

**Report to U.S. Senate
and House of Representatives
Committees on Appropriations**

**Practices and Procedures for Small
Business Input**



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Advocacy Mission

For decades, our nation has recognized the importance of small businesses as generators of innovation, employment, economic growth, and competition in the U.S. economy. The need for policies that support the development, growth, and health of small business led to the creation in 1976 of the Office of Advocacy, an independent office within the SBA.

Advocacy's mission is to encourage policies that support the development and growth of American small businesses by:

- Fostering two-way communication between the small business community and other stakeholders, including federal policymakers and regulatory agencies;
- Engaging early in federal agencies' regulatory development process to reduce the regulatory burden on small businesses and providing Regulatory Flexibility Act (RFA) compliance training to federal agencies and regulatory development officials; and
- Producing research that documents the vital role of small businesses in the economy, informs policymakers and other stakeholders of the impact of federal regulations on small businesses, and explores the variety of issues of concern to the small business community.

Advocacy Background

The RFA is the primary legal tool that gives small businesses a voice in the rulemaking process. The RFA establishes in law the principle that government agencies must analyze the effects of their regulatory actions on small entities—small businesses, small nonprofits, and small governments—and consider alternatives that would minimize the economic burden on small entities while still achieving their regulatory objectives. Advocacy has the responsibility of overseeing and facilitating federal agency compliance with the RFA.

Since it was enacted in 1980, the RFA has been strengthened by legislation and executive orders including:

- **The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).** SBREFA provided for judicial review of agency compliance with key sections of the RFA. It also established a requirement that certain agencies (currently the Environmental Protection Agency, the Occupational Safety and Health Administration, and the Consumer Financial Protection Bureau) convene panels whenever they are developing a rule for which an initial regulatory flexibility analysis (IRFA) would be required.

- **Executive Order 13272.** Signed by President Bush in August 2002, E.O. 13272 requires Advocacy to notify the leaders of the federal agencies from time to time of their responsibilities under the RFA. The executive order also requires Advocacy to provide training to the agencies on how to comply with the law and to report annually on agency compliance. The executive order also requires that the agencies provide notice to Advocacy of any draft proposed rule that would impose a significant economic impact on a substantial number of small entities and include “in any explanation or discussion accompanying publication in the *Federal Register*” a response to any written comment it has received on the rule from Advocacy.
- **The Small Business Jobs Act of 2010.** This legislation codified the requirements of early notification and written responses previously included in E.O. 13272.

During the Obama Administration, an executive order and accompanying memo provided more support of Section 610 of the RFA, which requires agencies to review existing regulations periodically to determine whether they are still justifiable.

- **Executive Order 13563, Improving Regulation and Regulatory Review.** E.O. 13563 imposed on the executive agencies new requirements of heightened public participation, consideration of overlapping regulatory requirements and flexible approaches, and ongoing regulatory review. E.O. 13563 was accompanied by a presidential memorandum, Regulatory Flexibility, Small Business and Job Creation.
- **Presidential Memorandum, Regulatory Flexibility, Small Business and Job Creation.** This memo reminded the agencies of their responsibilities under the RFA, directed them “to give serious consideration” to reducing the regulatory impact on small business through regulatory flexibility, and to explain in writing any decision not to adopt flexible approaches.
- **Executive Order 13610, Identifying and Reducing Regulatory Burdens.** On May 11, 2012, President Obama issued Executive Order 13610, which established regulatory review as a rulemaking policy, and also established public participation as a key element in the retrospective review of regulations. E.O. 13610 also established as a priority “initiatives that would reduce unjustified regulatory burdens or simplify or harmonize regulatory requirements imposed on small business” and ordered the agencies to “give consideration to the cumulative effects” of their regulations.

With this emphasis on the principles of regulatory review and sensitivity to the special concerns of small businesses in the rulemaking process, federal agencies have increased their efforts to comply with the RFA. The Office of Advocacy, consistent with its statutory mission, provides assistance and guidance to the agencies in achieving this compliance.

Fulfilling the Advocacy Mission

The Office of Advocacy fulfills the three pillars of its mission by monitoring federal regulatory activity, soliciting the views of stakeholders, identifying areas of interest, and engaging with federal agencies on regulations and policies affecting small businesses.

Monitoring Federal Regulatory Activity

Advocacy's Office of Interagency Affairs monitors federal regulatory proposals through a variety of means, including through staff collaboration, publicly available sources such as the *Federal Register*, various government agency websites, and the agencies' periodic publication of their regulatory agendas, as well as the executive agencies' interagency review process.

- **Staff Collaboration.** The Office of Interagency Affairs (Interagency) holds a staff meeting every other Monday at 10:00 a.m. and at other times as needed. Other members of Advocacy also attend the meeting. The purpose of the meeting is to: (1) give the Director of Interagency Affairs a heads-up on priorities and (2) exchange information and ideas on federal regulatory activity.
- **Monitoring Published Regulatory Activity.** Interagency staff reviews [regulations.gov](https://www.regulations.gov), [Reginfo.gov](https://www.reginfo.gov), and other official websites for relevant items. Advocacy also makes use of industry and trade publications as well as RSS feeds, listserv subscriptions, and other means of electronic monitoring of rulemakings.
- ***Federal Register.*** Advocacy's goal is to know about draft rules that may have an impact on small entities via small business and agency contacts, or from prepublication OIRA review, before such rules are published. Although publication is usually very late in the process, *Federal Register* notices can still be useful in helping to flag issues meriting a Regulatory Alert and/or follow up calls to the agency or potentially affected small entities.
- **Semiannual Regulatory Agendas.** Interagency staff members review the semiannual Regulatory Agendas and the semiannual lists of rules to be reviewed under E.O. 1356. In a timely manner, the staff reviews items new to each agency's agenda and those which may have been dropped.
- **Agency Notification.** Many agencies also notify Advocacy directly in advance of planned regulations, particularly when these proposals will have significant costs or will affect significant numbers of small entities.

Outreach

Advocacy reaches out to its many stakeholders to solicit their views on issues of concern to small firms. In addition to seeking feedback through meetings and roundtables, Advocacy also communicates with small business owners through various platforms including Regulatory Alerts and comment letters. Advocacy's ten regional advocates are the office's eyes and ears outside of Washington, D.C., and they report back directly to the D.C. office about small business regulatory concerns. Advocacy also receives a steady flow of input on small business concerns from stakeholders.

- **Regulatory Alerts (Reg Alert).** Regulatory Alerts are an early-alert system on rulemakings and *Federal Register* notices that are potentially of significant interest to small businesses and that have open comment periods. Small businesses can sign up for Advocacy's Regulatory Alerts online. Reg Alerts direct stakeholders to [regulations.gov](https://www.regulations.gov) as the comprehensive listing of rulemakings open for comment and as the preferred method of submitting comments. Preparing a Reg Alert on a rule does not mean Advocacy will necessarily comment on the rulemaking.
 - ❖ **Detailed Description of a Regulatory Alert.** A Reg Alert includes a summary which is posted on the website and distributed via the listserv. Each Reg Alert includes the date that the notice appears in the *Federal Register* so that it can be linked to the notice; the Reg Alert also includes an email address for electronic submissions. For Reg Alerts with open comment periods, the Reg Alert also includes a comment deadline. When possible, Reg Alerts link directly to the comment submission page so that only minimal steps are required for the user to submit a comment.
- **Roundtables.** Advocacy listens to small businesses and their representatives at numerous roundtables throughout the year. On many occasions, officials from federal agencies and Congress attend Advocacy roundtables to hear from small businesses directly and to discuss agency activities and approaches. Roundtable meetings are a unique means of bringing small businesses and agency officials together.
 - ❖ **Occurrence.** Roundtables are held as needed on an agency- or rule-specific basis at the recommendation of the Interagency staff member handling the issue.
 - ❖ **Purpose.** Roundtables are intended to provide an informal format for discussion of regulatory topics of interest to small business and to give Advocacy direction on economic impacts and alternatives. They may involve presentations from agencies or roundtable participants, but are not intended as a means to receive formal testimony or to develop a consensus position.
 - ❖ **Agenda.** The proposed agenda, including speakers, agency participants, and discussion topics must be approved by the Chief Counsel before invitations are sent to participants.

- Agendas also contain the standard statement of Advocacy policy:

Roundtable meetings are open to all interested persons, with the exception of the press, in order to facilitate open and frank discussion about small business problems. Agendas and presentations are available to all, including the press. Anyone who wants to receive roundtable agendas or presentations, or be included in the distribution list, should forward such requests to Charles.Maresca@sba.gov. The purpose of these Roundtable meetings is to exchange opinions, facts and information and to obtain the attendees' individual views and opinions regarding small business concerns. The meetings are not intended to achieve or communicate any consensus positions of the attendees.
- Agendas also include information about presenters, if any. For presentations by agency officials, a simple identification of agency, title, etc. is included. For presentations by an actual small business owner or employee, the agenda provides identification of the speaker and the name and the type of business. Small business representatives and technical representatives may be identified by name, employer, and/or the small businesses they represent. In the case of trade association representatives, they may also include the industry sector they represent.
- Agendas include items that will be discussed with a description about the small business impact.
- Agendas ensure that Advocacy and roundtable participants have sufficient time for each issue; presentations are generally brief, followed by questions and answers or discussion.

❖ **Meeting Space.** The roundtables are held at government facilities or rented spaces. Within SBA headquarters, the usual meeting room options are Advocacy's conference room, the SBA's Eisenhower Conference Room, or occasionally the SBA Administrator's Conference Room.

❖ **Invitations.** Invitation lists are currently maintained by each Interagency staff member; however, as outlined in Advocacy's statement of policy, roundtable meetings are open to all interested persons with the exception of press. Anyone who wants to be added to the invitation list, or to receive roundtable agendas or presentations, can do so upon request.

- **RFA Compliance Training.** Advocacy also completes its mission through federal agency outreach. The working relationship between Advocacy and the federal agencies is

critical to Advocacy's success. Executive Order 13272 requires Advocacy to provide training to federal regulatory development officials on RFA compliance, and agencies have been responsive to Advocacy's training.

Identifying Areas of Interest

Advocacy takes its direction from small businesses to determine the Office's involvement in agency rulemaking. To accomplish this, staff members talk regularly with individual small businesses and contacts at the small business trade associations to determine which agencies and rulemakings warrant the Office's attention and involvement. Advocacy performs due diligence in the form of legal and economic analysis—to understand the issues, implications, and context of the rulemaking (and broader issues involved).

- **Legal Analysis.** The legal analysis determines compliance with RFA provisions while also reviewing alternatives, RFA case law, administrative procedures law, and the substantive law under which a rule is being promulgated.
- **Economic Analysis.** Advocacy's regulatory economists are involved early, including the initial assessment of whether Advocacy should become involved and what information is needed to be effective. The attorney and economist review the draft regulation for its potential affect on small business and use data resources to assist in calculating the potential economic impact on various sizes of small businesses and to determine which alternatives might be the least burdensome on them.

However, if small businesses or their stakeholders are not concerned with a given rule, Advocacy will focus its resources elsewhere.

Engagement with Federal Agencies on Regulations and Policies Affecting Small Businesses

After an issue of interest has been identified, Advocacy's Office of Interagency Affairs works with regulatory officials and policymakers to ensure that the views of small entities are known and considered in the agency's actions. Advocacy interventions can occur at all stages of the rule development process. First, comments can be submitted during confidential pre-decisional deliberative consultations before a proposal is made. In addition, formal comments can be made after a proposed rule has been published or after a rule has been finalized.

- **Non-Regulatory Input.** In some cases, the Office of Advocacy releases public comments on behalf of small businesses in non-regulatory matters including legislative activity, statements of policy, and other non-regulatory issues impacting small business.

Under these circumstances, the attorney must hear from concerned small businesses, research the potential problem, and finally, bring the results of their findings to the attention of the Chief Counsel by recommending a course of action. It is up to the Chief Counsel's discretion whether or not to engage on such issues.

- **Inform Agency Early and Often.** While Advocacy has the authority to take positions that differ from the Administration, Advocacy makes contact with the agency as early as possible in the process in order to gather information and assess whether or not to become involved. Advocacy always talks with the agency contact to ask questions, provide information, and discuss alternatives for small business, if possible before the agency has drafted its regulation or finalized its policy.
- **Confidential interagency communications.** All draft documents and interagency communications exchanged under E.O. 12866 review, or due to an agency seeking our involvement pre-publication, are deliberative/confidential documents exempt from FOIA and should be treated confidentially.
- **Interagency Regulatory Review.** Advocacy also engages through the interagency review process under E.O. 12866. In the past, Advocacy had a Memorandum of Understanding with the Office of Information and Regulatory Affairs (OIRA), which is now expired. By mutual agreement, Advocacy and OIRA continue to cooperate on interagency regulatory review; this enables Advocacy to recommend changes to a rule that does not comply with the RFA.
- **SBREFA Panels.** Under the RFA as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), Advocacy participates in small business review panels for draft proposed rules. Three agencies—CFPB, EPA, and OSHA—must convene panels under SBREFA. The purpose of these SBREFA panels is to ensure that the views and needs of small entities are considered early in the process of drafting rules that could have significant effects on them. These panels consist of Advocacy, the Administrator of OIRA, and the rulewriting agency. They develop information solicited from small entity representatives and other sources concerning the potential impacts of a new agency proposal, consider alternatives that minimize burdens, and prepare a report that provides recommendations to the agency head for consideration in the proposed rule.
- **Public Comment Letters.** If working with the agency does not resolve the small business issue, a public comment letter is an important tool to submit information on small business impacts into the administrative rulemaking record to promote compliance with the RFA.
 - ❖ If it appears that Advocacy may submit a public comment letter on a given regulation (or if any other circumstance warrants), the Assistant Chief Counsel must prepare a memorandum explaining the issues and outlining the process that has led to the recommendation that such a letter be submitted. This gives the

Chief Counsel time to review and become familiar with the issues that will be addressed by the letter.

- ❖ All letters must go through Advocacy's internal clearance process.
 - ❖ Correspondence from the Office of Advocacy is signed by the Chief Counsel for Advocacy or the Deputy Chief Counsel.
 - ❖ All letters include the appropriate background information on the Office of Advocacy and standard policy language.
 - ❖ Once the letter is approved by the Chief Counsel, it is submitted to the electronic docket. If appropriate, it may also be emailed and/or faxed to the agency (or intended recipient). A copy is provided to the Administrator of OIRA, who is copied on all comment letters.
- **Amicus Authority.** Under SBREFA, Advocacy has the authority to enter friend-of-the-court briefs in cases related to agency compliance with the RFA. Advocacy has rarely invoked this authority, but will do so when circumstances warrant. Submission of a brief to a federal court requires the participation of many members of the Interagency team, as well as the Chief Counsel's office.