. 13272. DOD notifies Advocacy of its draft rules in compliance with section 3(b) of E.O. 13272, and routinely submits prepublication rulemakings for Advocacy’s consideration. In compliance with Section 3(c), DOD has given appropriate consideration to comments provided by Advocacy. For the most part, these comments have been discussed and considered during inter-agency deliberations. DOD staff participated in two RFA training sessions in FY 2010.

Department of Education

E.O. 13272 Compliance

The Department of Education has made its policies and procedures publicly available as required by section 3(a) of E.O. 13272. Education notifies Advocacy of draft rules that may have a significant economic impact on a substantial number of small entities, as required by section 3(b) of E.O. 13272. Advocacy filed one public comment letter with the Department of Education in FY 2010; however, that rule was not finalized. Therefore Education’s compliance with 3(c) cannot be assessed.

Issue: Program Integrity: Gainful Employment. On July 26, 2010, the Department of Education’s Office of Postsecondary Education published a proposed rule that establishes measures for determining whether certain postsecondary educational programs lead to gainful employment in recognized occupations, for the purposes of determining eligibility for the student financial assistance programs authorized under title IV of the Higher Education Act of 1965, as amended. Advocacy was contacted by small institutions and their representatives, who have expressed concern regarding the economic impact of the proposal on small schools. Advocacy drafted a public comment letter relaying the small institutions’ concerns and urging the agency to consider alternatives that would be less burdensome on small schools. Due to the large number of comments and concerns submitted regarding this rule, the agency opted to delay publication of the final rule until 2011.

Department of Health and Human Services

E.O. 13272 Compliance

The Department of Health and Human Services (HHS) has complied with section 3(a) of E.O. 13272 by making its policies and procedures publicly available online. Agencies within HHS do not consistently notify Advocacy of draft proposed rules pursuant to section 3(b) of E.O. 13272. In general, HHS and its agencies comply with section 3(c) of E.O. 13272 by giving appropriate consideration to comments made by Advocacy during the rulemaking process.

Issue: Modification to Health Insurance Portability and Accountability Act (HIPAA) Privacy, Security and Enforcement Rules under the Health Information Technology for Economic and Clinical Health Act (HITECH). On July 14, 2010, HHS published a proposed rule whose purpose was to modify and implement recent statutory amendments under the HITECH Act, to strengthen the privacy and security protection of health information, and to improve the workability and effectiveness of the HIPAA rules. The original HIPAA rules generally applied to three types of “covered entities”—health care providers who conduct covered health care transactions electronically, health plans, and health care clearinghouses. The proposed rule extended the HIPAA privacy and security regulations to the “business associates” of covered entities. The HIPAA rules define “business associate” generally to mean a person who performs, on behalf of a covered entity, functions, activities, or certain services that involve the use or disclosure of protected health information. Business associates include “third party administrators or pharmacy benefit managers for health plans, claims processing or billing companies, transcription companies, and persons who perform legal, actuarial, accounting,

management, or administrative services for covered entities and who require access to protected health information.”

Despite treating all of the affected health care entities as small for the purposes of this rule, HHS chose to certify that this regulation will not have a significant economic impact on a substantial number of small businesses under Section 605 of the RFA. Advocacy’s comments voiced concern about the computation by HHS of the costs of the rule. Affected small entities had approached Advocacy with their belief that the business associate provisions of the rule would result in a significant burden on their businesses.

Centers for Medicare and Medicaid Services

Issue: Medicare Program: Home Health Prospective Payment System Rate Update for Calendar Year 2011; Changes in Certification Requirements for Home Health Agencies and Hospices. On July 23, 2010, the Centers for Medicare and Medicaid Services (CMS) published in the *Federal Register* a proposed rule that would update the Home Health Prospective Payment System (HHPPS) rates effective January 1, 2011, update the wage index and outlier used under the HHPPS, and institute changes to the home health agency capitalization requirements, among other changes. CMS also certified under the RFA that the rule would not have a significant economic impact on a substantial number of small businesses. Advocacy was approached by small home health care agencies and their representatives because they believed that, contrary to the CMS certification, the regulation would significantly affect their businesses and potentially beneficiary access to quality care. These concerns primarily involved the rule’s proposed changes to their certification and capitalization requirements. On September 14 and October 4, 2010, Advocacy filed public comments with CMS asking that the agency revisit its certification by preparing an initial regulatory

flexibility analysis based on the economic impact arguments raised by affected home health care agencies.

Department of Homeland Security

E.O. 13272 Compliance

The Department of Homeland Security (DHS) has made progress in complying with E.O. 13272. DHS has posted its RFA policy on its website, as required by section 3(a) of E.O. 13272. The Transportation Security Administration (TSA) was trained in RFA compliance in FY 2005 and FY 2010, and the United States Coast Guard (USCG) was trained in FY 2005, FY 2008, and FY 2010. In FY 2010, Advocacy did an advanced RFA training course for members of the DHS General Counsel's Office, as well as DHS staff from Immigration and Customs Enforcement (ICE), the U.S. Citizenship and Immigration Service (USCIS), and the Office of the Chief Procurement Officer (OCPO). DHS did not submit all draft rules that may have a significant economic impact on a substantial number of small entities to Advocacy in FY 2010, as required by 3(b). However, USCIS did submit all draft rules to Advocacy, whether or not they had a significant economic impact on a substantial number of small entities. DHS did not publish any final rules in FY 2010 that were the subject of Advocacy comments; therefore, compliance with section 3(c) of E.O. 13272 cannot be assessed. Advocacy submitted comments to DHS on TSA's proposed Aircraft Repair Station rule; however, this rule was not finalized in FY 2010.

Issue: Limitations on Subcontracting in Emergency Acquisitions. On August 9, 2010, Advocacy submitted comments on DHS's proposed Revision of the Department of Homeland Security Acquisition Regulation: Limitations on Subcontracting in Emergency. DHS's proposed rule would limit the use of subcontractors by

prime contractors on cost-reimbursement-type emergency contracts above the simplified acquisition threshold.

U.S. Coast Guard

Issue: Standards for Living Organisms in Ships' Ballast Water Discharged in U.S. Waters. On December 4, 2009, Advocacy filed comments with the U.S. Coast Guard (USCG) regarding its proposed rule amending its regulations for ballast water management by establishing standards for the allowable concentration of living organisms in ships' ballast water discharged in U.S. waters. The rule would aid USCG's efforts to manage the introduction and spread of nonindigenous and invasive species into U.S. waters. USCG has not yet published a final rule.

USCG's current regulations for the management of ballast water discharge require that all vessels equipped with ballast after tanks and bound for ports or places of the United States conduct mid-ocean ballast water exchange, retain their ballast water on board, or use another USCG-approved ballast water management method. In lieu of ballast water exchange, USCG proposed regulations establishing a two-phased ballast water discharge standard for the concentration of living organisms that can be discharged in ballast water and establishing an approval process for ballast water management systems intended for use on board vessels that would be used to treat ballast water to ensure it meets the standard.

The Coast Guard's initial regulatory flexibility analysis did not examine a significant portion of the shipping industry composed mainly of small businesses. Advocacy requested that the Coast Guard expand its IRFA to include an analysis of the rule's impact for businesses operating vessels under 100 feet in length, river vessels, and tugboats. Advocacy also encouraged the Coast Guard to examine the relative benefits of imposing the new standards for small vessels

with relatively low-volume ballast tanks after it completes an expanded analysis.

Small businesses in the supply vessel industry contacted Advocacy and explained that a large number of their vessels use only municipal water in their ballast tanks. Because municipal water has not been shown to contribute to the spread of invasive species, Advocacy urged the Coast Guard to craft an exemption for vessels that use only municipal water in their ballast tanks.

The proposed rule also includes a five-year grandfathering provision for those vessels that comply with the phase one standard prior to January 1, 2016. Because the ballast water management systems required by the rule will be very costly to small businesses, Advocacy urged the Coast Guard to adopt a grandfathering provision that would apply for the life of a typical ballast water treatment system.

Department of Housing and Urban Development

E.O. 13272 Compliance

The Department of Housing and Urban Development (HUD) has made its policies and procedures available to the public in compliance with section 3(a) of E.O. 13272. HUD consistently notifies Advocacy of rules that may have a significant economic impact on a substantial number of small entities as required by section 3(b) of E.O. 13272. HUD received RFA training in FY 2005. HUD published a final rule in FY 2010 that was the subject of an Advocacy public comment and addressed Advocacy's comments in the final rule in compliance with section 3(c).

Issue: Continuation of FHA Reform: Strengthening Risk Management Through Responsible FHA-approved Lenders. On December 23, 2009, the Office of Advocacy submitted a comment letter to the Department of Housing and Urban Development, Federal Housing

Administration (FHA) on its proposed rulemaking on Continuation of FHA Reform-Strengthening Risk Management Through Responsible FHA-Approved Lenders. The purpose of the proposed rule was to streamline, modernize, and strengthen the mortgage insurance functions and responsibilities of FHA. These responsibilities are authorized by provisions contained in the National Housing Act, as amended by the FHA Modernization Act of 2008 and further supported by the Helping Families Save Their Homes Act of 2009. FHA proposed to no longer approve loan correspondents as participants in FHA programs. Mortgagees would be required to ensure that their loan correspondents meet applicable requirements. The proposal would also increase the net worth requirement for FHA-approved mortgagees for the purpose of ensuring that approved mortgagees are sufficiently capitalized.

FHA prepared a certification for the RFA section of the preamble. After working with industry representatives, Advocacy questioned the basis of this certification. Advocacy asserted that at least 40 percent of the approved mortgagees had a net worth that was less than \$1 million. Although HUD did not state that these approved mortgagees were small, it is fair to assume that at least 40 percent probably are small, given their net worth. The new net worth requirements will eliminate a large number of smaller wholesale lenders who are currently servicing mortgage brokers. Those lenders will lose the current income they receive by participating in the FHA program, and mortgage brokers may have a difficult time finding new lenders to obtain the FHA product. Because only FHA-approved mortgagees are allowed to request FHA case numbers and other information, the proposal interferes with a correspondent's ability to obtain information for FHA loans or access FHA's website. The lack of access is time-consuming and potentially costly if the customer decides to go elsewhere for the loan. Advocacy encouraged FHA to prepare an IRFA to determine the economic impact this proposal may have on small entities and to

consider less costly alternatives such as a net worth requirement that is not so excessive.

FHA finalized the rule in April 2010. As a result of Advocacy's involvement, the final rule provided for a more gradual transition to new net worth requirements for lenders that meet SBA's definition of a small business.

Department of the Interior

E.O. 13272 Compliance

The Department of the Interior (DOI) has complied with section 3(a) of E.O. 13272 by maintaining its RFA policies on its website. Not all of DOI's agencies comply with section 3(b) of E.O. 13272 by notifying Advocacy of draft rules that may have a significant economic impact on a substantial number of small entities. The U.S. Fish and Wildlife Service (FWS) fails to so notify Advocacy. The Office of Advocacy filed three public comment letters with DOI in FY 2010, discussed below. For rules that were ultimately published as final rules in FY 2010, DOI complied with section 3(c) of E.O. 13272 by responding to Advocacy's written comments.

Fish and Wildlife Service

For most of its rules proposing to designate critical habitat under the Endangered Species Act, FWS has not complied with the RFA by publishing an IRFA or a certification for public comment concurrently with its proposed rules. Instead, FWS often delays the publication of its RFA analysis until very late in the rulemaking process. Advocacy believes that these delays in completing RFA analyses hinder the ability of affected small entities to provide meaningful comment on the agency's proposals. Advocacy provided FWS with two public comment letters in FY 2010, discussed below.

Issue: Revised Critical Habitat for the Bull Trout in the Coterminous United States. On March 11, 2010, Advocacy filed comments with

FWS regarding its proposal to revise its critical habitat designation for the bull trout under the Endangered Species Act. Because conservation measures for endangered salmon, steelhead, Klamath suckers, and other protected fish were already in place within the designated areas, FWS concluded that the incremental economic impact of the proposed designation would be small. FWS indicated that the most significant economic impact would occur within the areas of proposed critical habitat that were not already occupied by bull trout, but are necessary for the conservation of the species.

Advocacy noted that several small entities, including county governments and other small municipal bodies, had filed comments expressing their concern regarding the impact of the designation on their localities. The office urged FWS to conduct further outreach with commenters to determine whether or not the economic impacts were of such a magnitude that FWS could exclude particular areas from its final designation, as allowed under Section 4(b)(2) of the act. Advocacy also commended FWS for publishing its IRFA at the time it published the proposed rule, instead of delaying the analysis as it has done in other instances. FWS finalized the critical habitat for the bull trout in October 2010 after determining that it would not exclude any areas from its proposal based on economic impacts.

Issue: Proposal to List the Boa Constrictor, Four Python Species, and Four Anaconda Species as Injurious Reptiles. On May 10, 2010, Advocacy filed public comments with FWS regarding its proposal to list nine species of constrictor snakes as injurious wildlife under the Lacey Act. If the rule is finalized, importation and interstate transport of the species listed will be prohibited, unless authorized by permit for scientific, medical, educational, or zoological purposes. Many of the species proposed for listing are widely sold to individuals who keep these animals as pets, and a large industry has grown up to support the hobby.

On April 21, 2010, Advocacy hosted a small business roundtable attended by members of the small business communities potentially affected by the proposed listing. Participants included constrictor snake breeders, reptile supply manufacturers, specialized reptile shipping companies, zoological organizations, academics, and trade associations. All participants expressed concerns that the proposed rule, if finalized, would have devastating consequences on their businesses as well as on the science of herpetology. Additionally, participants expressed concern that the Lacey Act is an inappropriate mechanism for managing feral snake populations because it would ban transport and trade of those animals between states that do not have habitat supportive of feral colonies.

In comments, Advocacy forwarded the concerns of roundtable participants and also highlighted deficiencies in the IRFA prepared for the proposed rule. Notably, Advocacy expressed concerns that the IRFA failed to identify the small entities directly affected by the rule, underestimated the economic impact of the rule on small entities, and did not discuss significant alternatives that would reduce the burden while achieving the agency's wildlife management goals. Advocacy recommended that FWS develop a supplemental IRFA that would more accurately describe the economic impacts on small entities engaged in the breeding, sale, use, and care of these snake species, and consider alternative approaches.

FWS has not made a final determination regarding whether it will list as injurious wildlife any or all of the species in the proposal at this time.

Office of Surface Mining Reclamation and Enforcement

Issue: Advance Notice of Proposed Rulemaking, Stream Buffer Zone and Related Rules; Notice of Intent to Prepare a Supplemental Environmental Impact Statement. On December 16, 2009, Advocacy filed comments with

the Office of Surface Mining Reclamation and Enforcement (OSMRE) requesting that OSMRE extend the comment period for its advance notice of proposed rulemaking (ANPRM) to allow small entities adequate opportunity to provide feedback on the alternatives presented. The ANPRM is the first step toward revising the agency's existing stream buffer zone rules to reduce the impacts on streams of Appalachian surface coal mining operations. Because the alternatives presented in the ANPRM could result in significant regulatory changes, Advocacy urged OSMRE to extend the comment period for 60 days. OSMRE ultimately decided not to extend the comment period for the rule.

Department of Justice

E.O. 13272 Compliance

The Department of Justice (DOJ) has made its policies and procedures publicly available as required by section 3(a) of E.O. 13272. DOJ notifies Advocacy through the office's email notification system of draft rules that may have a significant economic impact on a substantial number of small entities, as required by section 3(b) of E.O. 13272. DOJ finalized one rule in FY 2010 that was the subject of Advocacy's comments (amending Title III of the Americans with Disabilities Act), and the agency complied with Section 3(c) of E.O. 13272 by addressing these comments in the final rule.

Issue: Americans with Disabilities Act Regulations on Public Accommodations. On September 15, 2010, the Department of Justice published a final rule that amends the agency's regulations implementing Title III of the Americans with Disabilities Act (ADA). Title III sets standards for making buildings accessible for people with disabilities and requires existing facilities to remove barriers that conflict with these standards when such modifications are "readily achievable." DOJ's 2010 ADA Standards for Accessible Design adopt the Access Board's 2004 Americans

with Disabilities Act Accessibility Guidelines (2004 ADAAG). The agency had not changed its Title III ADA regulations since 1991.

Advocacy has been very involved with this rulemaking, submitting multiple comment letters and a report on this issue. When DOJ released its ANPRM on this issue in 2004, Advocacy submitted a public comment letter stating that the new regulations would unfairly punish the small businesses that had complied with the 1991 regulations. Advocacy recommended that DOJ adopt a general safe harbor for existing elements that complied with the 1991 ADA standards. In November 2007, Advocacy submitted a report to the U.S. Department of Justice titled *Evaluation of Barrier Removal Costs Associated with the 2004 Americans with Disabilities Act Accessibility Guidelines*. The report found that both small and large firms face substantial costs from the adoption of the barrier removal requirements in the 2004 ADAAG.

In June 2008, DOJ released a notice of proposed rulemaking (NPRM) on the 2010 ADA Standards titled Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities. DOJ's NPRM proposed two safe harbors to address the concerns of small businesses regarding the cost of adopting the 2010 standards. Under the "general" safe harbor, existing facilities' compliance with the current 1991 ADA standards may be sufficient to meet the new requirements. The small business safe harbor gives credit to small businesses that spend 1 percent of revenue on ADA modifications.

Advocacy held a small business roundtable on this rule, attended by small business stakeholders and DOJ, and wrote a comment letter based on this input. While the small business representatives were supportive of the general safe harbor, these entities were concerned that the small business safe harbor could be interpreted as a minimum spending requirement. In DOJ's final rule on the 2010 ADA standards, DOJ adopted the general safe harbor and declined to adopt the small business safe harbor.

Advocacy is in the process of calculating the cost savings for this regulation.

Department of Labor

E.O. 13272 Compliance

The Department of Labor (DOL) has made its policies and procedures publicly available as required by Section 3(a) of E.O. 13272. The Mine Safety and Health Administration (MSHA), the Occupational Safety and Health Administration (OSHA), the Employment and Training Administration, the Employment Standards Administration, the Employee Benefits Security Administration (EBSA), the Office of Labor-Management Standards (OLMS), the Office of Federal Contract Compliance Programs, the Wage and Hour Division, the Office of the Assistant Secretary for Policy, and the Solicitor's Office were trained in RFA compliance in FY 2004, FY 2009, and FY 2010.

Agencies within DOL notify Advocacy in a timely manner, through Advocacy's email notification system (OSHA, MSHA, EBSA and the Office of Worker Compensation Programs) of draft rules that may have a significant economic impact on a substantial number of small entities, as required by Section 3(b) of E.O. 13272. OSHA finalized one rule in FY 2010 upon which Advocacy filed comments (Cranes and Derricks in Construction), and the agency complied with Section 3(c) of E.O. 13272. Advocacy submitted comments to OSHA in FY 2010 on its proposed Occupational Injury and Illness (Musculoskeletal Disorder) Recording and Reporting rule and its proposed Walking-Working Surfaces and Personal Protective Equipment (Fall Protection Systems) rule; however, neither of these rules were finalized in FY 2010. Advocacy also submitted comments to the Wage and Hour Division on its proposed rule, Nondisplacement of Qualified Workers under Service Contracts; however this rule was not finalized in FY 2010. EBSA did not publish any proposed or final rules in FY 2010

that were the subject of Advocacy comments, but did institute a policy in FY 2010 that was the subject of Advocacy comments.

Advocacy also attended numerous public forums, advisory committee meetings, and stakeholder meetings for expected OSHA regulatory actions, including Combustible Dust, Hazard Communication, and the Injury and Illness Prevention Program.

Occupational Safety and Health Administration

Issue: Cranes and Derricks in Construction.

On August 9, 2010, the Occupational Safety and Health Administration (OSHA) finalized a rule that revises its safety standards for cranes and derricks in construction. The final rule updates and specifies industry work practices to protect employees using this construction equipment. The final rule also addresses advances in the designs of cranes and derricks, related hazards, and the qualifications of employees needed to operate

them safely. OSHA had been working on its cranes and derricks in construction rule since 1998, when its Advisory Committee for Construction Safety and Health recommended changes to the existing standard.

In July 2002, OSHA announced plans to use negotiated rulemaking under the Negotiated Rulemaking Act to revise the standard, and formed the Cranes and Derricks Negotiated Rulemaking Advisory Committee (CDAC) in late 2002. CDAC drafted a proposed rule that OSHA was

committed to publish. However, before proceeding with a proposed rule based on the CDAC document, OSHA was required to convene a Small Business Advocacy Review (SBAR) panel

in accordance with the Small Business Regulatory Enforcement Fairness Act of 1996. Advocacy, along with OSHA and the Office of Management and Budget, was an active participant in the SBAR panel process in identifying small entity representatives (SERs) to work with the panel, assisting the SERs in reviewing the draft rule and other materials, and preparing the final SBAR panel report.

When the proposed rule was published in 2008, the Office of Advocacy filed a public comment letter that recommended changes to make the rule less burdensome on small business. The final rule included a specific recommendation from Advocacy that the rule exempt companies that use equipment solely to deliver materials to a construction site; this represents cost savings to these firms. However, OSHA rejected Advocacy recommendations to allow small firms to self-certify their competence and other recommendations concerning controlling entities.

Employee Benefits Security Administration

Issue: New E-signature Option for Forms

5500. On May 20, 2010, Advocacy commended EBSA for taking into account the concerns of the small business community in its announcement (Release Number 10-680-NAT) issued on May 13, 2010, that provided a new e-signature option on electronically filed Forms 5500 and 5500-SF, employee benefit plan annual reports. EBSA designed the new e-signature option to simplify the electronic filing process for small businesses that use employee plan service providers to complete and file their annual reports.

Before EBSA announced the new e-signature option, service providers that managed the filing process for plans were not permitted to sign and submit the electronic Form 5500 or 5500-SF on behalf of plan sponsors. In March 2010, Advocacy coordinated a meeting between small business stakeholders and EBSA staff. At the meeting, the small business stakeholders expressed concern

“SBA Advocacy has been a reliable voice for small business concerns in the regulatory process. They have consistently worked with the small business community to identify issues of concern in proposed regulations and bring those issues to the agencies’ attention.”

—Marc Freedman, U.S.
Chamber of Commerce

that the EBSA policy on e-filing was burdensome for small business employers that sponsor plans, because the employers could not rely on their plan administrators and providers to file employee benefit plan annual reports.

EBSA addressed the concerns of small business stakeholders by announcing its new e-signature option. Under the new option, service providers can now obtain their own signing credentials and submit the electronic Form 5500 or 5500-SF for the plan on behalf of the sponsoring employers.

Department of State

E.O. 13272 Compliance

The Department of State (State) has made some progress in complying with E.O. 13272. While State has not posted its RFA policy on its website as required by Section 3(a) of E.O. 13272, it was trained in RFA compliance in FY 2006. The State Department did not notify Advocacy of any draft rules in FY 2010 as required by Section 3(b) of E.O. 13272. The State Department did not publish any final rules in FY 2010 that were subject to Advocacy comments; therefore, the agency's compliance with section 3(c) of E.O. 13272 cannot be assessed. Advocacy submitted comments to the State Department on its proposed rule, Exchange Visitor Program-General Provisions; however, this rule was not finalized in FY 2010.

Department of Transportation

E.O. 13272 Compliance

The Department of Transportation (DOT) has made its policies and procedures publicly available as required by section 3(a) of E.O. 13272. The Federal Aviation Administration was trained in RFA compliance in FY 2003 and FY 2008. The Federal Motor Carrier Administration and the Federal Railroad Administration were trained in RFA compliance in FY 2004, FY 2008, and

FY 2010. The National Highway Traffic Safety Administration and the Federal Highway Administration were trained in RFA compliance in FY 2005. Agencies within DOT have typically notified Advocacy in a timely manner, through Advocacy's email notification system, of draft rules that may have a significant economic impact on a substantial number of small entities, as required by section 3(b) of E.O. 13272; however, compliance has recently waned.

DOT agencies finalized one rule in FY 2010 on which Advocacy filed comments: FAA's Production and Airworthiness Approvals, Part Marking, and Miscellaneous Amendments rule. That rule responded to comments raised by Advocacy as required by section 3(c). Advocacy submitted comments to DOT agencies on two rules in FY 2010: FAA's Advance Notice of Proposed Rulemaking on Safety Management Systems, and the Pipeline and Hazardous Materials Safety Administration proposed rule on Hazardous Materials: Transportation of Lithium Batteries; however, neither rule was finalized in FY 2010.

Federal Aviation Administration

Issue: Production and Airworthiness Approvals, Part Marking, and Miscellaneous Amendments. On October 16, 2009, the Federal Aviation Administration (FAA) finalized a rule that amends its certification procedures and identification requirements for aviation parts and articles. The rule updates and standardizes requirements for production approval holders, revises export airworthiness approval requirements to facilitate global manufacturing, consolidates parts marking rules, and amends the identification requirements for parts and articles. The Office of Advocacy discussed FAA's proposed rule at its regular aviation safety roundtable and then hosted a conference call on January 29, 2007, for interested small business representatives and aviation parts manufacturers to obtain their input and discuss small business concerns with the proposed rule. Advocacy filed a public comment letter addressing these concerns, particularly

with respect to provisions addressing marking components within a subassembly and quality systems. Advocacy also worked with FAA to revise and re-publish a supplemental regulatory flexibility analysis to correct certain deficiencies with the original analysis.

In response to Advocacy's comments, the FAA revised the final rule to eliminate several provisions, including a requirement for airworthiness approvals (Form 8130-3) for all foreign

and domestic shipments of aviation parts and for marking all components and sub-components within an assembly. According to FAA, these revisions eliminated \$327.1 million or 99.1 percent of the (undiscounted) cost of the rule, most accruing to small firms. In addition, FAA followed Advocacy's recommendation by clarifying that the requirements for quality

systems may be scaled to the size and complexity of the business, resulting in additional but unquantified savings to small business.

Department of the Treasury

E.O. 13272 Compliance

The Department of the Treasury (Treasury) has made its policies and procedures available to the public in compliance with section 3(a) of E.O. 13272. The Internal Revenue Service (IRS) within Treasury creates regulations of most concern to small businesses. IRS notified Advocacy of draft proposed rules under section 3(b) of E.O. 13272. IRS did not publish any final rules in FY 2010 that were the subject of Advocacy comments; therefore, the compliance of the IRS with section 3(c) of E.O. 13272 cannot be assessed.

Issue: Registration of Mortgage Loan Originators to Implement the Secure and Fair Enforcement for Mortgage Licensing Act.

On June 9, 2009, the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation (FDIC), the Office of Thrift Supervision, the Farm Credit Administration (FCA), and the National Credit Union Administration (NCUA) issued a joint proposed rule on the Registration of Mortgage Loan Originators to implement the Secure and Fair Enforcement for Mortgage Licensing Act (the SAFE Act). The SAFE Act requires an employee of a bank, savings association, credit union or other depository institution and their subsidiaries who act as residential mortgage loan originators to register with the Nationwide Mortgage Licensing System and Registry. It also requires financial institutions to require their employees who act as residential mortgage loan originators to comply with the SAFE Act's requirements to register and obtain a unique identifier. Agency-regulated institutions must also adopt and follow written policies and procedures designed to assure compliance with the requirements in the proposal.

On July 9, 2009, Advocacy submitted comments on the proposed rule. Advocacy expressed concern that the agencies may have underestimated the economic burden of the proposal. The proposal provided for a *de minimis* exception, which the agencies applied to financial institutions processing less than 25 mortgages per year in the aggregate. Advocacy said that the agencies were defining *de minimis* in an extremely restrictive manner. As a result, the rule may be unduly burdensome on small community banks that had little to do with the recent problems in the mortgage industry. Advocacy encouraged the agencies to work with representatives of the small financial institution industry to develop a better definition.

In the proposed rule, they established a *de minimis* exception that would have exempted from the registration requirements an employee of an agency-regulated institution if, during the previous 12 months: (1) The employee acted as a mortgage loan originator for five or fewer residential mortgage loans and (2) the agency-regulated institution employed mortgage loan originators who, while exempted from registration pursuant

“My thanks go out to the Office of Advocacy for your efforts... It is through your efforts that we actually make progress.”

—Ric Peri, Aircraft Electronics Association

to this section, in the aggregate, acted as mortgage loan originators in connection with 25 or fewer residential mortgage loans. Advocacy specifically commented that the proposed *de minimis* exception would make the rule unduly burdensome for small community institutions.

The proposal also provided for a grace period for initial registrations of 180 days from the date the agencies provide public notice that the registry accepts initial registrations. Advocacy recommended that the agencies extend the time period for compliance to at least one year to provide small financial institutions the additional time needed to register employees, develop compliance policies, and make any other necessary changes.

The agencies finalized the rule on July 28, 2010. In the final rule, the agencies took steps to minimize the impact on small entities. First, they revised the rule's *de minimis* exception to reduce the compliance burden. In response to Advocacy and other comments, the agencies removed the institution threshold from this *de minimis* exception. As a result, the final rule's exception contains only the individual threshold, as well as a prohibition on any agency-regulated institution engaging in any act or practice to evade the limits of the *de minimis* exception. This revised exception should simplify compliance and therefore impose the least burden overall for institutions, including small entities.

The agencies also made changes to the final rule that reduced the impact its requirements would have on all agency-regulated financial institutions, including small entities. The final rule decreased the amount of information required for submission by a mortgage loan originator. Specifically, the final rule does not require submission of financial history information such as bankruptcies and liens, employment and terminations, pending actions, and felonies unrelated to crimes of dishonesty. Further, the agencies declined to include loan modification activities in the final rule's definition of mortgage loan originator. Under the Office of Thrift Supervision (OTS) rule, agency-regulated

institution employees engaged solely in bona fide, cost-free loss mitigation efforts, which result in reduced and sustainable payments for the borrower generally, would not meet the definition of "mortgage loan originator." This reduces the number of savings association employees subject to the final rule's requirements.

Department of Veterans Affairs

E.O. 13272 Compliance

The Department of Veterans Affairs (VA) has made its RFA policies publicly available on its website, as required by section 3(a) of E.O. 13272, while maintaining that most of its regulations do not affect small entities. The VA notifies Advocacy of any proposed rules that may have a significant economic impact on a substantial number of small entities in accordance with section 3(b) of E.O. 13272. The VA did not publish any final rules in FY 2010 that were the subject of Advocacy's comments; therefore, the department's compliance with section 3(c) of E.O. 13272 cannot be assessed.

Consumer Product Safety Commission

E.O. 13272 Compliance

The Consumer Product Safety Commission (CPSC) has complied with section 3(a) of E.O. 13272 by making its policies and procedures publicly available online. CPSC also periodically complies with section 3(b) of E.O. 13272 by notifying Advocacy of draft proposed rules. In general, CPSC complies with section 3(c) of E.O. 13272 by giving appropriate consideration to comments made by Advocacy during the rulemaking process.

Issue: Safety Standards for Cradles and Bassinets. On April 28, 2010, the CPSC published a

proposed rule in the *Federal Register* seeking to adopt the industry’s voluntary testing standards as mandatory. The rule also proposed additional

“By convincing EPA to overturn the numeric effluent limitation guideline for the construction and development industry, the SBA Office of Advocacy has helped to ensure that builders and developers will not be required to spend thousands of dollars on stormwater technology that may not help the agency meet its goal.”

—Bobby Bowling, *Tropicana Building Corporation, El Paso, TX*

product testing and the elimination of certain product features such as strap restraints. On July 8, 2010, the Office of Advocacy filed a public comment letter with the CPSC asking the agency to improve the analysis contained in its IRFA, which suggested that the new regulation would have only a small impact on the industry and that any costs could be passed on to the consumer. Advocacy noted that the IRFA contained little data that would allow an assessment of the true costs of the rule. Advocacy’s request was buttressed by industry complaints that the rule would raise their costs and lower

their revenues significantly. CPSC decided to reopen the comment period for the rule in an attempt to obtain additional information from the industry regarding the rule’s provisions and impacts.

Environmental Protection Agency

E.O. 13272 Compliance

The Environmental Protection Agency (EPA) has made its RFA policies and procedures publicly available through its website in accordance with section 3(a) of E.O. 13272. EPA has also consistently notified Advocacy of draft proposed rules expected to have a significant economic impact on a substantial number of small entities before publishing them in the *Federal Register*, as required by section 3(b) of E.O. 13272. EPA also consistently provides prepublication draft rules for Advocacy review. EPA continues to respond

to Advocacy’s comments in accordance with section 3(c) of E.O. 13272.

Issue: Construction and Development (C&D) Water Pollution Guidelines. On December 1, 2009, EPA promulgated the Construction and Development (C&D) Water Pollution Guidelines, which impose requirements for stormwater discharges from construction and development sites. Advocacy filed comments in spring 2009 opposing the EPA proposed standard, because it was based on costly advanced treatment systems. In April 2010, Advocacy petitioned EPA to reconsider the C&D rule, indicating that the numeric standard for turbidity in the rule was “costly, difficult to implement, and based on numerous factual errors.” Specifically, the office argued that EPA had misinterpreted its own data, set the 280 nephelometric turbidity unit (NTU) limit based on data from active rather than passive treatment systems, and underestimated the cost of the rule by a factor of ten. Several industry groups filed a lawsuit to overturn the rule.

In a significant victory for small businesses, in August 2010, EPA agreed to take a remand from the federal court to reconsider the rule, and in November EPA published a stay of the 280 NTU standard portion of the rule while it was under review. The stay of this requirement could save affected small businesses up to \$10 billion per year.

Issue: Clean Air Act Greenhouse Gas Regulations. On June 3, 2010, EPA published a final rule that defers Clean Air Act greenhouse gas (GHG) requirements for many small businesses for up to six years. The “tailoring” rule sets thresholds for GHG emissions that define when businesses must obtain a permit to modify or construct under the Prevention of Significant Deterioration (PSD) program or a permit to operate under the Title V permit program. The rule defers the requirements of these permitting programs to limit which facilities will immediately have to get PSD and Title V permits. Existing small businesses with potential carbon dioxide emissions

(or equivalent emissions of other GHGs) of less than 75,000 tons per year will not be subject to PSD and Title V permitting requirements until at least July 1, 2013. Advocacy recommended in a June 2009 public comment letter that EPA adopt an applicability threshold of at least 25,000 tons per year of CO₂. Advocacy subsequently recommended a 100,000 ton per year CO₂ threshold in a December 2009 public comment letter. EPA estimates that the permitting deferrals contained in the final rule will yield one-year cost savings for small entities of \$9.1 billion.

Issue: National Emission Standards for Hazardous Air Pollutants Reciprocating Internal Combustion Engines. In June 2009, Advocacy

submitted comments on the EPA's proposed rule, National Emission Standards for Hazardous Air Pollutants for Reciprocating Internal Combustion Engines. This rule affects hundreds of thousands of small businesses that employ engines for a variety of purposes. These engines are used at facilities such as power plants and chemical and manufacturing plants to generate electricity and to power pumps and compressors. Affected small businesses include those in oil and gas production, natural gas

pipeline companies, and agriculture (e.g., for irrigation pumps). On March 3, 2010, EPA promulgated the final rule affecting diesel (compression ignition or CI) engines. Through a variety of revisions made in the final rule, EPA has estimated annual cost savings of \$291 million.

Issue: Spill Prevention Controls and Countermeasures (SPCC). EPA completed the last major amendments to the SPCC rule (phase III, November 2009; phase II, December 2008; phase I, December 2006). Advocacy worked in collaboration

with EPA and a large coalition of affected trade associations. As a result, EPA provided relief for the following targeted facilities: small facilities, oil-filled equipment, and motive power equipment (for example, tractors). This Advocacy initiative is estimated to have saved more than \$100 million per year, affecting hundreds of thousands of facilities.

Equal Employment Opportunity Commission

E.O. 13272 Compliance

The Equal Employment Opportunity Commission (EEOC) has posted its RFA policy on its website, as required by section 3(a) of E.O. 13272. The EEOC did not have any draft rules that had a significant economic impact on a substantial number of small entities in FY 2010; therefore, the agency's compliance with section 3(b) of E.O. 13272 cannot be assessed. The EEOC did send Advocacy early drafts of other rulemakings and notices to seek input on the potential small business impacts. The EEOC also did not publish any final rules in FY 2010 that were the subject of Advocacy comments; therefore, the agency's compliance with section 3(c) of E.O. 13272 cannot be assessed.

Federal Acquisition Regulation Council

E.O. 13272 Compliance

The policies and procedures required by section 3(a) that were provided by the Department of Defense apply also to the Federal Acquisition Regulation Council (FAR Council). The FAR Council has complied with section 3(b) by making its deliberations and predecisional deliberative rulemaking processes open to the Office of

“The Office of Advocacy played a critical role throughout the multi-year effort to refine final Phase II SPCC regulations, and in the long run helped EPA develop a rule that fairly balances risk reduction with the regulatory costs imposed on small business.”

—Jim Stine, *The National Rural Electric Cooperation Association (NRECA)*

Advocacy. The FAR Council published one rule in FY 2010 that was the subject of Advocacy comments and was in compliance with section 3(c) of E.O. 13272. The FAR Council participated in two RFA training sessions in FY 2010.

Issue: Payments under Fixed-price Architecture and Engineering Contracts. On July 6, 2009, the Office of Advocacy submitted a comment letter to the FAR Council on the proposed regulation, Payments under Fixed-price Architecture and Engineering Contracts, FAR Case 2008-015. The proposed regulation was published in the *Federal Register* on May 5, 2009. The FAR Council proposed to amend the FAR to give contracting officers greater flexibility with respect to retainage on fixed-price architecture and engineering (A&E) contracts. Under the proposed rule, the contracting officer may retain less than the maximum of 10 percent of the contract price for each voucher of the A&E firm. The government retains the amount until the contracting officer determines that the work has been completed satisfactorily. Advocacy commended the FAR Council for proposing this regulation in response to the Office of Advocacy's Regulatory Review and Reform (r3) initiative. The r3 initiative, launched in 2008, is a process developed to help implement section 610 of the RFA, which requires agencies to consider whether their current rules should continue without change or should be amended or rescinded. It solicits small business comment in the effort to identify and address existing federal regulations that should be revised because they are ineffective, duplicative, or out of date. The A&E small business community recommended this proposed regulatory change under r3. The regulation was published as a final rule on March 19, 2010.

Federal Communications Commission

E.O. 13272 Compliance

The Federal Communications Commission (FCC) has not made its policies and procedures to promote RFA compliance publicly available and therefore has not complied with section 3(a) of E.O. 13272. The FCC complies in part with section 3(b) by notifying Advocacy of proposed rules that may have a significant economic impact on a substantial number of small entities; however, the FCC notifies Advocacy of such rules only after the adoption and release of the rule for public comment. The FCC does not provide its draft rules to Advocacy for review as required by section 3(b). The FCC complies with section 3(c) by responding to Advocacy's written comments when it issues final rules. Advocacy continues to offer the FCC assistance in complying with the RFA, and often reaches out to engage FCC staff early in the rulemaking process and to discuss the impact the proposed rules may have on a variety of small businesses.

Issue: Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent. On May 11, 2010, Advocacy filed a letter with the FCC in response to its request for comment on a petition filed on March 9, 2010, for rulemaking to amend the FCC's rules governing retransmission consent. Advocacy urged the commission to consider the impact of the current retransmission consent rules on small businesses. Advocacy noted specific issues of concern to small video providers, such as a lack of bargaining power in retransmission consent negotiations, which can lead to a substantial increase in fees. Small businesses have also expressed concern over the possible threat of losing the broadcasters' programming during

the negotiation process. Advocacy noted the large number of small businesses that constitute the multichannel video programming distributor “MVPD” market and the important role they play in creating a healthy, competitive marketplace. Advocacy recommended that the FCC be mindful of these issues and the impact on this important segment of the market as it considers this petition.

Issue: National Broadband Plan. On March 5, 2010, the Office of Advocacy sent a letter to the Federal Communications Commission requesting that the agency seek revision of the Small Business Administration size standards for telecommunications services to better reflect current market conditions. Advocacy expressed its belief that revising the size standards to more accurately reflect the existing telecommunications market will assist Advocacy and others in documenting the trends followed by small business providers of telecommunication services, and developing policies to ensure adequate competition in the telecommunications market.

Federal Reserve Board

E.O. 13272 Compliance

The Board of Governors of the Federal Reserve System (FRB) has not published policies and procedures as required by section 3(a) of E.O. 13272. The FRB did notify Advocacy of some rules that may have a significant economic impact on small entities, as required by section 3(b) of the executive order, through notify.advocacy@sba.gov in FY 2010. The FRB addressed Advocacy’s comments in the final rules as required by section 3(c) of the executive order.

Issue: Regulation Z Closed-end Credit. On December 23, 2009, the Office of Advocacy submitted a comment letter to the FRB on the Board’s proposed rulemaking on Regulation Z, Docket No. R-1366, Truth in Lending. The proposed rule amended Regulation Z, which implements the

Truth in Lending Act. The proposal revised the rules for disclosure of closed-end credit secured by real property or a consumer’s dwelling, except for rules regarding rescission and reverse mortgages. It required transaction-specific disclosures to be provided to the consumer at least three business days before consummation. The proposed rule also made changes to the format, timing, and content of the disclosures for the four main types of closed-end credit information governed by Regulation Z: 1) disclosures at application, 2) disclosures within three days after application, 3) disclosures three days before consummation, and 4) disclosures after consummation. It also proposed additional protections related to limits on loan originator compensation.

Although the FRB prepared an IRFA, Advocacy expressed concerns that the IRFA may not have complied with the requirements of the Regulatory Flexibility Act because it lacked adequate information about the economic impact of the proposal and full consideration of less burdensome alternatives. Small business representatives in the industry were concerned that the proposal may require small community banks to dramatically alter their business practices, raising costs for community banks. Advocacy argued that if community banks were to leave the market because of increased costs, it would be more difficult for consumers, including small entities, to obtain a mortgage. Advocacy further commented that small businesses offering loan origination services would be negatively and disproportionately affected by the proposal because the definition of loan originator in the proposal placed restrictions on small businesses that were not placed on larger competitors. Advocacy encouraged the Board to consider less costly alternatives, such as reconsidering the definitions of “finance charge” and “loan originator,” withdrawing the proposed prohibition on payments to loan originators that are based on the terms or conditions of the loan and instead requiring creditors to disclose the lowest interest rate, allowing loan originators to retain their ability to receive compensation as a percentage of the loan

amount and not just a flat fee, allowing consumers to waive the three-day waiting period, and delaying the implementation date. Advocacy also encouraged the Board to determine more accurately the full economic impact on small entities and to prepare and publish for public comment a revised IRFA.

The Board finalized the rule on September 24, 2010. In the final rule, the Board adopted an alternative that permits loan originator compensation to be based on the loan amount. In addition, the final rule does not apply to open-end credit or timeshare plans, and the final rule does not extend the record retention requirement to persons other than the creditor who pays loan originator compensation. This was the alternative requested by the small business community.

Office of Management and Budget

E.O. 13272 Compliance

The Office of Management and Budget (OMB), Office of Federal Procurement Policy (OFPP) does not issue regulations and is therefore not required to comply with E.O. 13272.

Office of Federal Procurement Policy

Issue: Work Reserved for Performance by Federal Employees. The Office of Advocacy submitted a formal comment letter on June 6, 2010. On March 31, 2010, the OFPP published a policy letter providing guidance to executive departments and agencies on circumstances when work must be reserved for performance by federal government employees. Advocacy supports the administration's goal of trying to balance work that is inherently governmental, and should be performed by government employees, with work that can be outsourced to the private sector. This policy will help provide a more

level playing field for small businesses. While the draft policy document is not by definition a regulation, Advocacy is concerned that the outcome of the policy directive may have effects similar to those of a regulation. Therefore the Office of Advocacy encouraged OFPP to consider the cost of compliance to small entities.

Securities and Exchange Commission

E.O. 13272 Compliance

The Securities and Exchange Commission (SEC) has not made public its written policies and procedures for the consideration of small entities in its rulemaking as required by section 3(a) of E.O. 13272. However, the SEC consistently notifies Advocacy through Advocacy's email notification system of draft rules that may have a significant economic impact on a substantial number of small entities, as required by section 3(b). The SEC did not publish any proposed or final rules in FY 2010 that were the subject of Advocacy comments. Therefore, compliance with 3(c) cannot be assessed.

Small Business Administration

E.O. 13272 Compliance

The U.S. Small Business Administration (SBA) has made significant efforts to stay in compliance with E.O. 13272. SBA has published its RFA procedures in compliance with section 3(a) of E.O. 13272. SBA notifies Advocacy of draft rules in compliance with section 3(b) of E.O. 13272 and consistently provides Advocacy with rules for review. As a result of RFA training and continued RFA discussions on draft rules, SBA personnel have utilized Advocacy input earlier rather than later in the regulatory development

process. SBA published the WOSB final rule in FY 2010 that was the subject of an Advocacy comment letter. The agency is in compliance with section 3(c) of E.O. 13272.

Issue: Small Business Size Regulations. On January 28, 2010, the Office of Advocacy filed a comment letter with the Small Business Administration, discussing small entity concerns about SBA’s proposed rulemaking to regulate the 8(a) procurement program. The proposed regulation attempts for the first time to establish a residency requirement for 8(a) companies. The proposal, if implemented, would require the participant to spend part of every month physically present at his/her primary offices. Public Law 95-507 is the legal authority for the 8(a) program and it requires the participant to be a citizen of the United States. There is no legislative or regulatory history of the 8(a) program to support this residency provision.

Issue: Women-owned Small Business Federal Contract Program. On May 3, 2010, the Office of Advocacy filed a comment letter with the SBA discussing small entity concerns with Section

811 of the Small Business Reauthorization Act of 2000, Public Law 105-554. Section 811 addressed the difficulties women-owned small businesses have encountered in competing for federal contracts. Public Law 105-554 created an acquisition tool that would allow agencies to restrict competition to qualified women-owned small businesses. Since 2000, SBA

has had a legislative requirement of trying to provide maximum practicable opportunity for women-owned small businesses to participate in the performance of contracts issued by any federal agency.

Conclusion

In FY 2010, Advocacy observed continued improvement in federal agencies with respect to their RFA and E.O 13272 compliance. While Advocacy still faces the challenge of working with stakeholders and federal agencies to ensure that federal regulations do not place small businesses at a competitive disadvantage because of disproportionate regulatory burdens, many agencies now see that the analytical process mandated by the RFA produces better and more informed regulatory decisions.

Advocacy will continue to work cooperatively with federal agencies so that they can both meet their regulatory goals and fulfill their obligations under the RFA. To accomplish this, Advocacy will focus its efforts on training new agency staff to establish continuity with respect to agency compliance with the RFA and E.O. 13272. Advocacy hopes to continue providing input to federal agencies regarding the impacts of proposed regulations on small entities early in the rulemaking process.

“The Office of Advocacy lived up to its reputation as an independent voice for small business in this case and I am sure will continue to do so.”

—Ann Sullivan, Women Impacting Public Policy

Appendix A Supplementary Tables

Table A.1 Federal Agencies Trained in RFA Compliance, 2003-2010

As required by E.O. 13272, the Office of Advocacy has offered training to the following federal departments and agencies in how to comply with the Regulatory Flexibility Act.

Department of Agriculture

- Animal and Plant Health Inspection Service
- Agricultural Marketing Service
- Grain Inspection, Packers, and Stockyards Administration
- Forest Service
- Rural Utilities Service

Department of Commerce

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

Department of Education

Department of Energy

Department of Health and Human Services

- Centers for Disease Control and Prevention
- Centers for Medicare and Medicaid Services
- Food and Drug Administration

Department of Homeland Security

- Bureau of Citizenship and Immigration Services
- Bureau of Customs and Border Protection
- Federal Emergency Management Agency
- Transportation Security Administration
- United States Coast Guard

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
- Fish and Wildlife Service
- Minerals Management 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

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
- Research and Special Programs Administration
- Surface Transportation Board

Department of the Treasury

- Alcohol and Tobacco Tax and Trade Bureau
- Financial Crimes Enforcement Network
- Financial Management Service
- Internal Revenue Service
- Office of the Comptroller of the Currency

Department of Veterans Affairs

Office of Management and Budget

- Office of Federal Procurement Policy

Independent Federal Agencies

- Access Board
- 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 Housing Finance Board
- Federal Reserve System
- Federal Trade Commission
- General Services Administration / FAR Council
- National Credit Union Administration
- Nuclear Regulatory Commission
- Pension Benefit Guaranty Corporation
- Securities and Exchange Commission
- Small Business Administration
- Trade and Development Agency

Table A.2 RFA Related Case Law

U.S. v. Neely

595 F.Supp.2d 662 (D.S.C. 2009)

The United States brought action to enforce monetary forfeiture assessed by the Federal Communications Commission (FCC) against Neely, the licensee of a radio station, for repeated violations of an FCC regulation limiting the radio station's nighttime transmitter power. Neely admitted all factual allegations establishing the violations, but he claimed that he did not have to pay the forfeiture because the FCC has not established policy under the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) with respect to the application of civil penalties to small entities. Both the United States and Neely filed motions for summary judgment.

The court granted summary judgment to the United States, holding that SBREFA did not require the reduction of the forfeiture in this case. The court reasoned that the FCC's forfeiture policy statement established procedures and guidelines through which the agency may consider whether small entities have the ability to pay a particular forfeiture amount or the ability to submit the same kind of documentation as larger entities to corroborate their inability to pay. Those procedures were sufficient to keep the forfeiture policy within the limits of SBREFA.

Table A.3 SBAR Panels through Fiscal Year 2010

Rule Title	Date Convened	Report Completed	NPRM ¹ Published	Final Rule Published
Environmental Protection Agency				
Nonroad Diesel Engines	03/25/97	05/23/97	09/24/97	10/23/98
Industrial Laundries Effluent Guideline ²	06/06/97	08/08/97	12/17/97	
Stormwater Phase II	06/19/97	08/07/97	01/09/98	12/08/99
Transportation Equipment Cleaning Effluent Guidelines	07/16/97	09/23/97	06/25/98	08/14/00
Centralized Waste Treatment Effluent Guideline	11/06/97	01/23/98	01/13/99 09/10/03	12/22/00
Underground Injection Control (UIC) Class V Wells	02/17/98	04/17/98	07/29/98	12/07/99
Ground Water	04/10/98	06/09/98	05/10/00	11/08/06
Federal Implementatin Plan (FIP) for Regional Nitrogen Oxides Reductions	06/23/98	08/21/98	10/21/98	04/28/06
Section 126 Petitions	06/23/98	08/21/98	09/30/98	05/25/99
Radon in Drinking Water	07/09/98	09/18/98	11/02/99	
Long Term 1 Enhanced Surface Water Treatment	08/21/98	10/19/98	04/10/00	01/14/02
Filter Backwash Recycling	08/21/98	10/19/98	04/10/00	06/08/01
Light Duty Vehicles/Light Duty Trucks Emissions and Sulfur in Gas	08/27/98	10/26/98	05/13/99	02/10/00
Arsenic in Drinking Water	03/30/99	06/04/99	06/22/00	01/22/01
Recreational Marine Engines	06/07/99	08/25/99	10/05/01 08/14/02	11/08/02
Diesel Fuel Sulfur Control Requirements	11/12/99	03/24/00	06/02/00	01/18/01

Rule Title	Date Convened	Report Completed	NPRM ¹ Published	Final Rule Published
Lead Renovation and Remodeling Rule	11/23/99	03/03/00	01/10/06	
Metals Products and Machinery	12/09/99	03/03/00	01/03/01	05/13/03
Concentrated Animal Feedlots Effluent	12/16/99	04/07/00	01/12/01	02/12/03
Reinforced Plastics Composites	04/06/00	06/02/00	08/02/01	04/21/03
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
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
Construction and Development Effluent Limitations Guidelines ³	07/16/01	10/12/01	06/24/02	
Aquatic Animal Production Industry	01/22/02	06/19/02	09/12/02	08/23/04
Lime Industry - Air Pollution	01/22/02	03/25/02	12/20/02	01/05/04
Nonroad Diesel Engines - Tier IV	10/24/02	12/23/02	05/23/03	06/29/04
Cooling Water Intake Structures Phase III Facilities	02/27/04	04/27/04	11/24/04	06/15/06
Section 126 Petition (2005 Clean Air Implementation Rule – CAIR)	04/27/05	06/27/05	08/24/05	04/28/06
FIP for Regional Nox/So2 (2005 CAIR)	04/27/05	06/27/05	08/24/05	04/28/06
Mobile Source Air Toxics	09/07/05	11/08/05	03/29/06	02/26/07

Rule Title	Date Convened	Report Completed	NPRM ¹ Published	Final Rule Published
Non-road Spark-ignition Engines/Equipment	08/17/06	10/17/06	05/18/07	10/08/08
Total Coliform Monitoring Rule (TCR)	01/31/08	01/31/08	07/14/10	
Renewable Fuel Standards 2 (RFS2)	07/09/08	09/05/08	05/26/09	03/26/10
Pesticides: Agricultural Worker Protection Standard Revisions	09/04/08	11/03/08		
Certification of Pesticide Applicators (Revisions)	09/04/08	11/03/08		
Combined Rulemaking for Industrial, Commercial, and Institutional Boilers and Process Heaters at Major Sources of Hazardous Air Pollutants and Industrial, Commercial, and Institutional Boilers at Area Sources	01/22/09	03/23/09	06/04/10	
Pesticides: Reconsideration of Exemptions for Insect Repellents	11/16/09	01/15/10		
Revision of New Source Performance Standards for New Residential Wood Heaters	08.04/10			
Occupational Safety and Health Administration				
Tuberculosis ⁴	09/10/96	11/12/96	10/17/97	
Safety and Health Program Rule	10/20/98	12/19/98		
Ergonomics Program Standard	03/02/99	04/30/99	11/23/99	11/14/00
Electric Power Generation, Transmission, and Distribution	04/01/03	06/30/03	06/15/05	
Confined Spaces in Construction	09/26/03	11/24/03	11/28/07	

Rule Title	Date Convened	Report Completed	NPRM ¹ Published	Final Rule Published
Occupational Exposure to Crystalline Silica	10/20/03	12/19/03		
Occupational Exposure to Hexavalent Chromium	01/30/04	04/20/04	10/04/04	02/28/06
Cranes and Derricks in Construction	08/18/06	10/17/06	10/09/08	08/09/10
Occupational Exposure to Beryllium	09/17/07	01/15/08		
Occupational Exposure to Diacetyl and Food Flavorings Containing Diacetyl	05/05/09	07/02/09		

¹ Notice of Proposed Rulemaking (NPRM) published in the *Federal Register*.

² Proposed rule was withdrawn August 18, 1999. EPA does not plan to issue a final rule.

³ Proposed rule was withdrawn on April 26, 2004. EPA issued a new proposal November 28, 2008.

⁴ Proposed rule was withdrawn on December 31, 2003. OSHA does not plan to issue a final rule.

Appendix B

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;

(7) 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.

§ 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) Environmental Protection Agency,

(2) Consumer Financial Protection Bureau,
and

(3) 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).

Appendix C

Executive Order 13272

Presidential Documents

Executive Order 13272 of August 13, 2002

The President

Proper Consideration of Small Entities in Agency Rulemaking

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:

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 Regulatory 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

(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.



THE WHITE HOUSE,
August 13, 2002.

Appendix D

Abbreviations

ABC	acceptable biological catch
ADA	Americans with Disabilities Act
ADAAG	Americans with Disabilities Act Accessibility Guidelines
A&E	architecture and engineering
ANPRM	advance notice of proposed rulemaking
APA	Administrative Procedure Act
APHIS	Animal and Plant Health Inspection Service
C&D	construction and development
CDAC	Crane and Derrick Negotiated Rulemaking Advisory Committee
CFPB	Consumer Financial Protection Bureau
CMS	Centers for Medicare and Medicaid Services
CPSC	Consumer Product Safety Commission
DHS	Department of Homeland Security
DOC	Department of Commerce
DOD	Department of Defense
DOE	Department of Energy
DOI	Department of the Interior
DOJ	Department of Justice
DOL	Department of Labor
DOT	Department of Transportation
EBSA	Employee Benefits Security Administration
Education	Department of Education
E.O.	Executive Order
EPA	Environmental Protection Agency
FAA	Federal Aviation Administration
FAR	Federal Acquisition Regulation
FCA	Farm Credit Administration
FCC	Federal Communications Commission
FDA	Food and Drug Administration
FDIC	Federal Deposit Insurance Corporation
FHA	Federal Housing Administration
FPAA	final partnership administrative adjustment
FRB	Federal Reserve Board
FRFA	final regulatory flexibility analysis
FRS	Federal Reserve System
FSIS	Food Safety and Inspection Service
FWS	Fish and Wildlife Service
FY	fiscal year
GHG	greenhouse gases

GSA	General Services Administration
HCFA	Health Care Financing Agency, now renamed, see CMS
HHPPS	Home Health Prospective Payment System
HHS	Department of Health and Human Services
HIPAA	Health Insurance Portability and Accountability Act
HITECH	Health Information Technology for Economic and Clinical Health Act
HUD	Department of Housing and Urban Development
ICE	Immigration and Customs Enforcement
IRFA	initial regulatory flexibility analysis
IRS	Internal Revenue Service
MSHA	Mine Safety and Health Administration
NASA	National Aeronautics and Space Administration
NCUA	National Credit Union Administration
NEFMC	New England Fishery Management Council
NESHAP	National Environmental Standards for Hazardous Air Pollutants
NMFS	National Marine Fisheries Service
NOAA	National Oceanic and Atmospheric Administration
NPRM	notice of proposed rulemaking
NPS	National Park Service
OCC	Office of the Comptroller of the Currency
OCPO	Office of the Chief Procurement Officer
OFPP	Office of Federal Procurement Policy
OIRA	Office of Information and Regulatory Affairs
OMB	Office of Management and Budget
OSHA	Occupational Safety and Health Administration
OSMRE	Office of Surface Mining Reclamation and Enforcement
OTS	Office of Thrift Supervision
PAHS	production approval holders
P.L.	Public Law
PSD	Prevention of Significant Deterioration Program
PTO	Patent and Trademark Office
RFA	Regulatory Flexibility Act
SAFE Act	Secure and Fair Enforcement for Mortgages Licensing Act
SBA	Small Business Administration
SBAR	Small Business Advocacy Review Panel
SBREFA	Small Business Regulatory Enforcement Fairness Act
SEC	Securities and Exchange Commission
SER	small entity representative
SFRA	special flight rules area
SOPPS	statement of operation, practices, and procedures
SOX	Sarbanes-Oxley Act
SPCC	Spill Prevention Control and Countermeasures
SSC	Science and Statistical Committee
State	Department of State
TRAC	Transboundary Resources Assessment Committee

Treasury	Department of the Treasury
TSA	Transportation Security Administration
USDA	United States Department of Agriculture
U.S.C.	United States Code
USCG	United States Coast Guard
USCIS	United States Citizenship and Immigration Service
VA	Department of Veterans Affairs
WOSB	women-owned small businesses

Appendix E

The RFA at 30



The Small Business Advocate

Advocacy: the voice of small business in government

October–November 2010

Vol. 29, No. 7

The RFA at 30: Balancing Federal Rules' Impact on Small Businesses

by Kathryn Tobias, Senior Editor

The RFA@30 Symposium, the Office of Advocacy's 30th anniversary observance of the Regulatory Flexibility Act (RFA) delved into the role of the RFA in the federal rulemaking process—past, present, and future. SBA Deputy Administrator Marie Johns greeted the audience of agency, trade association, and small business representatives by saying, "It takes a special breed to get up and get excited about celebrating the 30th anniversary of a law requiring regulatory fairness!"

Former Acting Chief Counsel Susan Walthall kicked off the day's events with her recollection of standing in the White House on September 19, 1980, for President Jimmy Carter's signing of the bill. Since that time the law has been a key tool in Advocacy's efforts to represent the concerns of small businesses in the federal government. The RFA charges Advocacy with monitoring agency compliance with

Special Edition: The RFA Turns 30

In honor of the anniversary of the signing of the Regulatory Flexibility Act in September 1980, Advocacy held a daylong symposium on September 21. The event featured speakers and panels on key aspects of the law and its implementation. These pages contain wrap-ups of these panels, plus a history and timeline of the RFA's first 30 years.

it, and the office has used it to speak up on behalf of small business in the halls of government.

Chief Counsel for Advocacy Winslow Sargeant discussed the importance of the law from the perspective of an entrepreneur and business owner. The RFA directs agencies to consider the impact of a

Continued on page 2



Former chief counsel Jere Glover joined Senator Mary Landrieu and Chief Counsel Winslow Sargeant at the RFA@30 Symposium.

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proposed rule on small businesses, because of the reality that small businesses lack economies of scale that may make tasks such as regulatory compliance less burdensome and less costly. The law's regulatory "flexibilities" and "alternatives" encourage agencies to give small businesses a fair shake in the rule writing process, while the agency still meets its regulatory objective.

Senator Mary Landrieu, chair of the Senate Small Business and Entrepreneurship Committee, praised her colleagues who worked together on the Small Business Jobs Act. The bill passed the Senate on September 16, the House on September 23, and the President signed it into law on September 27. The bill targets \$12 billion in tax cuts to America's 27.5 million small businesses, strengthens core programs of SBA, and engages small, healthy community banks in an effort to make loans to small businesses. Noting that government,

with the best intentions, can be clumsy at times in its rulemaking, she promised to work more closely with Advocacy. "The next thing I want to focus on is regulation," Senator Landrieu said.

Cass Sunstein, the head of the White House Office of Information and Regulatory Affairs, noted that regulations can have unforeseen and unintended consequences. Sunstein characterized the RFA as part of the set of analytical requirements imposed on agencies to ensure that they "look before they leap" when writing regulations.

"If regulatory choices are based on careful analysis, and subject to public scrutiny and review, we will be able to identify new and creative approaches designed to maintain and promote entrepreneurship, innovation, competitiveness, and economic growth." He continued, "These points have special importance in a period in which it is crucial to consider the effects of regulation on small business—and to ensure, in accordance with the first declara-

The Small Business Advocate

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tion of purpose in the Regulatory Flexibility Act, that agencies 'seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public.'"

The Regulatory Flexibility Act Timeline

June 1976 Congress enacts Public Law 94-305, creating the SBA Office of Advocacy.

January 1980 The first White House Conference on Small Business calls for "sunset review" and economic impact analysis of regulations, and a regulatory review board that includes small business representation.

September 19, 1980 President Jimmy Carter signs the Regulatory Flexibility Act (RFA).

October 1981 Advocacy reports on the first year of RFA experience in testimony before the Subcommittee on Export Opportunities and Special Small Business Problems of the U.S. House Committee on Small Business.

February 1983 Advocacy publishes the first annual report on agency RFA implementation. The report shows spotty agency compliance.

August 1986 Delegates to the second White House Conference on Small Business recommend strengthening enforcement of the RFA by, among other things, subjecting agency compliance to judicial review.

September 1993 President Bill Clinton issues Executive Order 12866, "Regulatory Planning and Review."

June 1995 The third White House Conference on Small Business recommends strengthening the RFA by subjecting additional agencies, including the IRS, to the law;

granting judicial review of agency compliance; and including small businesses in the rulemaking process.

March 1996 President Clinton signs the Small Business Regulatory Enforcement Fairness Act (SBREFA).

August 2002 President George W. Bush signs Executive Order 13272, "Proper Consideration of Small Entities in Agency Rulemaking."

July 2010 President Barack Obama signs the Dodd-Frank Wall Street Reform and Consumer Protection Act, which subjects the new Consumer Financial Protection Bureau to SBREFA provisions.

Message from the Chief Counsel

Full Speed Ahead for Small Business

by Dr. Winslow Sargeant, Chief Counsel for Advocacy

When I was sworn in on August 23rd, I felt honored to be appointed by President Obama to lead an organization that speaks out every day for the 27.5 million small businesses that make this country great. I believe in the work of this office and in the power of small businesses to improve lives and put our economy back to work.

In my first months as chief counsel for advocacy, I have met with the heads of small business associations and listened to their concerns and their issues. I immediately contacted agency heads and chief counsels to discuss these. My contacts have included a conversation with staff at the Internal Revenue Service on the expanded Form 1099 reporting requirements and a meeting at the White House Office of Federal Procurement Policy on women-owned businesses' insourcing and high-road contracting concerns. Additionally, I have sat down twice with Cass Sunstein, administrator of the White House Office of Information and Regulatory Affairs, to ensure that our offices work well together.

All of this is to let you know that the Office of Advocacy—the voice for small business in the federal government—is listening and relaying your concerns to the appropriate agencies. As your man in Washington, I will press forward on this important job.

Last month, I hosted the Office of Advocacy's symposium marking the 30th anniversary of the Regulatory Flexibility Act (RFA) where we released a study updating our research on the cost of regulation. We all know that small firms create new jobs in tough economic times. We also know that for this

to happen, entrepreneurs need an environment for success. It's Advocacy's job, through the RFA, to help ensure that they are being adequately considered when new regulations are developed.

My background is in technology and business, so I come to this job with a firsthand understanding of the challenges small businesses face. I started my career as an elec-

“Through my experience with high tech startups, I've learned what it's like to deal with federal regulations that apply a ‘one size fits all’ approach—which fail to take into account the different realities of a small business.”

trical and computer engineer, working for IBM, AT&T, and Lucent Technologies. The passage of the 1996 Telecommunications Act presented an opportunity to start a business. Along with a couple of friends in Allentown, Pennsylvania—a community going through some tough economic times—we quit our jobs and started a company designing computer chips. In a relatively short time, we grew from a handful of employees to more than 50. While we were ultimately successful, the challenges of starting and growing our business were plentiful. There were regulations, paperwork, legal bills, and sometimes rules that made no sense for a company of our small size.

Small businesses face different challenges and risks than large ones. The impact on small

businesses of what we do in Washington must always be front and center, because getting it right is too important for our economy. That is why the RFA was enacted in September 1980, and for 30 years it has been a key tool in improving the regulatory environment for small firms.

With change have come new opportunities, including new businesses developing innovations, products, and services. At the same time, environmental consciousness and demands for better health care and worker safety have intensified. As new business sectors pop up and others expand, new rules and regulations are not far behind.

Through my experience with high tech startups, I've learned what it's like to deal with federal regulations that apply a “one size fits all” approach—which fail to take into account the different realities of a small business. The study we've just released, *The Impact of Regulatory Costs on Small Firms*, demonstrates once again the disproportionately high cost of one-size-fits-all regulation for small business.

This burden is something the Office of Advocacy understands. For the last 30 years Advocacy has worked to ensure that the voice of small business is heard during the government's rulemaking process, and that agencies consider alternatives and solutions that meet their regulatory goals without placing undue burden on small firms.

Small businesses will always have an ally in the fight against burdensome regulations—the Office of Advocacy. I look forward to leading that fight for small business here in Washington.

Panel 1: The Cost of Regulation

Calculating the Additional Regulatory Cost Burden on Small Firms

by Patrick Morris, Public Liaison and Media Manager

Participants in the panel discussion on the cost of regulation on small business probably weren't expecting one of the presenters to quote the rock star Bono.

The panel discussed the disproportionate economic impacts of regulation on small business as highlighted by a new Office of Advocacy study, *The Impact of Regulatory Costs on Small Firms*. Thomas Hopkins, professor of economics at Rochester Institute of Technology moderated the panel. The three panelists were W. Mark Crain, a co-author of the study; John Morrall, the former deputy administrator of the White House Office of Information and Regulatory Affairs; and Rick Otis, a former deputy associate administrator in the EPA's Office of Policy, Economics and Innovation.

Crain summarized his study's findings; it is the fourth report on the topic sponsored by the Office of Advocacy. The study showed that the cost for regulatory compliance in 2008 for all federal regulations was \$1.75 trillion; when broken down by firm size, the difference in the cost per employee between the smallest and the largest firms was \$2,830 per employee.

Crain quoted the Irish singer Bono's September 19th *New York Times* guest op-ed: "Hidden somewhere in the Dodd-Frank financial reform bill... is a hugely significant 'transparency' amendment... Measures like this one should be central... And the cost to us is zero, nada." After sharing Bono's thoughts, Crain let it be known that the "costs are never zero." Costs may be hidden, or they may

be transferred, but there are no free lunches.

Morrall focused on the costs identified in the report and expressed concerns that high and growing levels of regulation could have a negative impact on growth.

A possible reason for the increasing costs, according to Rick Otis, may be limitations in the perspectives of rulemakers. Otis described a model in which decision-making takes place in "silos," with no interaction beyond those already in the loop. In this scenario, government decision-makers move ahead, but for the Regulatory Flexibility Act, which forces agencies to examine the impacts of their regulations on small businesses and other small entities.

Calculating Costs for Regulatory Review

Implicit in the panel discussion panel on regulatory costs is the importance of the completeness, validity, and precision of the cost-and-benefit estimates that come from the data and models that regulatory agencies, researchers, and policymakers employ. Concentrating on regulatory costs to small firms, there are two important types of data that drive the estimates and that are necessary for expanding knowledge of the subject. First are the costs of new regulations as they are promulgated; and second are the costs of the portfolio of all regulations still on the books. There are important issues with each type, and benefits to improving the quality of both kinds of cost data.

The most important reason for improving the quality of data used to estimate the costs of regulations in the proposal stage is to inform the rulemaking process and improve the quality of regulation. However, this endeavor also improves our regulatory cost estimates by making the ongoing inventory of regulatory cost data more complete and accurate. Currently, the Office of Information and Regulatory Affairs in the White House only reviews a small minority of all regulations under the process of E.O. 12866. Many rules that do not undergo review have serious cost implications for small business, and often these costs are under-reported.

The second category of cost data involves the backlog of existing regulations, many of which were passed at a time when regulatory cost impacts were not estimated in any systematic way. In many cases, data have been developed over the years to estimate the costs of these rules *ex post*, and certainly the research done by the Crains incorporates many of these estimates. Nevertheless, there are still large and important gaps in our knowledge about the costs of even some of the longest-lived regulations that affect small business. Developing new data and new methodologies to estimate both categories of costs is an ongoing process that will never cease to be relevant, as long as new regulations continue being promulgated and the conditions in which businesses operate continue to evolve.

— Joseph Johnson, Regulatory Economist

Cost of Federal Regulation Study Updated

Regulations provide the rules and structure that allow societies to function. While aware of this need, the Office of Advocacy has periodically examined the costs of complying with federal regulations and documented the disproportionate effects on small businesses compared with large ones.

In the 2010 edition of *The Impact of Regulatory Costs on Small Firms*, Nicole Crain and W. Mark Crain find that the cost for firms with fewer than 20 employees to comply with regulations is now \$10,585 per employee, up from \$7,647 in the 2005 report. Compared with firms with 500 or more employees, firms with fewer than 20 workers pay about \$2,830 more per employee—a 36 percent difference. The authors employ new and improved methodologies, so direct comparisons with the previous reports' data should be made with caution.

The authors estimate the cumulative cost of federal regulations at \$1.75 trillion. That figure is the sum of the compliance costs for four components: economic regulations; environmental regulations; tax compliance; and occupational safety, health, and homeland security regulations. The study uses the World Bank's Regulatory Quality Index for the economic regulations component. This index has more observations than the index used previously, as well as continuous data from 1998 to 2008.

Small firms continue to be disproportionately affected by the cost of regulations. Compliance with environmental regulations costs the smallest firms 364 percent more than large ones. Another significant disparity is in the cost of tax compliance—206 percent higher in the smallest firms. Analyzed by industry sector, regulations on manufacturing are particularly burdensome for small businesses. In the service sector, regulatory costs differ little between small and larger firms.

The full report is online at www.sba.gov/advo/research/rs371tot.pdf.

—Kathryn Tobias, Senior Editor

Type of Regulation	Cost per Employee for All Firms	Cost per Employee for Firms with:		
		Fewer than 20 Employees	20–499 Employees	500 or More Employees
All Regulation	\$8,086	\$10,585	\$7,454	\$7,755
Economic	5,153	4,120	4,750	5,835
Environmental	1,523	4,101	1,294	883
Tax Compliance	800	1,584	760	517
Occupational Safety and Homeland Security	610	781	650	520

Source: *The Impact of Regulatory Costs on Small Firms*, Nicole Crain and Mark Crain, 2010 (www.sba.gov/advo/research/rs371tot.pdf).



Authors Thomas Hopkins and Mark Crain discuss recent research with Advocacy economist Radwan Saade.



John Morrall presented alternate scenarios for calculating cumulative regulatory costs.

Panel 2: Regulatory Flexibility Act Training in a Nutshell

Four Basic Steps to Complying with the RFA

by Rebecca Krafft, Editor

Office of Advocacy staff members Claudia Rodgers (acting deputy chief counsel) and Joseph Johnson (regulatory economist) gave a condensed version of the three-hour RFA training course they have been treating regulatory agencies to over the past seven years. The training familiarizes rule writers with their obligations under the RFA.

Rodgers and Johnson described the four basic steps of a regulatory flexibility analysis, which they summed up in four questions:

1. Applicability: Does the RFA apply?
2. Threshold Analysis: Will there be a significant economic impact on a substantial number of small entities? If not, can you so certify?
3. The IRFA: What is the potential economic impact of the rule on small entities?
4. The FRFA: What has been done to minimize the adverse economic impact of the rule on small entities?

Two messages came through loud and clear: Start early and use Advocacy as a resource.

The place to begin to apply the RFA is the draft rule. The RFA requires an agency to include either a certification of no impact or an initial regulatory flexibility analysis (IRFA) with the publication of the draft rule. If a rule needs an IRFA, it should accompany the publication of the rule proposal in the *Federal Register*.

As an agency attempts to determine what a proposed rule's impact on small businesses is, Advocacy is available to help. Advocacy can hold roundtables to gather small businesses' impressions of a rule proposal, both its impacts and possible alternatives. Agency reps may participate in a roundtable, observe, or receive feedback after the fact. In this way, agencies can gather specific estimates of the number of businesses affected, the proportion of an industry they make up, as well as alternative approaches and solutions to the regulatory issue at hand.

The final regulatory flexibility analysis (FRFA) summarizes the comments received, any adjustments made in response to comments, and

it explains what has been done to minimize adverse economic impacts of the rule on small businesses.

Several helpful publications were made available. The shortest of them, *The RFA in a Nutshell*, is actually a smaller number of words than the law itself. Nice going! The longest, *A Guide to Compliance with the Regulatory Flexibility Act*, is an authoritative reference work created for federal agencies.

The trainers stressed many other important points, and especially the benefits of RFA compliance. To federal rulemakers, RFA compliance:

- Minimizes legal problems and challenges,
- Avoids delays due to these challenges,
- Improves public and congressional support, and
- Improves compliance with the regulation.

And to small businesses, RFA compliance:

- Levels the competitive playing field between large and smalls, and
- Supports the most vital segment of the American economy.



Advocacy staffers Claudia Rodgers and Joe Johnson led the RFA training panel.



Chief Counsel Sargeant and Assistant Chief Counsel Jamie Belcore Saloom led the successful RFA symposium.

Making a Difference with RFA Training

RFA training at federal regulatory agencies continues to be an important part of getting agencies to recognize that they can issue regulations that accomplish their objective while reducing the potential economic burden of those regulations on small businesses.

Since Executive Order 13272 was signed in 2002, the Office of Advocacy has been actively developing and maintaining a training program designed to teach agencies this important point. With over 80 agencies and 1,600 employees trained to date, Advocacy's RFA training sessions are making a difference. We see this difference in the consideration some agencies are giving to their economic analysis when drafting regulations and more importantly, in the advanced notice some agencies are giving to Advocacy staff regarding those draft regulations. If there is one thing Advocacy's RFA training sessions stress, it is that coming to Advocacy as early on in the regulatory development process as possible makes a significant difference for small business and makes it easier in the long run for the agency to comply with the RFA.

It still surprises my training team when we arrive at a federal agency for an RFA training session and I ask regulatory economists, attorneys, and policy staff at the agency, "How many of you are familiar with the RFA?" Consistently, no matter the agency, the number of agency staff that raise their hand are not even half of those in attendance. Even though Advocacy recently celebrated 30 years of the passage of the RFA, the need for training on compliance with the important mandates of the act remains. In these challenging economic times small businesses, now more than ever, need agencies to consider the potential economic impact of their regulatory decisions prior to issuing a final rule. The challenge continues!

—Claudia Rodgers, Acting Deputy Chief Counsel



Top left, SBA Deputy Administrator Marie Johns welcomed the audience. Below, OIRA Administrator Cass Sunstein talked about the RFA and transparency in governance.

Top right, Senate Small Business Committee Chair Mary Landrieu thanked Advocacy for supporting small business. Below, Chief Counsel Sargeant discussed regulations and the research, innovation, and development process.

Panel 3: The RFA in the Courts and Congress

Recent History of RFA Activity

by Assistant Chief Counsel Kate Reichert

“The RFA in the Courts and Congress” panel featured a discussion about developments in RFA case law since the passage of SBREFA and recent legislation regarding the RFA. The panel was moderated by Jeffrey Lubbers of American University’s Washington College of Law, and included panelists David Frulla of Kelley, Drye & Warren LLP; Keith Holman of the National Lime Association and former assistant chief counsel for advocacy; and Elizabeth Kohl, attorney advisor with the U.S. Department of Energy.

Lubbers raised several issues for discussion including the meaning of “significant,” “substantial,” and “small,” for purposes of RFA analyses, the ongoing discussion regarding whether indirect impacts, in addition to direct impacts, should be considered during regulatory analyses; as well as the use of small business regulatory review panels.

Holman described his experience at the Office of Advocacy with small business review panels at the Occupational Safety and

Health Administration and the Environmental Protection Agency, noting positive effects of the panel process and areas where panels could be utilized more effectively. Holman recognized that these panels can be labor-intensive for the agencies, but stressed their utility, explaining that the “purpose of the panel process is to get a better rule at the end of the process so that Advocacy can work with the agency at its best and highest level.”

Frulla discussed the impact that litigation can have on the RFA, noting that “rarely is regulatory flexibility legislation alone a silver bullet [in terms of ensuring an appropriate regulatory outcome for small businesses].” Rather, small businesses need to have the “staying power” to ensure that an agency adequately corrects RFA violations that a court finds. For instance, Frulla noted that, in *Southern Offshore Fishing Association v. Daley*, in which he served as counsel for a group of Atlantic shark fisherman, the RFA violations were addressed via an independent scientific review and

reconsideration of the agency’s proposed rules. In addition, Frulla singled out the standard of review used by the courts in RFA cases, and suggested that it is becoming more deferential to the agencies than Congress intended when it provided for judicial review of agency RFA compliance.

Elizabeth Kohl discussed RFA analysis from the agencies’ perspective noting some of the challenges her team faces when analyzing the impact on small entities; these include statutory limitations on creating flexibility for small entities and the difficulty in tiering small businesses based on revenue. Despite these challenges, Kohl acknowledged that “certification is the exception to the norm ... and conclusory or unsupported certifications are made at the agencies’ own peril.”



Panel 3 featured trade association and government experts. From left are Keith Holman, David Frulla, and Elizabeth Kohl.



Conference attendees trade ideas with OIRA Administrator Cass Sunstein (right).

Judicial Review: RFA Case Law since 1996

One of the most important amendments to the Regulatory Flexibility Act (RFA) is judicial review. When the RFA was passed 30 years ago, it did not specifically state that the law could be reviewed in the courts. As such, the courts initially found that the RFA was only reviewable in terms of the Administrative Procedures Act (APA). Agencies, therefore, did not give full consideration to their obligations under the RFA.

In 1996, Congress amended the RFA to include judicial review as part of the Small Business Regulatory Enforcement Fairness Act (SBREFA). Since the passage of SBREFA, scores of RFA cases have been filed. In those cases, the courts have ruled on several important issues such as standing to sue, the procedural requirements of the RFA, appropriate size standards, consideration of adequate alternatives, etc. An article on the RFA cases through 2006 can be found on Advocacy's website: www.sba.gov/advo/laws/law_lib.html.

The most recent reported case that raised an RFA claim is *Council Tree Communications, Inc. v. Federal Communications Commission*. The case involved some of the rules that governed the participation of small wireless telephone service providers in auctions of electromagnetic spectrum conducted by the FCC. The small service providers claimed that the rules were enacted without notice and comment as required by the APA and the RFA and that the rules were arbitrary and capricious. The court did not address the RFA, because it viewed it as duplicative of the APA notice-and-comment claim and stated, "To the extent that the FCC failed to give notice of the new rules for RFA purposes, it also gave inadequate notice for APA purposes, necessitating a remand on the latter basis alone." The court further stated that on remand, the FCC must comply with all RFA requirements.

—Jennifer Smith, Assistant Chief Counsel

SBREFA Panels Benefit Agencies, Small Business

Since the Small Business Regulatory Enforcement Fairness Act (SBREFA) was passed in 1996, two federal agencies, the U.S. Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA), have been required to convene small business advocacy review panels (also known as SBREFA panels) prior to proposing any rule that is expected to have a significant economic impact on a substantial number of small entities. In the future, the newly created Consumer Financial Protection Bureau (CFPB) at the Federal Reserve Board will join that short list of covered agencies.

Do SBREFA panels help agencies and small business? Well, judging by the final panel discussion at the recent RFA@30 Symposium, the answer is definitely, "Yes"!

SBREFA panels consist of officials from the rulemaking agency, the Office of Advocacy, and the Office of Information and Regulatory Affairs. Small entity representatives inform the panels about how the contemplated regulation would affect them. The small entity representatives review preliminary materials, assess the proposal, consider costs, and recommend alternatives. The panel in turn issues a report to the agency detailing these concerns and recommending a course of action.

SBREFA panels are definitely helpful. First and foremost, the panels force the agencies to consider the real world costs and implications of their rules on small business. As each of the panelists at the symposium agreed, requiring the agency to explain the rule to actual small business representatives forces the agency to think through its proposal, clearly explain the issue, and justify what it is trying to do. Each of the panelists agreed the process was beneficial, although not without costs. For small business, the panels give them direct access to the agency decision-makers and the opportunity to explain how regulations will affect them. Most small entity representatives report having a favorable experience working with the panel, and nearly all think the process is beneficial.

SBREFA panels do require time and effort by both the panel and the small entity representatives. However, because the SBREFA statute establishes a strict 60-day timeframe to conclude the panel, the panels have not been time-consuming and have operated efficiently. Further, because regulations may impose disproportionate impacts on small entities, the process helps to reduce costs and consider approaches that are more flexible and small business-friendly.

—Bruce Lundgren, Assistant Chief Counsel

Panel 4: RFA Success Stories and Challenges

Implementing the RFA

by Assistant Chief Counsel Janis Reyes

The panel, “RFA Success Stories and Challenges,” featured agency officials and small business stakeholders who shared their experiences with implementing the Regulatory Flexibility Act (RFA) and offered suggestions for improving the process.

Moderator Neil Eisner, assistant general counsel for regulation and enforcement at the U.S. Department of Transportation, opened the discussion with the question, “Is the RFA a success?” Eisner noted that the RFA was a success at the agency because for all important rules that go before the secretary, the question that is always posed at briefings is, “Has the agency considered the impact on small entities?”

“The greatest impact of the RFA that is out of the sight of the public is that it has changed the agency culture to think about small businesses when they are thinking about doing rulemaking,” stated Jim Laity, an audience participant and desk officer at the Office of Information and Regulatory Affairs.

“The Small Business Administration’s Office of Advocacy is the best use of tax dollars out there,” stated panelist Jeff Hannapel, vice president of regulatory affairs at the Policy Group and former official at the U.S. Environmental Protection Agency (EPA), “the RFA is so important because it allows small businesses to be part of the regulatory process.”

Panelist Nicole Owens, director of regulatory management at EPA, stated that the small business input in the SBREFA panel process before the rule is published has resulted in significant rulemaking improvements at EPA, such as small business exemptions or phased-in compliance dates.

Hannapel added, “SBREFA panels are important because they are composed of small businesses with real world experience. They discuss how they will be impacted by the rule—they are not just some talking heads.”

While SBREFA panels can be helpful, Owens stated that the EPA

can take four to ten months for agency staff to prepare its analyses to give to the SBREFA panel and it ultimately lengthens the time to do a rulemaking. Owens noted that it is hard for the agency to conclude that they couldn’t get the same data in another way, such as through the comment period or through agency outreach.

Panelist Jonathan Snare, partner at Morgan, Lewis & Bockius LLP and a former official of the Occupational Safety and Health Administration (OSHA), stated that getting relevant data is always a challenge for the agency. Sarah Shortall, an attorney for OSHA, recommended that Advocacy train small entity representatives on the SBREFA process and the type of quantitative data that the agency needs to make this process more helpful. Panelists noted that while OSHA and EPA have different ways of implementing the SBREFA process, the most important thing is for the agency to be flexible and hold panels before the policy decisions are made.



Panel 4 featured RFA success stories. From left are Neil Eisner, Jeff Hannapel, Nicole Owens, and Jonathan Snare.



Chief Counsel Sargeant recognized Susan Walthall for her service as acting chief counsel.

An RFA Success Story: EPA Gives a Final Rule a Second Look

In one of the major success stories under the Regulatory Flexibility Act, the Environmental Protection Agency (EPA) is reexamining its final rule for stormwater discharge from construction sites, known as the construction and development (or C&D) rule. The Office of Advocacy estimated that the regulation had the potential of costing business \$10 billion annually, with minimal environmental improvement; in addition, it would adversely affect housing affordability for millions of Americans. The cost impact would fall primarily on small firms, which make up 97.7 percent of the construction and development industry.

On February 26, 2009, Advocacy submitted comments on the proposed rule. Advocacy endorsed an “action level” approach as one of two desirable regulatory approaches. An action level does not stipulate a specific numeric limit, instead it requires the facility to take steps to minimize sediment runoff once the action level is exceeded. Under the RFA, Advocacy was recommending a less costly approach with substantially equivalent environmental protection.

In its final rule, issued on December 1, 2009, EPA adopted a numeric turbidity standard of 280 nephelometric turbidity units (NTU). On April 20, 2010, Advocacy issued a letter petitioning EPA to reconsider the final rule for stormwater discharges for construction sites. The petition identified errors in EPA’s data review and analysis. Advocacy also suggested that EPA could take notice and comment on a new proposal, after consideration of this new information, instead of re-promulgating a new standard without additional notice and comment.

In response to this petition for reconsideration, the Department of Justice, acting upon behalf of EPA, filed a motion in the 7th Circuit to vacate the 280 NTU standard and reconsider the standard. The court ruled in October to remand the standard back to the agency, and EPA is expected to issue another proposed rule for notice and comment.

—Kevin Bromberg, Assistant Chief Counsel

The History of the Regulatory Flexibility Act

by Kathryn Tobias, Senior Editor

After President Gerald Ford signed Public Law 94-305 creating the Office of Advocacy in June 1976, the important work of paying attention to regulations’ effects on small firms came under the wing of the newly created independent office. Part of Advocacy’s mandate was explicitly to “measure the direct costs and other effects of government regulation on small businesses; and make legislative and non-legislative proposals for eliminating excessive or unnecessary regulations of small businesses.”

On October 11, 1979, President Jimmy Carter added the Small Business Administration to his Regulatory Council and on November 16, he issued a memorandum to the heads of executive departments and agencies saying, “I want you to make sure that federal regulations will not place unnecessary burdens on small businesses

and organizations,” and laying out steps for agencies so that regulations are applied “in a flexible manner, taking into account the size and nature of the regulated businesses.” He required agencies to report the results of their efforts to the Office of Advocacy.

Meanwhile, the House and Senate Small Business and Judiciary Committees had been holding hearings on the effects of regulation. Small business people cited evidence that uniform application of regulatory requirements made it difficult for smaller businesses to compete effectively in the regulated market.

By 1980, when delegates assembled for the first of three White House Conferences on Small Business, the conference report to the president noted that “during the past decade, the growth of government regulation has been explosive,

particularly in such areas as affirmative-action hiring, energy conservation, and protection for consumers, workers and the environment. Small business people recognize that some government regulation is essential for maintaining an orderly society. But there are now 90 agencies issuing thousands of new rules each year.”

Moreover, the report said, the new Office of Advocacy had estimated that small firms spent \$12.7 billion annually on government paperwork. Among the conference recommendations, the fifth highest vote-getter was a recommendation calling for “sunset review” and economic impact analysis of regulations, as well as a regulatory review board with small business representation. The conference delegates recommended putting the onus of measuring regulatory costs on the

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regulatory agencies—to “require all federal agencies to analyze the cost and relevance of regulations to small businesses.”

1980: The Regulatory Flexibility Act

The White House Conference recommendations, supporting earlier calls for action and the findings on Capitol Hill, helped form the impetus for the passage, in 1980, of the Regulatory Flexibility Act (RFA). The intent of the act was clearly stated:

“It is the purpose of this act to establish as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives... of applicable statutes, to fit regulatory and informational requirements to the scale of businesses... 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.”

The law directed agencies to analyze the impact of their regulatory actions and to review existing rules, planned regulatory actions, and actual proposed rules for their impacts on small entities. Depending on the proposed rule’s expected impact, agencies were required by the RFA to prepare one or more of three documents: an initial regulatory flexibility analysis, a certification, and a final regulatory flexibility analysis. Rules to be included in the agencies’ “regulatory agendas” were those likely to have a “significant economic impact on a substantial number of small entities.”

Implementing the RFA

The Office of Advocacy was charged to monitor agency compliance with the new law. Over the next decade and a half, the office carried out its mandate, reporting annually on agency compliance to



President Jimmy Carter signed the Regulatory Flexibility Act on September 19, 1980. Courtesy Jimmy Carter Library.

the president and the Congress. But it became clear early to the Office of Advocacy and many small business people that the law wasn’t strong enough. A briefing paper prepared for the 1986 White House Conference on Small Business noted: “The effectiveness of the Regulatory Flexibility Act largely depends on small business’ awareness of proposed regulations and [their] ability to effectively voice [their] concerns to regulatory agencies. In addition, the courts’ ability to review agency compliance with the law is limited.”

The delegates recommended strengthening the RFA by requiring recalcitrant agencies to comply and by providing that the action or inaction of all federal agencies with respect to the RFA be subject to judicial review. President Ronald Reagan’s 1987 report on small business noted: “Regulations and excessive paperwork place small businesses at a disadvantage in an increasingly competitive world marketplace...” But it would take an act of Congress to make judicial review law—and reaching that consensus needed more time.

Regulations’ effects on the economic environment for competition also concerned

President George H.W. Bush, whose 1992 message in the annual small business report noted: “My Administration this year instituted a moratorium on new Federal regulations to give Federal agencies a chance to review and revise their rules. And we are looking at ways to improve our regulatory process over the long term so that regulations will accomplish their original purpose without hindering economic growth.” The scene was set for the regulatory logjam to move.

On September 30, 1993, President Clinton issued Executive Order 12866, “Regulatory Planning and Review,” designed, among other things, to ease the regulatory burden on small firms. The order required federal agencies to analyze carefully their major regulatory undertakings and to take action to ensure that these regulations achieved the desired results with minimal societal burden.

An April 1994 report by the General Accounting Office reviewed the Office of Advocacy’s annual reports on agency compliance with the RFA and concluded: “The SBA annual reports indicated

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agencies' compliance with the RFA has varied widely from one agency to another. ...the RFA does not authorize SBA or any other agency to compel rulemaking agencies to comply with the act's provisions."

The 1995 White House Conference and SBREFA

In 1995, a third White House Conference on Small Business looked at why the RFA had not made enough progress in mitigating regulations' increasing and disproportionate effect on small firms. The Administration's National Performance Review had recommended that agency compliance with the RFA be subject to judicial review. Still it had not happened.

Once again, the White House Conference delegates forcefully addressed the problem. Recommendation #183 of the National Conference Recommendation Agenda fine-tuned the regulatory policy guidance of earlier conferences, asking for specific provisions that would include small firms in the rulemaking process.

In October, the Office of Advocacy issued a report, based on research by Thomas Hopkins, that estimated the total costs of "process," environmental, and other social and economic regulations at \$668 billion in 1995. Conservative estimates put the average cost of regulation at \$3,400 per employee for large firms with more than 500 employees and \$5,000 per employee for small firms with fewer than 500 employees.

As it turned out, recommendation #183 was among the first of the 1995 White House Conference results to be implemented. President Clinton signed Public Law 104-121, the Small Business Regulatory Enforcement Fairness Act (SBREFA), on March 29, 1996. The new law gave the

courts jurisdiction to review agency compliance with the RFA, thus providing for the first time an enforcement mechanism. Second, it mandated that the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA) convene small business advocacy review panels to consult with small entities early on regulations expected to have a significant impact on them, before the regulations were published for public comment. This formalized for these two agencies a process for involving small entities in the agencies' deliberations on the effectiveness of regulations that would affect them. Third, it reaffirmed the authority of the chief counsel for advocacy to file *amicus curiae* (friend of the court) briefs in appeals brought by small entities from agency final actions.

The 2000s: A Small Business Agenda and Executive Order 13272

On March 19, 2002, President George W. Bush announced his Small Business Agenda, which succinctly noted that "The role of government is not to create wealth but to create an environment where entrepreneurs can flourish." The president gave a high priority to regulatory concerns, including as a key feature of his agenda the goal to "tear down the regulatory barriers to job creation for small businesses and give small business owners a voice in the complex and confusing federal regulatory process."

The first point under this section was the goal of strengthening the Office of Advocacy by enhancing its relationship with the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) and creating an executive order that would direct agencies to work closely with Advocacy in properly considering the impact of their regulations on small business.

On August 13, 2002, he issued Executive Order 13272, "Proper Consideration of Small Entities in Agency Rulemaking." The E.O. required federal agencies to

- Establish written procedures and policies on how they would measure the impact of their regulatory proposals on small entities and to vet those policies with Advocacy;
- Notify Advocacy before publishing draft rules expected to have a significant economic impact on a substantial number of small entities; and
- Consider Advocacy's written comments on proposed rules and publish a response with the final rule.

The E.O. requires Advocacy, in turn, to provide periodic notification as well as training to all agencies on how to comply with the RFA. These steps set the stage for agencies to work closely with Advocacy in considering their rules' impacts on small entities. Since then, Advocacy has trained nearly all agencies in implementing the RFA, and Cabinet departments as well as many independent agencies have submitted written RFA compliance plans and made their RFA procedures publicly available. Another significant development in the first decade of the 21st century was the creation of a model "state RFA" that has since been adopted by many states in whole or in part.

A New Administration Implements the RFA

When the Obama Administration took office in 2009, one immediate pressing challenge was to respond to the financial crisis faced by the American public and the business community in particular. Some of the participants in the debate on a new financial protection law were familiar with the success of the SBREFA panels that apply to EPA and OSHA rulemakings. The

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Test Your Knowledge of the RFA

Ten Frequently Asked Questions About the Regulatory Flexibility Act

The following questions repeatedly arise during RFA training. They address some of the more challenging parts of rule analysis, as well as areas that are commonly misunderstood. Many continue to pose problems for agency regulators. In the following article, Acting Deputy Chief Counsel Claudia Rodgers answers them. The list first appeared in the May 2004 issue of The Small Business Advocate.

1. What is the difference between direct and indirect impact?

A regulation imposes a direct impact on a business it regulates. Those compliance costs associated with the rule are an example of direct economic impacts of the rule on those businesses. However, a regulation may also have an economic impact on businesses that are not subject to the rule and its requirements. As a result of the regulation, those other businesses may also incur costs. For example, a rule that regulates car manufacturers may indirectly affect car rental agencies which must purchase those cars for use in their business.

Courts have held that the RFA requires an agency to perform a regulatory flexibility analysis of small entity impacts only when a rule directly regulates them. This issue was first decided in *Mid-Tex Electric Cooperative, Inc., v. Federal Energy Regulatory Commission (FERC)*.¹ In that case, FERC stated that “the RFA does not require the Commission to consider the effect of this rule, a federal rate standard, on nonjurisdictional entities whose rates are not subject to the rule.” The court agreed, reasoning 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.” The court concluded that “an agency may properly certify that no regulatory flexibility analysis is necessary when it determines that the rule will not have a significant economic impact on a substantial number of small entities that are subject to the requirements of the rule.” Although *Mid-Tex* occurred before passage of the Small Business Regulatory Enforcement Fairness Act of 1996, courts have upheld this reasoning since then. The court in *Cement Kiln Recycling Coalition v. EPA*² reasoned that “requiring an agency to assess the impact on all of the nation’s small businesses possibly affected by a rule would be to convert every rulemaking process into a massive exercise in economic modeling, an approach we have already rejected.”

Although it is not required by the RFA, the Office of Advocacy believes that it is good public policy for agencies to include reasonably foreseeable indirect impacts in the regulatory flexibility analysis.

2. Define “substantial number” and “significant economic impact.”

An agency’s second RFA step in a threshold analysis is to determine whether there is a significant economic impact on a substantial number of small entities. The RFA does not define “significant” or “substantial.” In the absence of statutory specificity, what is significant or substantial will vary depending on the problem being addressed, the rule’s requirements, and the preliminary assessment of the rule’s impact.

The agency is in the best position to gauge the small entity impacts of its regulations. Significance should not be viewed

in absolute terms, but should be seen as relative to the size of the business, business profitability, regional economics, and other factors. One measure for determining economic impact is the percentage of revenues or percentage of profits affected. Other measures may be used. For instance, the impact could be significant if the cost of the proposed regulation (a) eliminates more than 10 percent of the businesses’ profits; (b) exceeds 1 percent of the gross revenues of the entities in a particular sector, or (c) exceeds 5 percent of the labor costs of the entities in the sector.

The absence of a particularized definition of either “significant” or “substantial” does not mean that Congress left the terms completely ambiguous or open to unreasonable interpretations. Thus, Advocacy relies on legislative history of the RFA for general guidance in defining these terms.

3. Does an agency have to consider a rule’s impact on international firms doing business in the U.S.?

The definition of small business in the RFA comes from the Small Business Act³ and regulations issued by the Small Business Administration. With regard to international firms, the act defines a small business as “a business entity organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor.” So where a business meets the above criteria, agencies must consider a rule’s impact.

4. How soon must an agency notify Advocacy after certifying a rule?

If the head of an agency makes a certification that a rule will not have a significant economic impact upon a substantial number of small entities, section 605(b) of the RFA requires the agency to “provide such certification to the chief counsel for advocacy.” The RFA does not provide a time requirement. However, Advocacy encourages agencies to provide this information at a reasonable time in advance of publication or submission to the Office of Management and Budget for review.

5. Does an agency have to choose the alternative that gives the most relief to small business?

The RFA does not require an agency to choose the alternative that gives the most relief to small business. In an agency’s final regulatory flexibility analysis, an agency must give a statement of factual, policy, and legal reasons for adopting one or more alternatives and rejecting others. However, it would be contrary to the spirit of the RFA to reject an alternative that does the best job of reducing small business burden while accomplishing the agency’s regulatory goal.

6. Under what circumstances do interim final rules and direct final rules require an initial regulatory flexibility analysis (IRFA) or final regulatory flexibility analysis?

The RFA applies to any rule subject to notice and comment rulemaking under section 553(b) of the Administrative Procedure Act (APA)⁴ or any other law. Rules are exempt from APA notice and comment requirements (and therefore from the RFA requirements) when the agency for good cause finds that notice and public comment are impracticable, unnecessary, or contrary to the public interest.

In the case of an interim final rule where an agency has relied on this good cause exception, the rule is exempt from RFA analysis. However, Advocacy advises agencies that the exemption is narrowly construed by courts and may be challenged. Advocacy has been particularly concerned about agencies who might utilize this exemption to avoid performing the regulatory analysis required by the RFA. Advocacy encourages agencies to perform the analysis so the public can comment on the accuracy of the agency’s assumptions regarding the economic impact of the rule. Once an agency moves to a *final* final rule, following an interim final rule, the emergency nature of the rule is usually no longer in effect and the agency must then perform the regulatory analysis necessary under the RFA. In practice, some agencies have been slow (or have failed) to issue a *final*, final rule and therefore have avoided performing the required analysis.

7. Is an IRFA required when the small business impact is positive?

Admittedly, Advocacy is primarily concerned with agencies’ failure to identify *adverse* impacts of their regulations on small entities and lack of efforts to mitigate those adverse impacts. This, after all, is the primary concern of the law. Legislative history, however, makes it clear that Congress intended that regulatory flexibility analyses also address *beneficial* impacts. Therefore, an agency cannot certify a proposed rule if the economic impact will be significant but positive. If an agency finds the impact will be positive, it should conduct a regulatory flexibility analysis to determine if alternatives can enhance the economic benefits to small entities.

8. Does Advocacy ever file an *amicus curiae* brief on behalf of an agency?

The chief counsel for advocacy is authorized to file an *amicus curiae*, or friend of the court, brief in any action brought in a U.S. court to review a rule. Advocacy may present its views with respect to RFA compliance, the adequacy of the rulemaking record with respect to small entities, and the effect of the rule on small entities. To date, Advocacy has only sought to file *amicus* briefs to support the views of small business.

9. Where can an agency get small business data?

An agency should first look into its internal resources to identify what data it has on the industry it is intending to regulate. If such data need to be supplemented with additional information, the agency should conduct research or hire a contractor to acquire the information and should conduct outreach to trade associations and small businesses. Alternatively, an agency can contact the Office of Advocacy which will assist them in finding adequate sources of data, e.g., the Census Bureau or the Bureau of Labor Statistics. Advocacy also has the ability to convene small business roundtables to solicit additional data and information from potentially affected small entities.

10. If a rule does not require notice and comment under the Administrative Procedure Act, does the RFA require it?

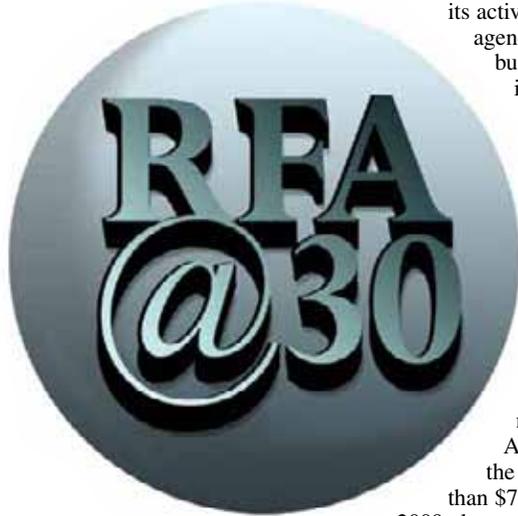
The RFA requires analysis of a proposed regulation only where notice and comment rulemaking is required by the APA or any other statute. If a rule is not required to follow notice and comment rulemaking under the APA or any other statute, then the rule is exempt from the requirements of the RFA.

NOTES

1. Mid-Tex Elec. Coop v. FERC, 773 F.2d 327, (D.C. Cir. 1985).
2. Cement Kiln, 255 F.3d at 868.
3. 13 C.F.R. 121.105.
4. 5 U.S.C. §553(b).

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Dodd-Frank Wall Street Reform and Consumer Protection Act, signed by President Obama in July



2010, names the new Consumer Financial Protection Bureau as the third agency required to use the SBREFA panel process in developing regulations.

Meanwhile, Advocacy continues its active work with federal agencies and the small business community to implement the intent of the RFA. New regulatory cost studies continue to find a disproportionate burden on small firms; but the amount of additional regulatory burden that was not loaded onto the backs of small businesses because of Advocacy's work and the RFA totaled more than \$7 billion in fiscal year 2009 alone. As agencies adjust their regulatory development pro-

cesses to accommodate the requirements of the RFA and the E.O., the benefits will continue to accrue to small firms.

At the 30th anniversary symposium on the RFA in September 2010, OIRA Administrator Cass Sunstein summed up the RFA mission: "In the current economic environment, it is especially important to see that [regulatory] analysis and openness are mutually reinforcing. If the two are taken together, they can help to promote important social goals, to reduce unjustified burdens, and to identify approaches that will promote entrepreneurship, innovation, job growth, and competitiveness, not least for the millions of small businesses that are indispensable to economic recovery and growth."

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