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Report on the Regulatory Flexibility Act FY 2013

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

February 2014

Created by Congress in 1976, the Office of Advocacy of the U.S. Small Business Administration (SBA) is an independent voice for small business within the federal government. Appointed by the President and confirmed by the U.S. Senate, the Chief Counsel for Advocacy directs the office. The Chief Counsel advances the views, concerns, and interests of small business before Congress, the White House, federal agencies, federal courts, and state policy makers. Economic research, policy analyses, and small business outreach help identify issues of concern. Regional Advocates and an office in Washington, DC, support the Chief Counsel's efforts.

For more information on the Office of Advocacy, visit **http://www.sba.gov/advocacy**, or call (202) 205-6533. Receive email notices of new Office of Advocacy information by signing up on Advocacy's List-servs at **http://www.sba.gov/updates.**

To the President and the Congress of the United States

The Regulatory Flexibility Act requires the Chief Counsel for Advocacy to monitor federal agency compliance with the law and to report on it at least annually to the President and to the Senate and House Committees on the Judiciary and Small Business. This report covers federal agencies' compliance with the Regulatory Flexibility Act during FY 2013. It also details compliance with the requirements of Executive Order 13272, Proper Consideration of Small Entities in Agency Rulemaking.

Under the RFA, federal agencies must review proposed regulations that would have a significant economic impact on a substantial number of small entities—small businesses, small governmental jurisdictions, and small nonprofits—and consider significant alternatives that would minimize the regulatory burden on them while achieving the rules' purposes. Executive Order 13272 requires agencies to take additional specific steps to demonstrate that they are considering small entities in their rulemakings.

The federal rulemaking process can be time-consuming and complex. A small business is rarely able to track a federal regulation of importance to it from the proposed to final stage. The RFA requires agencies to take steps to consider the effect of rulemakings on small entities, and the Office of Advocacy evaluates these agency efforts. We do so by monitoring rulemakings of importance to small businesses, listening to small entities' concerns and conveying them to federal rulemakers, and ensuring small entities' concerns are voiced and given appropriate attention.

Advocacy's outreach to small business continued in FY 2013. As Advocacy attorneys discovered proposed rules of concern to small entities, Advocacy's 10 regional advocates heard directly from small business owners around the country and relayed their concerns to Advocacy's Office of Interagency Affairs in Washington, D.C.

Business owners and small entity representatives participated in 21 roundtables throughout the year. The value of the roundtables is well established; they are an effective means of communication for small business and Advocacy, and for small business and federal agencies, whose staff and leadership routinely participate in them.

Advocacy filed 26 formal comment letters to agencies on rulemakings in FY 2013. Our office continued to provide RFA compliance training to agencies, and Advocacy trained over 150 regulatory staff from various federal agencies in RFA implementation.

Several rules that were made final in FY 2013 reflected changes made because of RFA compliance, resulting in savings for small entities. RFA compliance helped save at least $2.5 billion in first-year regulatory costs for small entities, while ensuring that agencies were able to meet their regulatory goals.

One change, in particular, helps millions of the nation's smallest businesses. The IRS's adoption of a standard home-office deduction beginning in tax year 2013 is a breakthrough of simplicity. The change, which our office has long advocated, created an alternative along the lines of the well-known standard personal

deduction. The new option allows home-based businesses to apply a straightforward formula to qualify for a deduction, without having to maintain extensive records and fill out many pages of tax forms.

Advocacy's RFA vigilance also yielded savings on regulations whose impact is significant, although not quantified. One example from FY 2013 is contained in the Mortgage Servicing Rules finalized by the Consumer Financial Protection Bureau. The actual cost savings could not be specified, but the agency estimated that the one-time cost savings resulting from RFA compliance ranged from $1 billion to $2.3 billion. In issuing the rule, the CFPB recognized that small servicers were not the cause of the problem the rule was meant to address and that the public interest would not be served by imposing some of the rule's provisions on small entities.

The RFA and Executive Order 13272 continue to provide an effective means of enhancing communication between small businesses and the federal agencies that regulate them. The Office of Advocacy looks forward to continuing this work with you and our federal partners.

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Director of Interagency Affairs

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1 The Regulatory Flexibility Act in the Rulemaking Process

The importance of small businesses as generators of innovation, employment, economic growth, and competition in the U.S. economy has been recognized for decades.[1] 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:

- Intervening early in federal agencies' regulatory development process on proposals that affect small businesses and providing Regulatory Flexibility Act (RFA) compliance training to federal agencies and regulatory development officials;
- 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; and
- Fostering two-way communication between the small business community and other stakeholders, including federal policymakers and regulatory agencies.

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 be effective in achieving their regulatory objectives without unduly burdening these small entities. Advocacy has the responsibility of overseeing and facilitating federal agency compliance. Since it was enacted in 1980, the RFA has been strengthened by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA); executive order 13272; the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010; and the Small Business Jobs Act of 2010.[2]

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, 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. This is detailed in the remainder of this report.

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

1 For a summary of small businesses' key role in the economy, see Frequently Asked Questions About Small Business, U.S. Small Business Administration, Office of Advocacy, **www.sba.gov/advocacy/7495**.

2 See Appendix D for the text of E.O. 13272.

small entities, and "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. These requirements of early notification and written responses have since been codified by the Small Business Jobs Act of 2010.

Monitoring Federal Regulatory Activity

Advocacy's Office of Interagency Affairs monitors federal regulatory proposals through a variety of means, including publicly available sources such as the *Federal Register* and the agencies' periodic publication of their regulatory agendas, as well as the executive agencies' interagency review process. Many agencies also notify Advocacy directly in advance of planned regulations, particularly when these proposals have significant costs or will affect significant numbers of small entities.

Soliciting the Views of Stakeholders

Advocacy reaches out to its many stakeholders to solicit their views on issues of concern to small firms. Roundtables on specific topics, at which representatives of small businesses, industries, and government agencies meet, provide important input. The chief counsel regularly meets with business organizations and trade associations and stakeholders around the country. Advocacy's ten regional advocates are the office's eyes and ears outside of Washington, D.C., and the office also receives a steady flow of input on small business concerns from stakeholders.

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, from confidential pre-decisional deliberative consultations before a proposal is made, to formal comments after a proposed rule has been published, to comments after a rule has been finalized.[3]

SBREFA Panels

Three agencies—the 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 affect them. These panels consist of Advocacy, the Office of Information and Regulatory Affairs, 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.

RFA Compliance Training

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. Since Advocacy began its ongoing

3 For a listing of Advocacy's regulatory comment letters, see **www.sba.gov/advocacy/816**.

RFA compliance training program in 2003, and through FY 2013, such live classroom training has been provided to officials in 18 cabinet-level departments and agencies, 59 separate component agencies within these departments, 21 independent agencies, and various special groups including congressional staff, business organizations and trade associations. More than 150 agency officials participated in Advocacy's RFA training in 2013.

Retrospective Review of Regulations

RFA Section 610 requires federal agencies to examine the burden of existing rules on small entities. Reviews must be performed every 10 years for final rules that have a significant economic impact on a substantial number of small entities. Reviews should "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."[4]

When President Obama issued Executive Order 13563, Improving Regulation and Regulatory Review, he imposed on the executive agencies new requirements of heightened public participation, consideration of overlapping regulatory requirements and flexible approaches, and ongoing regulatory review.[5] E.O. 13563 was accompanied by a presidential memorandum, Regulatory Flexibility, Small Business and Job Creation. This memo reminded the agencies of their responsibilities under the RFA, and 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. The executive order and accompanying memo support Section 610 of the RFA, which requires agencies to review existing regulations periodically to determine whether they are still justifiable. On May 11, 2012, President Obama issued Executive Order 13610, Identifying and Reducing Regulatory Burdens, which established regulatory review as a rulemaking policy, and also established public participation as a key element in the retrospective review of regulations.[6] 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.

4 5 U.S.C. 610(a).

5 See Appendix E for the text of E.O. 13563.

6 See Appendix G for the text of E.O. 13610.

2 Executive Order 13272 Implementation and Compliance

Overseeing federal agencies' compliance with the Regulatory Flexibility Act and Executive Order 13272 is the responsibility of the Office of Advocacy. Legislative improvements to the RFA and executive orders have required greater Advocacy 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 2013, this more cooperative approach yielded at least $2.5 billion in foregone regulatory costs as well as additional unquantifiable savings (Tables 6.1, 6.2 and 6.3).

The provisions of E.O. 13272 have given Advocacy and federal agencies additional tools for implementing the RFA, and parts of the executive order have been codified in the RFA.

E.O. 13272 Implementation

Executive Order 13272, Proper Consideration of Small Entities in Agency Rulemaking, was signed in 2002. Its requirements have had a significant effect on many agencies' consideration of small businesses—both in how they draft their proposed regulations and how they consider the potential impacts of their regulatory actions on small business.

Under E.O. 13272, federal agencies are required to make publicly available information on how they take small businesses and the RFA into account when creating regulations. By the end of 2003, most agencies had made their RFA policies and procedures available on their websites.

Agencies must also send Advocacy copies of any draft regulations that may have a significant economic impact on a substantial number of small entities. They are required to do this at the same time such rules are 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*.

E.O. 13272 also requires agencies to consider Advocacy's written comments on a proposed rule and to address these comments in the final rule published in the *Federal Register*. This section of the executive order was codified in 2010 as an amendment to the RFA by the Small Business Jobs Act. Most agencies complied with this provision in FY 2013.

Advocacy has three duties under E.O. 13272. First, Advocacy must notify agencies of how to comply with the RFA. This was first 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 2012. The 2012 revision incorporated the later amendments to the RFA.[7]

Second, Advocacy must report annually to OIRA on agency compliance with the executive order. In FY 2013, most agencies complied with E.O. 13272, and some agencies improved compared with FY 2012. However, a few agencies continue to ignore the requirements and failed to provide Advocacy with copies of their draft regulations. A summary of agencies' FY 2013 compliance with E.O. 13272 is found in Table 2.1.

Third, Advocacy is required to train federal regulatory agencies in how to comply with the RFA. In fiscal year 2013, Advocacy trained nearly 200 agency employees in RFA compliance. After ten years of E.O. 13272, RFA training continues

7 The guide is on Advocacy's website, **www.sba.gov/sites/default/files/rfaguide_0512_0.pdf**.

to be a crucial tool in instilling small business consideration into the rule writing process. Agencies that have had RFA training 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. Table A.1 in Appendix A of this report provides a complete list of the agencies that have participated in training since 2003.

Compliance with E.O. 13272 and the Small Business Jobs Act

Table 2.1 displays agency compliance with E.O. 13272's three agency requirements:[8]

- Section 3(a): Issue written procedures and policies;
- Section 3(b): Notify Advocacy of any draft rules that may have a significant economic impact on a substantial number of small entities under the Act; and
- Section 3(c): Give every appropriate consideration to any comments provided by Advocacy regarding a draft rule.

8 The 2010 Small Business Jobs Act strengthened E.O. 13272 section 3(c) by requiring agencies to include in their final regulatory flexibility analysis "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."

Table 2.1 Agency Compliance with the Small Business Jobs Act of 2010 and E.O. 13272, FY 2013

Department	Written Procedures	Notify Advocacy	Response to Comments	Comments
Agriculture	√	√	√	
Commerce	√	√	√	
Defense	√	√	√	
Education	√	√	√	
Energy	√	√	n.a.	
Environmental Protection Agency	√	√	√	
General Services Administration	√	√	√	
Health and Human Services	√	√	√	
Homeland Security	√	√	n.a.	
Housing and Urban Development	√	√	n.a.	
Interior	√	X	X	The Fish and Wildlife Service does not notify Advocacy of rules that will have a significant impact on small entities [3(b)] and consistently does not respond adequately to Advocacy's comments [3(c)].
Justice	√	√	√	
Labor	√	√	√	
Small Business Administration	√	√	√	
State	X	√	n.a.	
Transportation	√	√	√	
Treasury	√	√	n.a.	
Veterans Affairs	√	√	n.a.	

Key: √ = agency complied with the requirement.
X = agency did not comply with the requirement.
n.a. = not applicable in FY 2013 because Advocacy did not publish a public comment letter in response to an agency rule.

Table 2.1 Agency Compliance with the Small Business Jobs Act of 2010 and E.O. 13272, FY 2013, continued

Department	Written Procedures	Notify Advocacy	Response to Comments	Comments
Other Agencies with Regulatory Powers				
Consumer Financial Protection Bureau	n.a.	√	√	
Consumer Product Safety Commission	√	√	√	
Equal Employment Opportunity Comission	√	√	n.a.	
Federal Acquisition Regulation Council	√	√	√	
Federal Communications Commission	√	√	√	
Federal Reserve Board	X	√	√	
National Labor Relations Board	X	√	n.a.	
Securities and Exchange Commission	X	√	√	

Key: √ = agency complied with the requirement.
X = agency did not comply with the requirement.
n.a. = not applicable in FY 2013 because Advocacy did not publish a public comment letter in response to an agency rule.

3 Advocacy's Communication with Small Businesses and Federal Agencies

This chapter provides an overview of Advocacy's engagement with agencies to achieve compliance with the RFA and Executive Order 13272 in FY 2013.

Regulatory Agendas

Section 602 of the RFA requires each agency to publish its regulatory flexibility agenda in April and October in the *Federal Register*. The agenda must specify the subject of upcoming proposed rules and whether they are likely to have a significant economic impact on a substantial number of small entities. Agencies are also required to provide their agendas to the chief counsel for advocacy and to small businesses or their representatives. The regulatory agendas alert Advocacy and small entities to forthcoming regulations, and they are frequently discussed at Advocacy roundtables.

In FY 2013, regulatory flexibility agendas were published in the *Federal Register* on July 3, 2013, and they were also provided to Advocacy on that date.

SBREFA Panels

Section 609 of the RFA requires three agencies to convene small business advocacy review panels (also called SBAR or SBREFA panels) whenever a draft regulation is anticipated to have a significant economic impact on a substantial number of small entities. Since 1996, Advocacy has participated in 55 SBREFA panels. In FY 2013, EPA initiated one new panel, and OSHA and CFPB conducted none. A complete list of SBREFA panels to date is in Appendix Table A.3.

Retrospective Review of Existing Regulations

RFA Section 610 requires federal agencies to examine the burden of existing rules on small entities. Agencies announce planned Section 610 reviews in the fall edition of the *Unified Agenda of Regulatory and Deregulatory Actions*.[8] President Obama issued two executive orders in 2011 to strengthen the review requirement. Executive Order 13563, signed January 18, 2011, instructed agencies to develop a plan for periodic retrospective review of all existing regulations. E.O. 13579, signed July 11, 2011, directed independent agencies to promote the goals outlined in the January executive order.[9] OMB followed suit by issuing a series of memoranda implementing these requirements.[10] As a result, agencies developed retrospective review plans (some after significant public input) and published them online.[11] Agency

8 The *Unified Agenda* is available online at **www.reginfo.gov**. Section 610 reviews can be found using the "advanced search" feature.

9 Appendixes E and F contain the complete text of the executive orders and the OMB memoranda.

10 M-11-10, Executive Order 13563, Improving Regulation and Regulatory Review (February 2, 2011), M-11-19, Retrospective Analysis of Existing Significant Regulations (April 25, 2011), and M-11-25, Final Plans for Retrospective Analysis of Existing Rules (June 14, 2011).

11 For example, EPA posted its plan at **www.epa.gov/improvingregulations**. DOT posted information on its regulatory portal, **http://regs.dot.gov/retrospectivereview.htm.**

plans and updates are also posted on the White House webpage.[12]

Advocacy provided comments through OMB on agency plans and is monitoring agency compliance, including the continuation beyond this initial implementation period. Advocacy welcomes input from small entities to identify future rules in need of retrospective review.

Interagency Communications

Meetings and training sessions are two opportunities Advocacy uses to present the views of the small business community to federal agencies and to remind them of their compliance obligations. Advocacy's work with federal agencies has increased in scope and effectiveness as its training program has grown and as agencies have become more open to Advocacy assistance. In FY 2013, Advocacy's communications with agencies included 26 formal comment letters (Table 4.1).

More effective regulations that avoid excessive burdens on small firms are the result of these efforts. See the cost savings examples in Tables 6.1, 6.2 and 6.3.

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. They are a unique means of bringing small businesses and agency officials together.

Consumer Financial Protection Bureau

Advocacy held a financial services roundtable on February 28, 2013, to discuss the regulatory agendas for the financial agencies (the Federal Reserve, FDIC, OCC, CFPB and others). These agendas provide insight into upcoming agency activity. By reviewing them with small entity representatives, Advocacy can determine which upcoming rulemakings are most important. This is especially important in terms of CFPB rulemakings since SBREFA panels may be required. The roundtable also featured a presentation on the Dodd-Frank Act requirement that the CFPB consider the impact of its actions on the cost of credit for small entities whenever an initial regulatory flexibility analysis is required.

Department of Interior, Fish and Wildlife Service

On August 24, 2012, in response to the Presidential Memorandum to the Secretary of Interior entitled, *Proposed Revised Habitat for the Spotted Owl: Minimizing Regulatory Burdens* (the Memorandum), the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service published the proposed rule entitled Revisions to the Regulations for Impact Analysis of Critical Habitat. Pursuant to the directive in the Memorandum the proposed regulation provides that the economic analysis be completed and made available for public comment at the time of publication of a proposed rule to designate critical habitat. FWS also proposed several significant revisions to the manner in which they conduct their economic impact analyses for critical habitat designations.

On January 9, 2013, Advocacy hosted a roundtable which was attended by small entity representatives from as far away as Hawaii and from industries including transportation, real estate, oil and gas, electric, county governments, and conservation groups. These entities

12 All agencies regulatory review plans are posted on the White House webpage at **www.whitehouse.gov/21stcenturygov/actions/21st-century-regulatory-system.**

expressed support for increasing transparency of the critical habitat designation process by including economic analyses at the time of publishing the critical habitat designations. Many of the entities were concerned with the proposed revisions to the process for conducting an economic analysis. Entities also wanted FWS to expressly state in the rule that they would be actively seeking the most accurate available economic information for use in their economic analyses. Small entities also expressed their desire that FWS make clear in the rule that the goal is to conduct a quantitative economic analysis with every critical habitat designation and that qualitative information will only be used in cases in which future costs cannot be reliably estimated.

Department of Labor, Employee Benefits Security Administration

On May 1, 2013, Advocacy hosted a small business roundtable on pension-related issues. Discussion topics included the burdens associated with disclosure notices, possible solutions to ease these burdens, and tax simplification ideas related to employee benefits.

Department of Labor, Occupational Safety and Health Administration; Mine Safety and Health Administration

Advocacy held six roundtables on occupational safety and health issues during FY 2013.

The November 16, 2012, roundtable included an update on OSHA's Cranes and Derricks in Construction Rule, plus discussion of the Elliott Construction judicial decision, a recent meeting of OSHA's National Advisory Committee on Occupational Safety and Health, and OSHA and MSHA's fall 2012 *Regulatory Agendas*.

The January 25, 2013, roundtable featured an update on OSHA activities from Jordan Barab, deputy assistant secretary of labor for occupational safety and health. Other topics included MSHA's final Pattern of Violations rule, the NFPA 652–Combustible Dust Standards, OSHA's stakeholder meeting on backing hazards, and the "incorporation by reference" funding and access issue.

The March 22, 2013, meeting included an update on OSHA enforcement data and other activities from Richard E. Fairfax, deputy assistant secretary of labor for occupational safety and health. Other topics included Science in the Administrative Process, a project of the Administrative Council of the United States, and the National Association of Homebuilders' petition to OSHA on residential fall protection.

On May 17, 2013, the roundtable featured M. Patricia Smith, solicitor of the U.S. Department of Labor. Other topics included the West Fertilizer plant explosion in West, Texas, and a refresher on the RFA and SBREFA.

The July 26, 2013, roundtable included an update from Doug Kalinowski, director of OSHA's Directorate of Cooperative and State Programs. Other topics were OSHA and MSHA's spring 2013 *Regulatory Agendas*, plus a panel discussion of the Safety Culture/Safety Climate workshop offered by the National Institute for Occupational Safety and Health.

The September 20, 2013, roundtable included an overview of OSHA's newly proposed Occupational Exposure to Respirable Crystalline Silica rule by William Perry, the acting director of OSHA's Directorate of Standards and Guidance and other OSHA staff. Other topics included the release of the National Fire Protection Association draft General Industry Combustible Dust standard.

Department of Transportation, Federal Aviation Administration

On November 5, 2012, Advocacy hosted a small business aviation roundtable to discuss the Federal Aviation Administration's proposed Aviation Repair Stations rule and obtain small business input. Professional staff from FAA and the agency's Repair Station Branch attended the roundtable and gave a background briefing on the proposed rule. Representatives from the Aeronautical Repair Station Association and the Aviation Electronics Association also provided their assessment of the proposed rule.

Department of the Treasury, Internal Revenue Service

Advocacy's February 14, 2013, roundtable focused on new IRS guidance referred to as the "Repair Regulations," regarding whether businesses may deduct or capitalize purchases of property. The new guidance affects many small businesses across the country. At the roundtable, small business representatives provided an overview of the IRS Repair Regulations, including the treatment of costs to acquire, improve, or dispose of tangible properties, and the treatment of materials and supplies under the Repair Regulations.

Environmental Protection Agency

In FY 2013, Advocacy hosted nine environmental roundtables.

The first roundtable of FY 2013 was held on October 12, 2012. The topics included EPA's proposed rule on polybrominated diphenyl ethers (PBDEs), EPA's Phthalate Action Plan, the Design for the Environment, and Green Chemistry alternative assessments.

At the November 30, 2012, roundtable, Bob Sussman, senior policy counselor to the EPA administrator, discussed the outlook for EPA over the second Obama Administration. This was a unique opportunity for small business stakeholders to interact with top EPA policymakers. Former EPA assistant administrator Jeffrey Holmstead also provided an update on EPA's work on the Ozone National Ambient Air Quality Standards.

The December 14, 2012, roundtable focused on the draft recommendations of the Administrative Conference of the United States addressing science in the administrative process.

The topics discussed at the January 11, 2013, roundtable were EPA's Toxic Substances Control Act (TSCA) Section 8(d) Health and Safety Data Reporting rulemaking for cadmium and cadmium compounds and adjustments to the air toxics standards for major and area source boilers and certain incinerators. Sheila Canavan, associate director in EPA's Office of Pollution Prevention and Toxics, discussed the cadmium Health and Safety Data Reporting rulemaking. Participants thanked the EPA for withdrawing the rulemaking until further scoping of the request could be undertaken. Several presenters, including Bob Wayland from EPA's Energy Strategies Group, spoke on the Boiler and Non-Hazardous Secondary Materials Reconsideration.

Topics of the February 22, 2013, roundtable included the Integrated Risk Information System (IRIS) Program and the proposed Safer Consumer Products regulations part of California's Green Chemistry Initiative.

On April 11, 2013, Lynn Flowers, of EPA's Office of Research and Development, gave a presentation on the IRIS program.

On April 26, 2013, Jeff Morris, deputy director of the Office of Pollution Prevention and Toxics, spoke to the roundtable about EPA's TSCA Work Plan Chemical Risk Assessments. The roundtable also included a presentation on the recent efforts at TSCA modernization. Roundtable participants heard which amendments would affect small businesses.

The two topics of the June 21, 2013, roundtable were EPA's Multi-Sector (Stormwater) General Permit, and the Ozone National Ambient Air Quality Standards.

At Advocacy's roundtable on July 19, 2013, Lynn Vendinello, branch chief within EPA's Office of Pollution Prevention and Toxics, spoke. Participants gave feedback on two EPA rulemakings: Formaldehyde Emissions Standards for Composite Wood Products and Third-Party Certification Framework for Formaldehyde Standards for Composite Wood Products.

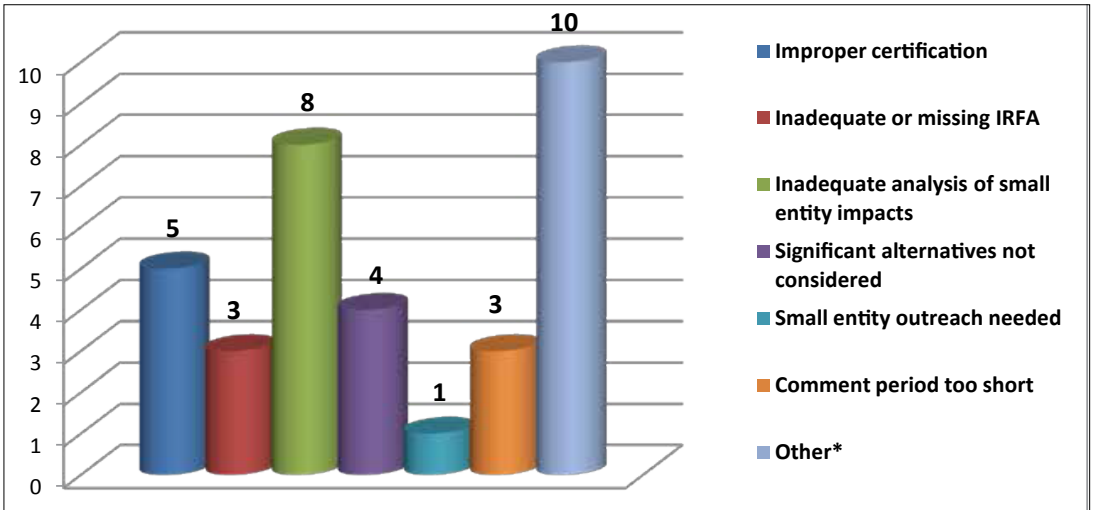
Federal Communications Commission

On February 14, 2013, Advocacy hosted a small business aviation roundtable to discuss the Federal Communication Commission's proposed Aviation Communications rule and to obtain small business input. Advocacy also organized meetings with small business aviation stakeholders at the FCC and the U.S. Department of Transportation to discuss small business concerns with the proposed rules.

4 Summary of Advocacy's Public Comments to Federal Agencies in FY 2013

This chapter details Advocacy's official comments to federal agencies. The office filed a total of 26 official comment letters over the course of the year. Charts 4.1, 4.2, and 4.3 summarize the concerns. The most frequently cited concern in FY 2013 was that the agency's analysis of the proposed rule's impact on small entities was inadequate. The second most common concern was improper certification that a rule would have no significant impact on a substantial number of small entities. Table 4.1 lists all 26 of the agency comment letters. Copies of these are located on Advocacy's website.

Chart 4.1 Number of Specific Issues of Concern in Comment Letters to Agencies, FY 2013



*Other comments include a variety of concerns; for example, that the rule will have a negative impact or a significant economic impact on a substantial number of small entities, that further research or discussion was needed, that industry representatives provided specific comments, that small entity burdens should be re-evaluated, etc.

Chart 4.2 Agency Comments: Major Reasons IRFAs Were Inadequate, FY 2013

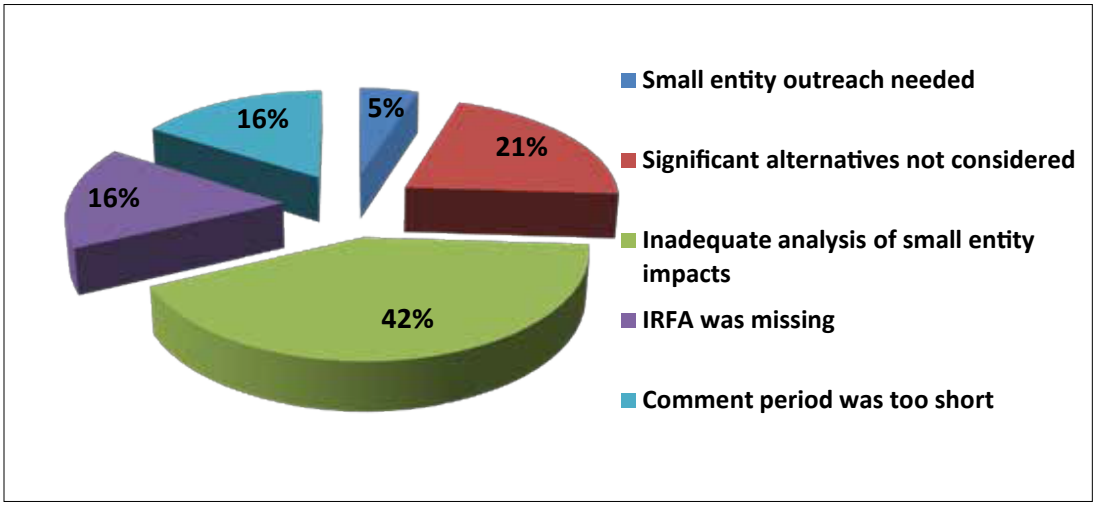


Chart 4.3 Agency Comments: Major Reasons Certifications Were Improper, FY 2013

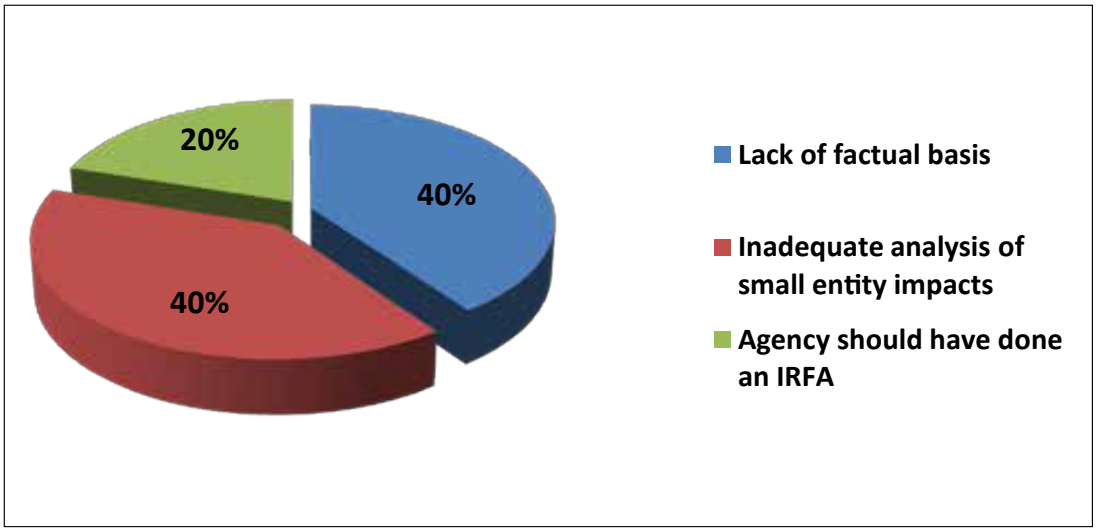


Table 4.1 Regulatory Comment Letters Filed by the Office of Advocacy, FY 2013

Date	Agency	Title	Citation to Rule
09/19/13	EPA	Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, **www.sba.gov/advocacy/816/753996**	78 *Fed. Reg.* 34432, 6/17/13
09/19/13	HHS	Medicare and Medicaid Programs: Home Health Prospective Payment System Rate Update for CY 2014, Home Health Quality Reporting Requirements, Cost Allocation of Home Health Survey Expenses, **www.sba.gov/advocacy/816/753076**	78 *Fed. Reg.* 40272, 7/3/13
09/17/13	EPA	Comments on EPA's Notice of Proposed Consent Decree on the NESHAP for Petroleum Refineries, **www.sba.gov/advocacy/816/753967**	78 *Fed. Reg.* 51186, 8/20/13
09/12/13	SEC	Amendments to Regulation D, Form D and Rule 156, File Number S7-06-13, **www.sba.gov/advocacy/816/753436**	78 *Fed. Reg.* 44806, 7/24/13
08/21/13	HHS	Medicare Program; End-Stage Renal Disease Prospective Payment System, Quality Incentive Program and Durable Medical Equipment, Prosthetics, Orthotics, and Supplies, **www.sba.gov/advocacy/816/752735**	78 *Fed. Reg.* 40836, 7/8/13
08/21/13	EPA	Formaldehyde Emissions Standards for Composite Wood Products and Third-Party Certification Framework for the Formaldehyde Standards for Composite Wood Products, **www.sba.gov/advocacy/816/751677**	78 *Fed. Reg.* 34820, 6/10/13; 78 *Fed. Reg.* 34796, 6/10/13
08/19/13	FCC	Accessibility of User Interfaces, and Video Programming Guides and Menus, **www.sba.gov/advocacy/816/753506**	78 *Fed. Reg.* 36478, 6/18/13
07/29/13	FWS	National Environmental Policy Act: Implementing Procedures; Addition to Categorical Exclusions for U.S. Fish and Wildlife Service, **www.sba.gov/advocacy/816/747931**	78 *Fed. Reg.* 39307, 7/1/13
07/13/13	FWS	Proposed Designation of Critical Habitat for the New Mexico Jumping Mouse, **www.sba.gov/advocacy/816/727661**	78 *Fed. Reg.* 37328, 6/20/13
06/04/13	DOL, DHS	Wage Methodology for Temporary Non-Agricultural Employment H-2B Program, Part 2, Interim Final Rule, **www.sba.gov/advocacy/816/653321**	78 *Fed. Reg.* 24047, 4/24/13

Note: All comment letters are posted on the Office of Advocacy's website. The comment letter urls were current as of February 2014. See Appendix H for explanations of agency abbreviations.

Table 4.1 Regulatory Comment Letters Filed by Advocacy, FY 2013, continued

Date	Agency	Title	Citation to Rule
04/24/13	FCC	Proposed Aviation Communications Rules, **www.sba.gov/advocacy/816/589011**	78 *Fed. Reg.* 6276, 1/30/13
03/15/13	EPA	Draft Toxic Substance Control Act Workplan Chemical Risk Assessments for Methylene Chloride (DCM), N-Methylpyrrolidone (NMP) and Trichloroethylene (TCE), **www.sba.gov/advocacy/816/543211**	Docket ID No. EPA-HQ- OPPT-2012-0725
02/28/13	FCC	Update to the FCC's regulations on 121.5 MHz emergency locator transmitters, **www.sba.gov/advocacy/816/519491**	78 *Fed. Reg.* 6276, 1/30/13
02/21/13	IRS	Shared Responsibility for Employers Regarding Health Coverage, **www.sba.gov/advocacy/816/475401**	78 *Fed. Reg.* 218, 1/2/13
01/31/13	NMFS/ FWS	Revisions to the Regulations for Impact Analyses of Critical Habitat, **www.sba.gov/advocacy/816/457421**	77 *Fed. Reg.* 51503, 8/24/12
01/10/13	EPA	National Emission Standards for the Brick Production Industry, **www.sba.gov/advocacy/816/776551**	77 *Fed. Reg.* 73029, 12/7/12
12/06/12	NTP	Anticipated Adoption of the National Toxicology Program's "Approach for Systematic Review and Evidence Integration for Literature-based Health Assessments," **www.sba.gov/advocacy/816/554501**	77 *Fed. Reg.* 60707, 10/4/12
11/28/12	FWS	12-Month Finding for the Lemmon Fleabane; Endangered Status for the Acuñea Cactus and the Fickeisen Plains Cactus and Designation of Critical Habitat, **www.sba.gov/advocacy/816/370141**	77 *Fed. Reg.* 60510, 10/3/12
11/19/12	DOT/FAA	Proposed Repair Stations Rule, **www.sba.gov/advocacy/816/368981**	77 *Fed. Reg.* 30054, 5/21/12
11/06/12	CFPB	Integrated Mortgage Disclosures under the Real Estate Settlement Procedures Act and the Truth in Lending Act, **www.sba.gov/advocacy/816/360081**	77 *Fed. Reg.* 51116, 8/23/12
11/05/12	PTO	Proposed Rules and Examination Guidelines Implementing the First-Inventor-to-File provision of the Leahy-Smith America Invents Act, **www.sba.gov/advocacy/816/356881**	77 *Fed. Reg.* 43742, 7/26/12

Note: All comment letters are posted on the Office of Advocacy's website. The comment letter urls were current as of February 2014. See Appendix H for explanations of agency abbreviations.

Table 4.1 Regulatory Comment Letters Filed by Advocacy, FY 2013, continued

Date	Agency	Title	Citation to Rule
10/22/12	Federal Reserve, OCC, FDIC	Regulatory Capital Rules: Regulatory Capital, Implementation of Basel III, Minimum Regulatory Capital Ratios, Capital Adequacy, and Transition Provisions; Regulatory Capital Rules: Standardized Approach for Risk-weighted Assets; Market Discipline and Disclosure Requirements; and Regulatory Capital Rules: and Advanced Approaches Risk-based Capital Rules; Market Risk Capital Rule, **www.sba.gov/advocacy/816/350661**	78 *Fed. Reg.* 52791, 8/30/12
10/16/12	CFPB	2012 Truth in Lending Act Loan Originator Compensation, **www.sba.gov/advocacy/816/337341**	77 *Fed. Reg.* 55272, 9/7/12
10/5/12	CFPB	2012 Real Estate Settlement Procedures Act Mortgage Servicing Proposal and 2012 Truth in Lending Act Mortgage Servicing Proposal, **www.sba.gov/advocacy/816/335841**	77 *Fed. Reg.* 57200, 9/17/12
10/8/12	GSA/FAR	Small Business Set Asides for Research and Development Contracts, **www.sba.gov/advocacy/816/331871**	77 *Fed. Reg.* 47797, 8/10/12
10/4/12	PTO	Proposed Rules and Examination Guidelines Implementing the First-Inventor-to-File provision of the Leahy-Smith America Invents Act, **www.sba.gov/advocacy/816/328201**	77 *Fed. Reg.* 43742, 7/26/12

Note: All comment letters are posted on the Office of Advocacy's website. The comment letter urls were current as of February 2014. See Appendix H for explanations of agency abbreviations.

5 Discussion of Advocacy's Public Comments to Federal Agencies in FY 2013

This section discusses the public comment letters filed by Advocacy during FY 2013.

Consumer Financial Protection Bureau

Issue: Integrated Mortgage Disclosures

On November 6, 2012, Advocacy submitted a comment letter to the Consumer Financial Protection Bureau on the proposed rule on Integrated Mortgage Disclosures under the Real Estate Settlement Procedures Act (RESPA or Regulation X) and the Truth in Lending Act (TILA or Regulation Z). Advocacy's comments reflected comments made by small entity representatives (SERs) at the small business advocacy review panel held in 2012.

The Dodd-Frank Act required the CFPB to establish new disclosure requirements and forms in Regulation Z for most closed-end consumer credit transactions secured by real property. In addition to combining the existing disclosure requirements and implementing new requirements in the Dodd-Frank Act, the proposed rule also provided extensive guidance regarding compliance with those requirements. Its record-keeping provision required creditors to maintain electronic, machine-readable electronic records of the loan estimates for three years and the closing disclosures for five years. Advocacy encouraged the CFPB to exempt small entities from this requirement.

The proposal also required that loan estimates be provided to consumers within three business days after receipt of the consumer's application, to replace the early TILA disclosure and RESPA good faith estimate. It also required that the closing disclosure be provided at least three business days prior to consummation, to replace the final TILA disclosure and RESPA settlement statement. Advocacy encouraged the CFPB to provide clear guidance to small entities as well as a minimum of 18 months to comply with the requirements for the integrated disclosure forms.

The existing regulations require the following information for an application: 1) borrower's name; 2) monthly income; 3) social security number; 4) property address; 5) an estimate of the value of the property; 6) loan amount sought; and 7) any information deemed necessary by the lender. The proposed rule removed item 7 from the application. Some SERs felt this could create uncertainty, and Advocacy encouraged the CFPB not to eliminate this provision. The SERs also stated that the address requirement was problematic, and Advocacy encouraged the CFPB to strike it from the definition of the application.

The proposal further revised existing rules regarding the circumstances in which a consumer may be charged more at closing for settlement services than the creditor estimated in the disclosure. The proposal applies the zero tolerance category to a larger range of charges, including fees charged by an affiliate of the creditor and charges for services for which the creditor does not permit the consumer to shop. Zero percent tolerances could potentially reduce or eliminate independent service providers, many of which are small. Advocacy encouraged the CFPB to maintain the status quo of 10 percent tolerances.

The proposal had a three-day presumption that a document was received. The requirement would apply even to documents that were

emailed to the consumer unless the business could prove that the document was received sooner. Advocacy encouraged the CFPB to develop a rule that recognizes instantaneous methods of delivery and to provide clear guidance on the acceptable forms of proof of delivery.

In the provisions of the proposal that required a certain number of days for notice, the CFPB considered Saturday a business day. Advocacy asserted that including Saturday in the definition of a business day would cause confusion for consumers and small businesses. Advocacy encouraged the CFPB not to include Saturday as a business day.

Issue: Regulation Z—Loan Originator Compensation

On October 16, 2012, Advocacy submitted a comment letter to the CFPB on the proposed rule, Regulation Z–Loan Originator Compensation. The proposed rule amended Regulation Z to implement changes made by the Dodd-Frank Act. The proposal would implement statutory changes to Regulation Z's current loan originator compensation provisions, including a new additional restriction on the imposition of any upfront discount points, origination points, or fees on consumers under certain circumstances. It also provided additional guidance and clarification under the existing regulation's provisions restricting loan originator compensation practices. The proposed rule required creditors to create and maintain records to demonstrate their compliance with provisions that apply to the compensation paid to or received by a loan originator for three years rather than two years. Advocacy encouraged the CFPB to clarify what was considered compensation and to consider a safe harbor that would provide small entities a mode of compliance without the complexity and cost of the rule.

The Dodd-Frank Act prohibited consumer payment of upfront points and fees in all residential mortgage loan transactions except those where no one other than the consumer pays a loan originator compensation tied to the transaction. The proposal required that before a creditor or loan originator may impose discount points and origination points or fees on a consumer, the creditor must make available to the consumer a comparable, alternative loan that does not include such points or fees. The CFPB also sought comment on whether it should adopt a "bona fide"' requirement.

The rulemaking was the subject of a small business advocacy review panel in 2012. During the panel, small entity representatives raised three concerns. First, the zero point–zero fee alternative was unrealistic for small players. Second, putting all points and fees into interest rates might create a riskier loan. Third, small lenders might not have the ability to comply with the bona fide part of the proposal. Advocacy encouraged the CFPB to give full consideration to these concerns and urged the CFPB to carefully consider the alternatives set forth by the industry.

The proposal also clarified and restricted pooled compensation, profit sharing and bonus plans for loan originators, depending on certain incentives to steer consumers to different transaction terms. It would permit employers to make contributions to 401(k) plans, employee stock option plans and other "qualified plans." It also permitted employers to pay bonuses or make contributions to non-qualified profit-sharing and retirement from general profits derived from mortgage activity, if the loan originator affected had originated five or fewer mortgage transactions in the last 12 months or if the company's mortgage business revenues are limited. The CFPB sought comment on whether 25 percent or 50 percent would be the proper test for such limitation. Advocacy encouraged the CFPB to provide some clarification as to the definition of revenue. Advocacy also encouraged the CFPB develop a mortgage-related revenue limit that reflects the unique business structure of smaller industry members and provides relief to small entities.

The CFPB issued the final Mortgage Loan Originator Compensation rule in January 2013. The final rule waived a provision of Section 1403 of the Dodd-Frank Act which would have prohibited consumers from paying upfront discount points and fees to lower their interest rate. The CFPB issued the exemption out of concern about consumer confusion and other negative outcomes, and decided to study the matter further.

Issue: Mortgage Servicing Proposal

On October 5, 2012, Advocacy submitted a comment letter to the CFPB on two proposed rules implementing portions of the Dodd-Frank Act: 2012 Real Estate Settlement Procedures Act (Regulation X) Mortgage Servicing Proposal; and Regulation Z.[14]

The Dodd-Frank Act requires statements for residential mortgages to be provided at each billing cycle. The CFPB proposed an exemption for servicers who service 1,000 or fewer loans. The regulatory flexibility analysis indicated that the 1,000 loan threshold would exclude some small servicers, and Advocacy encouraged the CFPB to exempt all small entities.

The Dodd-Frank Act also requires servicers of hybrid adjustable rate mortgages (ARMs) with a fixed rate introductory period to provide six months notice prior to the initial reset period; the Act also permits the CFPB to extend the requirement to traditional (non-hybrid) ARMs. The CFPB proposed changing the minimum time for providing advance notice from 25 days to 60 days. Since changes were not statutorily required for non-hybrid ARMs, Advocacy encouraged the CFPB to exempt small entities from the non-hybrid rate change notification provisions.

Dodd-Frank prohibits certain acts and practices by servicers with regard to resolving errors and responding to requests for information. The changes would require costly software updates for small entities. Advocacy encouraged the CFPB to provide sufficient time for the vendors to make the necessary changes to their software prior to the effective date of the proposed rule.

The Dodd-Frank Act requires rules to be in place by January 21, 2013, but it allows the CFPB the option of delaying implementation for up to 12 months. Advocacy encouraged the CFPB to provide small entities with a sufficient amount of time for them to comply with the requirements of this proposal.

The CFPB issued the final Mortgage Servicing rules in January 2013. The rule exempts mortgage servicers who service fewer than 5,000 loans from many requirements. In issuing the rule, the CFPB recognized that small servicers were not the cause of the problem the rule was meant to address. Because smaller servicers have relationship-based business practices, the public interest would not be served by imposing some of the provisions on small servicers.

Department of Commerce, Patent and Trademark Office

Issue: Proposed Examination Guidelines and Rules Implementing the First-Inventor-to-File Provisions of the AIA

In July 2012, the U.S. Patent and Trademark Office published proposed patent examination guidelines and proposed rules implementing the "first-inventor-to-file" provisions of the 2011 Leahy-Smith America Invents Act (AIA). Before and after the passage of the AIA into law, small business and non-profit stakeholders expressed significant concerns with possible interpretation of these provisions, particularly the so-called "grace period" provisions of the law. Specifically, the proposed guidelines interpreted the law to mean that non-inventor disclosures of a claimed subject matter made within the one year grace period following an inventor's disclosure of an invention would constitute a bar to patentability—unless the non-inventor disclosure was

14 These regulations were issued as two rules, but did the same thing and were treated as one regulation by Advocacy.

identical to the inventor's earlier disclosure, or could be proven to have been derived from the inventor's own disclosure.

Advocacy conducted outreach with small entity stakeholders after PTO issued its proposed interpretation. Stakeholders strongly disagreed with PTO's proposed interpretation and described the negative impact that it would have on independent inventors, startups, and universities. They argued that it would provide a significant disincentive for individuals to publish or discuss their inventions prior to filing a patent application, because competitors could simply publish an obvious variant of a published (but not yet patented) invention and strategically block the first inventor's ability to obtain broad patent rights within the grace period provided. Not only would it discourage publication in the academic setting, it would have a chilling effect on research and development conducted at universities and other nonprofit research institutions. It would also add an element of risk to the decision to publish an invention prior to filing for a patent and thus slow the pace of innovation in these settings.

Advocacy filed public comments asking for an extension of the comment period for the proposals on October 4, 2012, and a public comment outlining the above concerns on November 5, 2012. Advocacy also participated in numerous interagency discussions about the proposed regulations and examination guidelines, including meetings between agency staff and affected stakeholders. Ultimately, PTO declined to adopt the interpretation of the grace-period provisions favored by small entities, publishing a final rule and final examination guidelines without significant changes. Small entity stakeholders continue to seek legislative and judicial remedies to clarify the scope of the AIA grace period provisions.

Department of Health and Human Services

Issue: End-Stage Renal Disease Prospective Payment System

On July 8, 2013, the Centers for Medicare and Medicaid Services (CMS) published a proposed rule that would, among other things, make revisions to the prospective payment system for end-stage renal disease (ESRD). CMS complied with the statutory requirements of the Affordable Care Act and the American Taxpayer Relief Act of 2012 by analyzing the impacts associated with the adjustment of the market basket calculation and the change in ESRD drug utilization. Pursuant to the RFA, CMS drafted an initial regulatory flexibility analysis after concluding that the proposed rule would result in a 9.4 percent reduction in payments to the small providers, and a total decrease of $970 million in payments to ESRD facilities in 2014.

Representatives from the National Renal Administrators Association voiced concerns to Advocacy that the proposed rule underestimated the economic impacts on their industry and that alternatives existed that would lessen those impacts. In its comment letter of August 30, 2013, Advocacy asked CMS to reassess its cost estimates based upon the cost data provided by the affected industry, as well as the Government Accounting Office and the Medical Advisory Commission, an independent congressional agency that advises Congress on Medicare issues. Advocacy also provided CMS with alternatives to the rule's provisions, including a phased-in approach that would reduce the cost of compliance for ESRD dialysis providers.

Issue: Home Health Prospective Payment System Rate Update for 2014

On July 3, 2013, CMS published a rule that proposed to update and revise the home health prospective payment system for calendar year 2014. CMS stated that the rule would make rebasing

adjustments with a four-year phase-in, to the national, standardized 60-day episode payment rates; the national per-visit rates; and the non-routine medical supply conversion factor as required by the Affordable Care Act. The proposed rule suggested that the overall economic impact of the regulation was estimated to be $290 million in decreased payments to home health agencies in calendar year 2014. While acknowledging the reduction in Medicare reimbursements to home health agencies, CMS certified that the regulation would not have a significant impact on a substantial number of small entities. However, CMS provided data about the small business impacts in an initial regulatory flexibility analysis.

Advocacy was approached by home health agencies and their representatives from the National Association for Home Care and Hospice. They believed that the rate rebasing adjustments would significantly affect their small business members and affect Medicare beneficiaries' access to quality care. Advocacy commented that the transparency of the proposed rule would be increased if CMS refined the RFA analysis that led the agency to its certification of no small business impact. Advocacy suggested to CMS that it utilize its standard measure of economic impact by looking at home health revenues, in addition to an analysis of volume of episodes. Also, Advocacy recommended that CMS provide information on the rule's projected impacts for the four-year phase-in of the rates, not just the impacts for 2014, especially since the agency's discussion of alternatives raised the possibility that it may take additional rebasing factors into consideration when finalizing the 2014 home health prospective payment system.

Department of the Interior, Fish and Wildlife Service

Issue: Critical Habitat Designation for Lemmon Fleabane

On November 28, 2012, Advocacy submitted comments on the U.S. Fish and Wildlife Service's (FWS) proposed rule, 12-Month Finding for the Lemmon Fleabane; Endangered Status for the Acuña Cactus and the Fickeisen Plains Cactus and Designation of Critical Habitat. FWS did not publish an initial regulatory flexibility analysis (IRFA) with this proposed rule. Advocacy provided comments in anticipation of FWS's publication of its IRFA or certification. Advocacy encouraged FWS to identify companies that might be affected by the proposed designation and determine the costs that the designation would impose upon them. To the extent that the costs of designating a particular area as critical habitat outweighed the benefits of such designation, Advocacy encouraged FWS to exclude it. FWS finalized the designation in September 2013 with a certification that there would be not be significant economic impacts on a substantial number of small entities.

Issue: Critical Habitat Designation for New Mexico Jumping Mouse

On June 20, 2013, FWS proposed critical habitat for the New Mexico jumping mouse. FWS proposed to designate approximately 14,500 acres as critical habitat in several counties in New Mexico, Colorado, and Arizona. FWS indicated that special management considerations might be necessary to reduce the impact of grazing, development, coal methane production, and highway construction in the proposed critical habitat areas. On July 15, 2013, Advocacy submitted a comment letter stating that FWS had failed to comply with the RFA because it had neither completed an IRFA nor certified the rule. Advocacy's letter pointed out that the designation imposed direct costs on small entities and that those costs

were required to be documented in an IRFA at the time the rule was published. Advocacy encouraged FWS to issue a supplemental IRFA and allow small entities sufficient time to comment before determining critical habitat designation for the New Mexico jumping mouse.

Issue: Addition to Categorical Exclusions for U.S. Fish and Wildlife Service

On July 29, 2013, Advocacy filed public comments with FWS in response to a notice entitled National Environmental Policy Act: Implementing Procedures; Addition to Categorical Exclusions for U.S. Fish and Wildlife Service. The exclusion would allow the Fish and Wildlife Service to add species to the list of injurious wildlife under the Lacey Act. Listed species are prohibited from being imported into the U.S. or transported across state lines. Small businesses contacted Advocacy concerned that the 30-day comment period was not long enough to consider all potential effects of such a far-reaching exclusion. Small businesses engaged in commercial trade of species proposed for listing are concerned that the categorical exclusion will remove much needed transparency and checks and balances from the process of Lacey Act listings. In response to comments, the agency reopened the comment period and the U.S. House of Representatives held a hearing on the proposed rule on September 20, 2013.

Department of the Interior, Fish and Wildlife Service

Department of Commerce, National Marine Fisheries Services

Issue: Revisions to the Regulations for Impact Analyses of Critical Habitat

On August 24, 2012, the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service issued a proposed rule revising the regulations for impact analysis of critical habitat. The rule was issued pursuant to a presidential memorandum to the secretary of interior entitled Proposed Revised Habitat for the Spotted Owl: Minimizing Regulatory Burdens. The proposed regulation provides that the economic analysis of the impact of a critical habitat designation be completed and made available for public comment at the time of publication of a proposed rule designating critical habitat. FWS also proposed several significant revisions to the manner in which they conduct their economic impact analyses for critical habitat designations.

On January 9, 2013, Advocacy hosted a roundtable which was attended by small entity representatives from as far away as Hawaii and from industries including transportation, real estate, oil and gas, electric, county governments, and conservation groups. Roundtable participants expressed support for increasing transparency of the critical habitat designation process by including economic analyses at the time of publishing the critical habitat designations. Many were concerned with the proposed revisions to the process for conducting an economic analysis. Most expressed the need for FWS to establish a process for timely requesting and obtaining economic information. Entities also wanted the rule to expressly state that FWS would actively seek and use the most accurate available economic information in their economic analyses. They also expressed the desire that FWS espouse the goal of conducting a quantitative economic analysis with every critical habitat designation and rely on qualitative information only in cases in which quantitative information is not available.

Department of Labor

Department of Homeland Security

Issue: H-2B Visa Wage Rule

In late 2010, DOL released a proposed rule that changed the methodology for calculating the wages of H-2B visa workers, increasing these wages by $1 to $9 per hour. The H-2B visa program allows employers to hire seasonal non-agricultural foreign workers. Advocacy worked with small businesses on this H-2B wage rule (referred to as the "2011 Rule"). Advocacy held roundtables and wrote multiple public comment letters to DOL citing the negative impact the wage increase would have on small businesses. Based on small businesses' and Advocacy's involvement, DOL extended the effective date of the rule several times. Congressional actions in 2012 and 2013 further delayed its implementation.

During this period, the 2008 Wage Rule was in place. On March 21, 2013, the United States District Court for the Eastern District of Pennsylvania vacated the 2008 Wage Rule and ordered DOL to issue a new rule within 30 days. This caused a lapse of over a month where neither the 2008 Wage Rule nor the 2011 Wage Rule was effective; DOL and DHS cancelled processing any H-2B petitions during this time.

In April 2013, DOL issued an interim final H-2B wage rule. The rule took immediate effect and raised H-2B workers' wages by an average of over $2 per hour. Advocacy submitted a public comment letter on June 4, 2013, expressing concern that this interim final rule increasing wages mid-season would hurt small businesses that operate at narrow margins and have already signed seasonal contracts based on lower wage rates. This interim final rule took effect immediately, and DOL did not change this rule in response to public comments.

Department of Transportation, Federal Aviation Administration

Issue: Aviation Repair Stations

On November 19, 2012, Advocacy submitted comments to the Federal Aviation Administration (FAA) on the Proposed Aviation Repair Stations Rule. The proposed rule would amend FAA regulations for aviation repair stations by revising the system of ratings, repair station certification requirements, and the regulations on repair stations providing maintenance for air carriers. Following publication of the proposed rule, Advocacy hosted a small business roundtable to discuss the proposed rule and obtain small business input on it. Staff from FAA and FAA's Repair Station Branch attended the roundtable and provided a background briefing on the proposed rule. In addition, representatives from the Aeronautical Repair Station Association and the Aviation Electronics Association provided their assessment of it. Advocacy's comments reflected small business concerns that the proposed rule would have unintended consequences and be problematic to enforce. Advocacy also recommended that FAA reassess its RFA certification and consider significant alternatives that would meet the agency's objectives in a manner that is less burdensome for small entities.

Department of the Treasury, Internal Revenue Service

Issue: Shared Responsibility for Employers Regarding Health Coverage

On December 28, 2012, the IRS published a notice of proposed rulemaking (NPRM) setting forth guidance on large employers' shared responsibility for employee health insurance coverage under Internal Revenue Code Section 4980H. The IRS asserted that the NPRM did not impose a collection of information on small

entities and that the RFA did not apply. On February 21, 2013, Advocacy submitted a public comment disagreeing with the IRS assertion and recommending that the IRS perform an RFA analysis of the proposed rule. Advocacy recommended that the IRS publish for public comment either a supplemental RFA assessment or an IRFA. Advocacy observed that these steps would provide small businesses with data to assess how much paperwork the proposed rule could be expected to generate. Moreover, Advocacy noted that the IRS would gain valuable insight into the effects of the proposed rule.

Environmental Protection Agency

Issue: TSCA Workplan Chemical Risk Assessments of Methylene Chloride, N-Methylpyrrolidone and Trichloroethylene

On March 15, 2013, Advocacy submitted a comment letter to EPA on its Draft Toxic Substances Control Act (TSCA) Workplan Chemical Risk Assessments of Methylene Chloride, N-Methylpyrrolidone, and Trichloroethylene. Advocacy was concerned with EPA's focus on small commercial shops in the risk assessments, including the lack of specific data from these settings and the assumption that employee exposure at small commercial shops is less controlled and monitored than at large-scale operations. Because EPA intends to use the risk assessments to help focus and direct the activities of the existing chemicals program over the next several years, Advocacy anticipates that such activities will include rulemakings that would be subject to the RFA.[15] It is essential that these risk assessments accurately model the use of and employee exposure to these chemicals in small commercial shops, so that EPA has sufficient information to develop effective regulatory alternatives. Advocacy hosted a roundtable on April 26, 2013, at which the acting director of EPA's Risk Assessment Division, Jeff Morris, presented. EPA is currently conducting peer review panels to review the risk assessments prior to final publication.

Issue: Formaldehyde Emissions Standards for Composite Wood Products

On August 21, 2013, Advocacy submitted a comment letter to the EPA on two rulemakings: Formaldehyde Emissions Standards for Composite Wood Products and Third-Party Certification Framework for the Formaldehyde Standards for Composite Wood Products.

Advocacy was concerned that even though many small businesses operating in the composite wood products industry were anticipating the publication of the proposed rules, most were unprepared for the extent to which they exceed the California Air Resources Board's airborne toxic control measures (ATCM) on composite wood products, on which the proposed regulations are based. Small businesses believe that the proposed rules will impose greater burdens on them without EPA having shown that the ATCM provisions are underperforming. Advocacy urged EPA to reduce the small business burden by following the recommendations made by the SBREFA panel to the EPA administrator. Advocacy hosted a roundtable on July 19, 2013, at which EPA Branch Chief Lynn Vendinello spoke. The public comment period closed on October 9, 2013, and EPA is reviewing comments in advance of its final regulations.

Issue: Steam Electric Power Plant Effluent Limitations Guidelines

Advocacy submitted comments on September 19, 2013, regarding the EPA's proposal to update the Steam Electric Power Plant Effluent Limitations Guidelines by imposing technology-based standards to control wastewater under the Clean Water Act. Advocacy worked closely with EPA's Office of Water in developing this proposed regulation, and EPA improved

15 EPA's chemical workplans are online at **www.epa.gov/oppt/existingchemicals/pubs/workplans.html.**

the proposal by considering alternatives that address small business concerns. Small entities potentially affected by this rule include several hundred small utilities, owned by private entities, local governments, and rural electric cooperatives.

Advocacy's recommendations are consistent with the RFA, Executive Order 13563, and the Clean Water Act. Advocacy recommended that EPA exclude all plants with de minimis amounts of pollution, primarily smaller plants with generation capacity below a certain size. Advocacy generally recommended that there be no additional regulation of existing bottom ash or fly ash impoundments, and that flue gas desulfurization impoundments would face new regulation above a specified design flow. Advocacy also strongly recommended that EPA issue a notice of data availability after the public comments are reviewed. The small entities and the public will then have a proper opportunity to comment, and EPA can improve its costs, pollutant loadings, and related data and analyses. A final rule is now scheduled for May 2014, although EPA may need more time to issue a notice of data availability and review the public comments.

Issue: National Emission Standards for the Brick Production Industry

On January 10, 2013, Advocacy filed comment on a proposed consent decree in *Sierra Club v. Jackson*, requiring EPA to propose national emission standards for hazardous air pollutants for the brick production industry by August 2013 and to finalize this rule by July 2014. EPA did not respond directly to Advocacy's comment, but the agency subsequently extended the deadlines and convened a panel in June 2013.

Issue: National Emission Standards for the Petroleum Refinery Industry

On September 17, 2013, Advocacy filed comment on a proposed consent decree in *Air Alliance Houston, et al. v. McCarthy,* which required EPA to conclude its mandatory residual risk and technology reviews of the existing national emission standards for the petroleum refinery industry and its proposed revisions by February 2014. As of the end of FY 2013, the consent decree had not been finalized.

Federal Communications Commission

Issue: Prohibition of 121.5 MHz Emergency Locator Transmitters

On April 24, 2013, Advocacy submitted comments to the Federal Communications Commission on its proposed Aviation Communications rules. The proposed rules consider whether the FCC should, among other things, prohibit the manufacture, importation, sale, or use of 121.5 MHz emergency locator transmitters (ELTs). ELTs are radio beacons that are activated manually or automatically to alert search-and-rescue personnel that an aircraft has crashed and to identify the location of the aircraft and any survivors. The FCC proposed this ban chiefly because the international Cospas-Sarsat satellite system, which relays distress alerts to search-and-rescue authorities, stopped monitoring the 121.5 MHz frequency in 2009 (in favor of the newer digital 406 MHz frequency). However, many of the older ELTs are still in use, and the 121.5 MHz frequency is still monitored by other search-and-rescue entities.

Advocacy hosted a small business roundtable on February 14, 2013, to discuss the proposed rules and obtain small business input. The office also organized meetings with small business aviation stakeholders at the FCC and the U.S. Department of Transportation to discuss small business concerns with the proposed rules. (Advocacy filed a request to extend the comment period on the rule on February 28, 2013). Advocacy's comments reflected small business concerns with the proposed rule and recommended that FCC revise and republish its initial regulato-

ry flexibility analysis for additional public comment before proceeding with this rulemaking.

Issue: Accessibility of User Interfaces and Video Programming Guides and Menus
On May 30, 2013, the FCC released its notice of proposed rulemaking implementing Sections 204 and 205 of the Twenty-first Century Communications and Video Accessibility Act (CVAA). The Act requires that user interfaces on digital apparatus and navigation devices used to view video programming be accessible to and usable by individuals who are blind or visually impaired, when achievable. The CVAA gives the FCC discretion to exempt certain small businesses from the requirements. Following the publication of the proposed rule, small cable and telecommunications company representatives contacted Advocacy with their concerns. They felt that the rule would disproportionately burden small entities if implemented without flexibilities for small multichannel video programming distributors (MVPDs). Advocacy forwarded these concerns to FCC staff in person, and filed a letter detailing the meeting in the FCC's public docket on August 19, 2013. Advocacy recommended that the FCC exercise its authority to exempt small MVPDs serving fewer than 20,000 subscribers from the proposed rule. Advocacy also recommended that the FCC adopt a delayed compliance schedule for all small MVPDs. A staggered compliance date would let smaller operators who lack economies of scale follow the industry direction in adopting technology solutions that meet the FCC performance standards. Finally, Advocacy shared its concerns that the FCC had not provided any quantitative or qualitative analysis of the potential impacts of the rule on small MVPDs, and recommended that it include such analysis in its final rule, as well as a discussion of any steps taken to mitigate those impacts. FCC is expected to adopt a final rule in late 2014.

Federal Reserve

Office of the Comptroller of Currency

Federal Deposit Insurance Corporation

Issue: Regulatory Capital Rules
On October 22, 2012, Advocacy submitted a comment letter to three agencies—the Federal Reserve, the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation—on their joint proposed rules implementing the Basel III Accords on bank capital adequacy, stress testing and market liquidity risk and portions of the Dodd-Frank Act. The three proposals were:

- Regulatory Capital Rules: Regulatory Capital, Implementation of Basel III, Minimum Regulatory Capital Ratios, Capital Adequacy, and Transition Provisions (Regulatory Capital);
- Regulatory Capital Rules: Standardized Approach for Risk-weighted Asset, Market Discipline and Disclosure Requirements (Standardized Approach); and
- Regulatory Capital Rules: Advanced Approaches Risk-based Capital Rules; Market Risk Capital Rule (Advanced Approach).

In the Regulatory Capital proposal, the agencies proposed a revision to their risk-based and leverage capital requirements and to apply limits on a banking organization's capital distributions and certain discretionary bonus payments. In the Standardized Approach proposal, the agencies proposed a revision to their rules for calculating risk-weighted assets to enhance risk sensitivity and address weaknesses identified over recent years. The Standardized Approach proposal also included alternatives to credit ratings, consistent with Section 939A of the Dodd-Frank Act. The

Regulatory Capital proposal and the Standardized Approach proposal would apply to all banking organizations that are subject to minimum capital requirements. In the Advanced Approach proposal, the agencies are proposing to revise the advanced approaches risk-based capital rules consistent with Basel III and other changes to the Basel Committee on Bank Supervision's capital standards.

The agencies prepared an IRFA for the Standardized Approach and Regulatory Capital proposals. Advocacy commended the agencies for considering the cumulative impact of the proposals on small entities. The agencies listed the alternatives that are being considered, but did not discuss the burden reduction associated with the alternatives. Advocacy encouraged the agencies to provide a discussion that would explain how the alternatives reduce the economic burden on small entities. Small community banks operate on a business model designed for long-term service to their respective communities, many of which are in areas that are not served by large banks. Because of this, Advocacy recommended that community banks be allowed to continue to use the current Basel I framework for computing their capital requirements. Advocacy also opined that the changes may require significant software changes at a time when small banks are facing many changes due to Dodd-Frank Act requirements. Advocacy encouraged the agencies to carefully consider the information provided by the small community financial institutions in determining the economic impact of the actions as well as analyzing regulatory alternatives

The final Basel III capital rules were approved in the summer of 2013. The final rules did not include a general exemption for small financial institutions. However, the final rules were significantly better for small banks than the original proposal. They include a number of exemptions requested by the small business community. For example, all banks will be able to continue using the Basel I risk weights for residential mortgages. Under the final rules, banks will not be subject to the more complex and onerous risk-weight schedule of Basel III, which require loan-to-value ratios to calculate risk weights for mortgages. Additionally, banks with assets under $250 billion will have the option not to include accumulated other comprehensive income as regulatory capital.

Government Services Administration, Federal Acquisition Regulatory Council

Issue: Small Business Set-Asides for Research and Development

On October 8, 2012, Advocacy submitted comments to the Federal Acquisition Regulatory Council (FAR) on Case 2012-015, Small Business Set-Asides for Research and Development Contracts. These comments were filed as a result of a proposed rule issued by the FAR Council on August 10, 2012. The proposed rule would change the last sentence in FAR Part 19.502-2 (b)(2). This provision restricts the contracting officer from making a small business set-aside for research and development contracts unless there is a reasonable expectation of obtaining from two or more small businesses the best scientific and technological sources consistent with the demands of the proposed acquisition.

Advocacy's comment letter supported the proposed rule change for three reasons. First, there is no regulatory nor legislative history to support the inclusion of this requirement in the FAR. Second, the current regulatory language is more restrictive than the basic small business set-aside requirements in FAR Part 19. Third, this restrictive provision has had a negative impact on the number of small business research and development contracts awarded by the federal government. According to 2011 and 2012 contracting data from the federal Procurement Data System, small businesses have been awarded less than 8

percent of research and development contracts in NAICS codes 54170, 541710, and 541720. In general small businesses are awarded nearly 22 percent of federal contracts annually. As of the end of FY 2013, the FAR Council had not yet issued a final regulation.

National Toxicology Program

Issue: Approach for Systematic Review and Evidence Integration for Literature-based Health Assessments

Advocacy submitted comments to the National Toxicology Program (NTP) Board of Scientific Counselors in advance of their December 11, 2012, meeting. NTP is an interagency program run by the U.S. Department of Health and Human Services to coordinate, evaluate, and report on toxicology within public agencies.

Advocacy heard from small businesses that were concerned about the short time period NTP provided for review of and comment on its proposed rule, Approach for Systematic Review and Evidence Integration for Literature-based Health Assessments. The proposed rule set forth NTP's new approach for systematic review and evidence integration for literature-based health assessments. NTP did not post the relevant documents on its website until late November, and although NTP extended the deadline for public comment to Thursday, December 6, the extension still did not provide enough time to comment. Small entities felt that the short time frame for commenting negatively affected their interests and did not promote openness and transparency as outlined in Executive Order 13563. Advocacy requested that the board extend time for consideration of the systematic approach in order to allow for a more robust public comment process.

Securities and Exchange Commission

Issue: Amendments to Regulation D, Form D and Rule 156

On July 10, 2013, the Securities and Exchange Commission issued a final rule implementing Section 201(a) of the Jumpstart Our Business Startups (JOBS) Act. This section lifts the ban on general solicitation and general advertising. The SEC final rule permits businesses to openly advertise to raise money in private offerings provided that the issuer of securities takes certain steps to verify that the purchasers of the securities are accredited investors.

On July 24, the SEC published a proposed rule related to the agency's final rule of July 10. The proposed rule is intended to enhance the agency's ability to evaluate and enforce market practices associated with general solicitation and general advertising. On September 12, 2013, Advocacy submitted a public comment letter on the July 24 proposal. Based on input from small business owners and representatives, Advocacy expressed concern that the IRFA contained in the proposed rule lacked essential information required by the RFA. Specifically, the IRFA failed to adequately describe and estimate the number of small entities to which the proposed rule would apply. In addition, it contained no description of significant alternatives which would accomplish the stated SEC objectives and minimize any significant economic impact of the proposed rule on small entities. For these reasons, Advocacy recommended that the SEC republish for public comment a supplemental IRFA before proceeding with this rulemaking.

6 Cost Savings and Results

Representing the concerns of small businesses before federal regulatory agencies is one of Advocacy's most important statutory missions. The metric chosen to capture some of the impacts of Advocacy's representation is the achievement of regulatory cost savings for small businesses and other small entities. It is important to note that not all successful interventions produce quantifiable results; hence the limitation of the cost savings metric.

Cost savings from rules on which Advocacy has intervened consist of forgone capital or annual compliance costs that otherwise would have been required in the first year of a rule's implementation. Advocacy captures cost savings in the quarter and fiscal year in which the regulating agency agrees to changes resulting from Advocacy's intervention and not necessarily during the period in which the intervention occurred. Therefore, the results reported for any year do not reflect the total of Advocacy's interventions to date that may produce quantifiable cost savings in the future. Cost savings estimates are generally based on estimates from the agencies promulgating the rules in which Advocacy intervened, although industry estimates may be used in some cases.

In FY 2013, fourteen rules on which Advocacy intervened on small businesses' behalf were made final and included positive results. As can be seen in the following pages, seven of these resulted in cost savings totaling $1.5 billion.

Seven of Advocacy's successful interventions are not readily quantifiable. These instances are listed in a table with a narrative explaining the nature of the intervention and ensuing success. As more federal agencies come in line with substantiated economic analyses in properly done IRFAs and FRFAs, we shall see a trend favoring quantifiable successes.

Quantifiable Cost Savings

This section describes the quantifiable cost savings from rules that were finalized in FY 2013. The cost savings are listed in Tables 6.1 and 6.2.

Department of Agriculture, Animal and Plant Health Inspection Service

Issue: Animal Welfare; Retail Pet Store and Licensing Exemptions

On May 16, 2012, the U.S. Department of Agriculture published a proposed rule, Animal Welfare; Retail Pet Store and Licensing Exemptions, more commonly referred to as the "puppy mill" rule. The rule subjects retail entities selling animals via remote methods, such as the Internet, to licensing requirements. The rule was designed to prevent abusive puppy mills—where breeders of dogs, cats, and other animals breed numerous litters at one time. The proposed rule exempted breeders with three or fewer breeding animals from the rule's requirements. Small businesses contacted Advocacy and complained that this rule would force them to incur costs that would put many of the hobbyist breeders out of business. They asked for an exemption for breeders with six or fewer breeding animals. On September 18, 2013, the agency published a final rule. Through interagency involvement, Advocacy was able get the agency to increase the number of breeding animals in the exemption from three to four. This resulted in a savings of $5.5 million.

Department of Commerce, National Oceanic and Atmospheric Administration

Issue: Sea Turtle Conservation; Shrimp Trawling Requirements

On May 10, 2012, the National Oceanic and Atmospheric Administration (NOAA) proposed a rule that would require the use of turtle excluder devices in the nets of all skimmer trawls, pusher-head trawls, and wing nets rigged for shrimp fishing.

Through a series of regional roundtables and meetings, Advocacy learned that shrimp fisheries were concerned that the proposed rule would cause significant economic harm to the already fragile shrimping industry in the Gulf of Mexico. Small business stakeholders informed Advocacy that NOAA's analysis failed to take into account the fact that turtle excluder devices cannot be safely used on small shrimping vessels, and thus underestimated the economic impact of the rule on small entities.

Advocacy recommended that NOAA further evaluate alternatives that would exclude vessels under a certain length from the regulations to avoid forcing a significant number of small businesses out of the industry. Advocacy also urged NOAA to reconsider implementing its proposed rule unless it could show a link between increased sea turtle strandings and commercial shrimping.

On February 7, 2013, NOAA withdrew the proposed rule finding that the information collected during the comment period indicated that the proposed costs of the rule would outweigh the benefits, resulting in $15 million in cost savings.

Department of Labor

Issue: Application of the Fair Labor Standards Act to Domestic Service

In December 2011, the Department of Labor (DOL) released a proposed rule that would require some companion care workers, such as those hired by home care staffing agencies, to be paid minimum wage and overtime under the Fair Labor Standards Act (FLSA). Companion care workers are non-medical aides who provide in-home assistance to the elderly and infirm; these workers are currently exempt from FLSA requirements. The proposed rule would limit the companion care exemption to those employed by the family or household using those services.

On February 1, 2012, Advocacy held a small business roundtable, where small home care staffing agencies expressed concern that this rule will add significant burdens and costs to the companion care industry. In a comment letter on March 12, 2012, Advocacy recommended that DOL publish a supplemental initial regulatory flexibility analysis to reevaluate the impact of this rule on small business, and consider regulatory alternatives to accomplish the agency's goals without harming small businesses. One of these recommendations was that DOL delay the rulemaking to allow small businesses to change their practices because of the rule's new requirements.

On September 17, 2013, DOL released a final rule that delayed the effective date of this rulemaking to January 1, 2015, and specifically cited Advocacy's comment letter as one of the reasons for this delay. Advocacy estimates that the delay in the effective date will provide cost savings of over $134 million to small businesses.

Department of the Treasury, Internal Revenue Service

Issue: Simplification of the Home Office Deduction

On January 15, 2013, the Internal Revenue Service (IRS) issued Revenue Procedure 2013-13, which provided a simplified option that many owners of home-based businesses may use to calculate the deduction for the business use of homes. The new option allows a deduction of up to $1,500 based on a formula of $5 per square foot of home office spaced used and will take effect for the 2013 tax year. The IRS estimated that

this change in the rule will reduce the paperwork burden on small businesses by 1.6 million hours annually. An estimated 14.4 million, or 52 percent of America's 27.8 million small businesses, are home-based. The change saves an estimated $26 million.

Over the years, Advocacy worked with the IRS to encourage the simplification of the home office business deduction. As an example, Advocacy sent a letter in 2009 to the Presidential Economic Recovery Advisory Board's Tax Reform Subcommittee in response to a request for ideas to reduce the burden of regulations. Simplification of the home office business deduction was Advocacy's top recommendation, and the letter suggested that the IRS offer a standard deduction option. Advocacy applauds the IRS's decision to offer a simplified version of the home office deduction. Advocacy will continue to pursue straightforward solutions for small business through tax reform.

Environmental Protection Agency

Issue: National Emission Standards for Hazardous Air Pollutant Emissions: Hard and Decorative Chromium Electroplating and Chromium Anodizing Tanks; and Steel Pickling–HCl Process Facilities and Hydrochloric Acid Regeneration Plants

On February 8, 2012, EPA published a supplemental notice of proposed rulemaking titled National Emissions Standards for Hazardous Air Pollutant [NESHAP] Emissions: Hard and Decorative Chromium Electroplating and Chromium Anodizing Tanks; and Steel Pickling-HCl Process Facilities and Hydrochloric Acid Regeneration Plants. EPA's supplemental notice presented a new technology review and a new residual risk analysis completed since the proposed rulemaking was published on October 21, 2010. Based on the new information, EPA proposed revisions to the NESHAP that would result in stricter emissions limits for hexavalent chromium emissions.

On March 12, 2012, Advocacy submitted a comment letter to EPA stating that although EPA had certified that the proposed action would not have a significant economic impact on a substantial number of small entities, Advocacy was concerned that the certification lacked a sufficient factual basis. Specifically, there was insufficient data demonstrating that the rulemaking was technically feasible. The rulemaking also banned the use of wetting agency fume suppressant (WAFS) containing perfluorooctyl sulfonates (PFOS). EPA had not demonstrated that the proposed surface tension levels were achievable using the non-PFOS WAFS.

The final rule, published September 19, 2012, made several changes from the proposed rule. EPA gathered data to support its contention that the surface tension levels could be met using non-PFOS WAFS. Most notably, it identified the use of wetting agent fume suppressants as an alternative to add-on control devices, thus decreasing the cost of the rule from $376.6 million to $8.2 million, for a savings of $368.4 million. (Although this rulemaking was finalized in the fourth quarter of FY 2012, Advocacy did not have access to the required data to calculate the cost savings until FY 2013.)

Issue: Final Revisions to Non-Hazardous Secondary Materials That Are Solid Waste

On February 21, 2012, Advocacy submitted comments on the proposed revisions to the final rule, Non-Hazardous Materials That Are Solid Waste, which was promulgated on March 21, 2011. These non-hazardous secondary materials are products left over from industrial, manufacturing, or other processes. These materials are often burned in boilers as fuel. This is a form of recycling that reduces fuel costs, while avoiding the expense of transporting materials to a landfill and releasing additional greenhouse gases. Such material may be designated as "non-waste" or

"solid waste." The designation determines which regulatory regime applies.

EPA's initial decision not to designate certain fuels as non-wastes would disrupt the manufacturing processes at many sites, including cement kilns, steel mills, paper mills, and other manufacturing plants. Advocacy asked EPA to designate seven categories of materials as non-waste: (1) off-specification used oil, (2) pulp and paper processing residuals, (3) scrap tires in stockpiles, (4) animal manure, (5) treated wood, (6) pulp and paper sludges, and (7) resinated wood. Advocacy did not see a clear difference between these wastes and the ones proposed by EPA.

In its February 7, 2013, final rule, EPA responded favorably to many of Advocacy's suggestions. This resulted in annual savings of $690 million for small firms. The final rule specifically designated scrap tires in established recycling problems, pulp and paper sludges, and resinated wood as non-waste fuels, providing relief to thousands of small businesses that recycle and combust these materials. Furthermore, the rule established another option for relief for other non-waste categories by establishing a new rulemaking procedure with flexible criteria for making the non-waste designation. Other materials may warrant relief under the provisions of the rule and include off-specification used oil, paper recycling residuals, construction and demolition waste, creosote-treated wood, and other treated wood.

Issue: Final Rule on Air Pollution from Reciprocating Internal Combustion Engines

In 2009, Advocacy submitted comments on the EPA's proposed rule, National Emission Standards for Hazardous Air Pollutants for Reciprocating Internal Combustion Engines (RICE). This rule will affect tens of thousands of small businesses that employ engines to generate electricity, as well as power pumps and compressors. They include small businesses in oil and gas production, the natural gas pipeline industry, and agriculture (e.g., for irrigation pumps). Advocacy's comments included the recommendation that engines fired by natural gas or diesel fuel in areas remote from population should not be subject to expensive emission control retrofits, but instead be subject to work practice controls.

In a reconsideration of the final rule that was completed on January 30, 2013, EPA adopted Advocacy's approach for natural gas-fired engines. EPA also allowed additional flexibility for utility companies to utilize emergency generators to avoid power failures. EPA estimated that this modification would reduce the capital cost of the original rule by $287 million and the annual costs by $139 million, while still producing substantial air pollution reductions.

Table 6.1 Description of Regulatory Cost Savings, FY 2013

Agency	Rule	Cost Savings/ Impact Measures
Department of Agriculture, Animal and Plant Health Inspection Service	Revision of the Definition of Retail Pet Store	APHIS increased the number of breeding animals that would subject a breeder to the requirements of this rule from three to four. This resulted in a savings of $5.5 million.
Department of Commerce, National Oceanic and Atmospheric Administration	Sea Turtle Conservation; Shrimp Trawling Requirements	On February 7, 2013, NOAA withdrew the proposed rule resulting in $15 million in cost savings.
Department of Labor	Fair Labor Standards Act Application to Domestic Service	On September 17, 2013, DOL delayed the effective date of this rulemaking to January 1, 2015, providing cost savings of over $134 million to small businesses.
Department of the Treasury, Internal Revenue Service	Simplified Home Office Deduction	On January 15, 2013, the IRS provided a simplified option that home-based businesses may use to calculate the deduction for the business use of homes. The IRS estimated that the change will reduce the paperwork burden by 1.6 million hours annually. An estimated 14.4 million businesses are home-based. The change saves small businesses an estimated $26 million.
Environmental Protection Agency	National Emission Standards for Hazardous Air Pollutant Emissions: Hard and Decorative Chromium Electroplating and Chromium Anodizing Tanks; and Steel Pickling – HCl Process Facilities and Hydrochloric Acid Regeneration Plants	The final rule, published September 19, 2012, made several changes from the proposed rule; most notably it identified the use of wetting agent fume suppressants as an alternative to add-on control devices thus decreasing the cost of the rule from $376.6 million to $8.2 million.[1]
Environmental Protection Agency	Non Hazardous Secondary Materials: Combustion of Off-Specification Used Oil	In its final rule issued on February 7, 2013, EPA accepted several of Advocacy's suggestions, resulting in annual savings of $690 million per year for small firms. The agency is addressing other secondary materials in future rulemakings.
Environmental Protection Agency	Reciprocal Internal Combustion Engine Final Rule	EPA exempted engines fired by natural gas or diesel fuel in remote areas from emission control retrofits and gave utility companies the flexibility to utilize emergency generators to avoid power failures. These changes resulted in $287 million in capital cost savings and $139 million annual cost savings.

1. Although this rulemaking was finalized in the fourth quarter of FY 2012, Advocacy did not have access to the required data to calculate the cost savings until FY 2013.

See Appendix H for abbreviations.

Table 6.2 Summary of Regulatory Cost Savings, FY 2013

Rule / Intervention (Agency)	First-year Costs[1]	Annual Costs[1]	Source
Revision of the Definition of Retail Pet Store (Department of Agriculture, Animal and Plant Health Inspection Service)	$5,477,814	$5,477,814	APHIS FRFA Tables 4-7, 78 *Fed. Reg.* 57227 (September 18, 2013)
Sea Turtle Conservation; Shrimp Trawling Requirements (Department of Commerce, National Oceanic and Atmospheric Administration)	$15,075,195		NOAA Proposed Rule 77 *Fed. Reg.* 27411 (May 10, 2012); withdrawn 78 *Fed. Reg.* 9024 (February 7, 2013)
Fair Labor Standards Act Application to Domestic Service (Department of Labor)	$134,705,000		DOL FRFA Table 22, 78 *Fed. Reg.* 60454 (October 1, 2013)[2]
Simplified Home Office Deduction (Department of the Treasury, Internal Revenue Service)	$26,000,000		IRS Rev. Proc. 2013-13 (January 15, 2013); Bureau of Labor Statistics wage rate tables, **www.bls.gov/oes/current/oes132082.htm**
National Emission Standards for Hazardous Air Pollutant Emissions: Hard and Decorative Chromium Electroplating and Chromium Anodizing Tanks; and Steel Pickling – HCL Process Facilities and Hydrochloric Acid Regeneration Plants (Environmental Protection Agency)	$368,401,000		EPA RIA proposed rule at 75 *Fed. Reg.* 65902 (October 26, 2010) and final rule at 77 *Fed. Reg.* 58221 (September 19, 2012)[3]
Non Hazardous Secondary Materials – Combustion of Off-Specification Used Oil (Environmental Protection Agency)	$690,000,000	$690,000,000	Industry estimate from the Association of Responsible Recyclers
Reciprocal Internal Combustion Engine final rule (Environmental Protection Agency)	$287,000,000	$139,000,000	EPA final rule preamble 78 *Fed. Reg.* 6676 (January 30, 2013)
TOTAL	**$1,526,659,009**	**$834,477,814**	

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, we limit 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. DOL released the final rule and press release on their website on September 17, 2013.
3. Although this rulemaking was finalized in the fourth quarter of FY 2012, Advocacy did not have access to the required data to calculate the cost savings until FY 2013.

See Appendix H for abbreviations.

Unquantifiable Results

Seven rules that were made final in FY 2013 resulted in savings to small businesses which could not be quantified. Here are descriptions of the savings from the seven rules listed in Table 6.3.

Consumer Financial Protection Bureau

Issue: 2012 RESPA and TILA Mortgage Servicing Proposal

Based on information from the CFPB IRFA, the range of costs avoided by exempting the 9,168 small mortgage servicers servicing less than 5,000 loans is between $1 billion and $2.3 billion for one-time costs and $60.5 million for ongoing costs. For a description of this rule and associated cost savings, see Chapter 5.

Department of Agriculture, Animal and Plant Health Inspection Service

Issue: National Requirements for Traceability of Livestock Moving Interstate

On August 11, 2011, the Animal and Plant Health Inspection Service proposed a rule to establish national official identification and documentation requirements for the traceability of livestock moving interstate. The proposal required livestock that are moved interstate to be officially identified with a tag and accompanied by a certificate of veterinary inspection or other documentation. APHIS indicated that the proposed rule would not have a significant economic effect on a substantial number of small businesses. APHIS felt that the majority of the proposed regulations were already being implemented by businesses as standard operating practice. Small businesses contacted Advocacy, contending that APHIS misunderstand the rule's actual effect on the market. They indicated that several of the proposal's assumptions, including the current state of animal tagging for interstate travel, were incorrect.

Advocacy submitted a comment letter on December 6, 2011. In April 2012, APHIS released a supplementary RIA with IRFA. In the final rule issued January 9, 2013, APHIS adopted several changes lessening the impact on small businesses. The final rule removes certain small businesses from the scope of the rule and provides flexibility in the tagging process so that many small businesses incur no further costs in complying with the rule.

Department of Labor, Occupational Safety and Health Administration

Issue: On-Site Consultation Program

In 2010, OSHA changed the criteria under which participants in the agency's On-site Consultation program could be subject to enforcement inspections. In discussing the proposed changes at Advocacy's small business labor safety roundtable and elsewhere, small business representatives expressed concern that small businesses would be deterred from participating in the program if they thought they were going to be turned over to OSHA enforcement. Advocacy filed comments on November 2, 2010, questioning the need to change a useful and effective program and expressing concern that the changes could discourage small business participation. As a result of Advocacy's comments and other stakeholder input, OSHA withdrew the proposed rule on August 7, 2013.

Department of Labor, Office of Federal Contract Compliance Programs

Issue: Affirmative Action and Nondiscrimination Obligations for Federal Contractors and Subcontractors

In 2011, the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) proposed two rules amending federal contracting affirmative action requirements for individuals with disabilities and veterans. The first rule updates Section 503 of the Rehabilitation Act of 1973 and the other amends regulations governing the Vietnam Era Veterans' Readjustment Assistance Act. These rules proposed

strengthening contractors' affirmative action programs by requiring an analysis of personnel processes, adding recruitment steps and data collection, and setting hiring goals pertaining to applicants and hires in both of these groups. After the comment period ended, small business representatives met with Advocacy to discuss their concerns with the costs and paperwork burden of these rulemakings. Advocacy participated in multiple meetings under Executive Order 12866 with small business stakeholders, OFCCP, and the Office of Information and Regulatory Affairs to advance small business concerns on these rulemakings.

OFCCP published the final rules in September 24, 2013. They eliminated or added flexibility to many requirements, reducing the compliance burden on all contractors, and making specific changes to help small contractors. For example, in the Section 503 rulemaking, the OFCCP proposed a single utilization or hiring goal of 7 percent per job group for individuals with disabilities, and a sub-goal for people with specific targeted disabilities. Small construction businesses sought an exemption or alternatives from this requirement for physically demanding and safety-sensitive positions. In the final rule, OFCCP permits contractors with 100 or fewer employees to apply the 7 percent goal to their entire workforce, rather than to each job group. OFCCP also eliminated the sub-goal requirements for specific targeted disabilities.

Department of Interior, Fish and Wildlife Service

Issue: Designation of Critical Habitat for the Northern Spotted Owl

On June 1, 2012, FWS published an economic analysis discussing the impact of the proposed critical habitat for the northern spotted owl. In a letter filed July 5, 2012, Advocacy commented that FWS had not provided an adequate factual basis for its certification and that small businesses would be directly affected by this rule. On December 4, 2012, FWS finalized the critical habitat designation reducing the total designation by 4.1 million acres.

Federal Communications Commission

Issue: Special Access for Price Cap Local Exchange Carriers

On May 22, 2012, Advocacy expressed concerns that the FCC had not adequately addressed issues regarding reasonable rates, terms, and conditions for special access services. Advocacy argued that some of the FCC's special access rules might be resulting in higher costs and lower-quality service for business broadband consumers who could be using these extra resources to grow their businesses and hire more employees. Specifically, Advocacy voiced concerns that the FCC rules under which price cap carriers could petition for pricing flexibility in competitive markets, and thus raise prices, were possibly flawed and contributing to unreasonably high rates for critical special access services in non-competitive markets. Advocacy encouraged moving forward with rulemaking to address these concerns if market data supported it. Ultimately, the FCC opted to suspend grants of pricing flexibility until it completes its review of the state of competition in the special access market and implements any necessary regulatory reforms. The FCC released a data request order on December 18, 2012.

Federal Reserve, Office of the Comptroller of Currency, Federal Deposit Insurance Corporation

Issue: Basel III Accords on Bank Capital Adequacy

The final rules included a number of exemptions requested by the small business community. All banks will be able to continue using the Basel I risk weights for residential mortgages, and banks will not be subject to the more complex and onerous risk-weight schedule of Basel III. See Chapter 5 for more about the rule and the cost savings.

Table 6.3 Unquantifiable Regulatory Cost Savings, FY 2013

Agency	Subject Description and Citation	Flexibility
Consumer Financial Protection Bureau	2012 Real Estate Settlement Procedures Act Mortgage Servicing Proposal and 2012 Truth in Lending Act Mortgage Servicing rule, 78 *Fed. Reg.* 10696 (February 14, 2013)	Based on information from the CFPB IRFA, the range of costs avoided by exempting the 9,168 small mortgage servicers servicing less than 5,000 loans is between $1 billion and $2.3 billion for one-time costs and $60.5 million for ongoing costs.
Department of Agriculture, Animal and Plant Health Inspection Service	Traceability for Livestock Moving Interstate, 78 *Fed. Reg.* 2039 (January 9, 2013)	The final rule removes certain small businesses from the scope of the rule and provides flexibility in the tagging process so that many small businesses will incur no further costs in complying with the rule.
Department of Labor, Occupational Safety and Health Administration	Proposed Consultation Agreements: Proposed Changes to Consultation Procedures Rule, 78 *Fed. Reg.* 48342 (August 8, 2013)	In 2010, OSHA changed the criteria under which participants in its On-site Consultation program could be subject to enforcement inspections. Advocacy filed comments on November 2, 2010, questioning the need to change a useful and effective program and expressing concern that the changes could discourage small business participation. OSHA withdrew the proposed rule on August 7, 2013.
Department of Labor, Office of Federal Contract Compliance Programs	Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals with Disabilities and Vietnam Era Veterans' Readjustment Assistance Act; 78 *Fed. Reg*. 58682 and 78 *Fed. Reg.* 58614 (September 24, 2013)	OFCCP eliminated many requirements or added flexibility, reducing the compliance burden on all contractors. It also made specific changes to help small contractors.
Department of Interior, Fish and Wildlife Service	Designation of Critical Habitat for the Northern Spotted Owl, 77 *Fed. Reg.* 71875 (December 4, 2012)	In its final rule issued on December 4, 2012, FWS finalized the critical habitat designation reducing the total designation by 4.1 million acres.
Federal Communications Commission	Special Access for Price Cap Local Exchange Carriers, 78 *Fed. Reg.* 6276 (January 30, 2013)	On May 22, 2012, Advocacy commented that the pricing flexibility rules did not adequately measure market competition and contributed to the unreasonably high rates for critical special access services. On August 22, 2012, the FCC suspended its rules allowing price cap carriers the use of pricing flexibility for special access in markets where there was sufficient competition.

Table 6.3 Unquantifiable Regulatory Cost Savings, FY 2013, continued

Agency	Subject Description and Citation	Flexibility
Federal Reserve, Office of the Comptroller of the Currency, Federal Deposit Insurance Corporation	Basel III Accords on Bank Capital Adequacy, 78 *Fed. Reg.* 52791 (August 30, 2013)	The final rules included a number of exemptions requested by the small business community. All banks will be able to continue using the Basel I risk weights for residential mortgages. Banks will not be subject to the more complex and onerous risk-weight schedule of Basel III, which required loan-to-value ratios to calculate risk weights for mortgages.

See Appendix H for abbreviations.

Appendix A
Supplementary Tables

Table A.1 Federal Agencies Trained in RFA Compliance, 2003-2013

In fulfillment of the requirements of E.O. 13272, the Office of Advocacy offers training to federal departments and agencies in how to comply with the Regulatory Flexibility Act. Since training was first offered in 2003, almost 100 departments and agencies have participated.

- Department of Agriculture
  - Animal and Plant Health Inspection Service
  - Agricultural Marketing Service
  - Grain Inspection, Packers, and Stockyards Administration
  - Forest Service
  - Rural Utilities Service
  - Office of Budget and Program Analysis
- Department of Commerce
  - National Oceanic and Atmospheric Administration
  - National Telecommunications and Information Administration
  - Office of Manufacturing Services
  - Patent and Trademark Office
- Department of Defense
  - Defense Logistics Agency
  - Department of the Air Force
  - Department of the Army, Training and Doctrine Command
  - U.S.Strategic Command
- Department of Education
- Department of Energy
- Department of Health and Human Services
  - Center for Disease Control and Prevention
  - Center for Medicare and Medicaid Services
  - Food and Drug Administration
  - Indian Health Service
- Department of Homeland Security
  - Federal Emergency Management Agency
  - Transportation Security Administration
  - U.S. Citizenship and Immigration Service
  - U.S. Coast Guard
  - U.S. Customs and Border Protection

Table A.1 Federal Agencies Trained in RFA Compliance, 2003-2013, continued

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

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

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

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

Department of State

Department of Transportation
- Federal Aviation Administration
- Federal Highway Administration
- Federal Motor Carrier Safety Administration
- Federal Railroad Administration
- Federal Transit Administration
- Maritime Administration
- National Highway Traffic Safety Administration
- Pipeline and Hazardous Materials Safety Administration
- Research and Special Programs Administration
- 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

Table A.1 Federal Agencies Trained in RFA Compliance, 2003-2013, continued

Department of Veterans Affairs
- National Cemetery Administration

Office of the Director of National Intelligence

Office of Management and Budget
- Office of Federal Procurement Policy

Small Business Administration

Independent Federal Agencies
- Access Board
- Consumer Financial Protection Bureau
- Consumer Product Safety Commission
- Commodity Futures Trading Commission
- Environmental Protection Agency
- Farm Credit Administration
- Federal Communications Commission
- Federal Deposit Insurance Corporation
- Federal Election Commission
- Federal Energy Regulatory Commission
- Federal Housing Finance Agency
- Federal Maritime Commission
- Federal Reserve System
- Federal Trade Commission
- General Services Administration / FAR Council
- National Credit Union Administration
- National Endowment for the Humanities
- Nuclear Regulatory Commission
- Pension Benefit Guaranty Corporation
- Securities and Exchange Commission
- Trade and Development Agency

Table A.2 RFA-related Case Law through FY 2013

Western Wood Preservers v. McHugh.
In *Western Wood Preservers Institute, et al. v. McHugh,*[15] two district office of the Army Corps of Engineers proposed regional conditions for nationwide permits under the Clean Water Act.[16] The Portland District proposed conditions prohibiting nationwide permittees from using "wood products treated with biologically harmful . . . chemical components" coming into contact with Oregon waters or wetlands.[17] The Alaska District's conditions similarly prohibited permittees from using products treated with creosote and pentachlorophenol, common wood preservatives, in certain Alaskan waters.[18] The plaintiffs (trade associations involved in the preserved wood products industry) alleged these conditions violate the RFA due to the Corps' failure to prepare an initial regulatory flexibility analysis (Section 603), a final regulatory analysis (Section 604), or certifying showing neither was necessary (Section 605).[19] The court did not consider the Corps' failure judiciable, stating that "Section 611(a) identifies specific sections of the Act that are subject to judicial review, and it does not include section 603."[20] In regards to sections 604 and 605, the court found that the plaintiffs were not adversely affected small entities as the effect was indirect.[21] Thus, the court found the plaintiffs lacked standing to bring suit under the RFA.[22]

Council for Urological Interests v. Sebelius.
In *Council for Urological Interests v. Sebelius,*[23] the Centers for Medicare and Medicaid Services (CMS) had expanded the definition of "an entity furnishing designated health services" under the Stark Act to include the organizations that performed the designated health services.[24] The Stark Act prevents abuse of Medicare and Medicaid claims by prohibiting "physician self-referrals"— instances where a physician refers a patient to an entity with which that physician has a financial relationship (a financial relationship being "(1) a physician's 'ownership or investment interest in the entity' or (2) a 'compensation arrangement . . . between the physician and the entity'").[25] The plaintiff (a not-for-profit corporation comprised of urological medical services companies) alleged the CMS did not provide the requisite regulatory flexibility analysis.[26] CMS argued this regulation was part of a larger rulemaking that included a regulatory flexibility analysis and, further, it certified the particular rule as it did not significantly impact a significant number of small entities.[27] Because the plaintiff did not provide a counterargument to CMS's assertions, the court treated the issue as conceded and ruled that the RFA had not been violated.[28]

Dovid v. U.S. Department of Agriculture.
In *Dovid v. U.S. Department of Agriculture,*[29] the Department of Agriculture's (USDA) Summer Food Service Program (SFSP) required that

15 *W. Wood Preservers Inst. v. McHugh,* No. CIV.A. 12-1253 ESH, 2013 WL 692789 (D.D.C. Feb. 27, 2013).

16 *Id.* at 1.

17 *Id.*

18 *Id.*

19 *Id.* at 8.

20 *Id.* at 9.

21 *Id.*

22 *Id.* See Regulatory Flexibility Act, 5 U.S.C. § 601-11 (2006 & Supps. III 2009, V 2011).

23 Council for Urological Interests v. Sebelius, No. 09-cv-0546-BJR, 2013 WL 2284885 (D.D.C. May 24, 2013).

24 *Id.* at 4.

25 *Id.* at 2-3.

26 *Id.* at 18.

27 *Id.*

28 *Id.* at 19.

29 Dovid v. U.S. Dep't of Agric., No. 11 CIV. 2746 PAC, 2013 WL 775408 (S.D.N.Y. Mar. 1, 2013).

Table A.2 RFA-related Case Law through FY 2013, continued

participating not-for-profit organizations not be associated with any entity that had been "seriously deficient" in any Federal child nutrition program.[30] After being disqualified due to an association, the plaintiff (a religious corporation operating a summer camp) alleged the USDA was in violation of the RFA as it had not reviewed the regulation governing SFSP.[31] The Court ruled that the USDA's 1989 certification included the cross-disqualification provisions and, thus, did not require periodic review.[32] Further, the Court found that, ignoring the certification, the plaintiff's claim is barred by the one-year period for cause of action following final agency action.[33]

United States v. Osborne.
In *United States v. Osborne,*[34] the Environmental Protection Agency relied on the Army Corps of Engineers' designation of an Ohio property as a wetland for alleging Clean Water Act (CWA) violations for unauthorized discharging of pollutants.[35] The defendants (commercial real estate developers) alleged that the Corps' issuance of the 1987 Wetland Delineation Manual designating Ohio wetlands was in violation of the RFA as it was a substantive and legislative rule.[36] The Court ruled that the manual was nothing more than a "guidance document" for internal procedures for identifying and delineating wetlands, as granted by the CWA.[37]

Allina Health Services v. Sebelius.
In *Allina Health Services v. Sebelius,*[38] the plaintiffs alleged that the secretary of the U.S. Department of Health and Human Services violated the RFA by providing inadequate financial analysis of the rule's effects.[39] The Court did not address the RFA argument because the lower court's conclusions were vacated and the case was remanded on other grounds before the Court heard the RFA argument.[40]

Lovegren v. Locke.
In *Lovegren v. Locke,*[41]the court analogized the permissibility of conducting a joint analysis of economic and social impacts under National Standard 8[42] to the legality of including other required analysis and impact statements in a final regulatory flexibility analysis under the RFA.[43]

National Ski Areas Association v. U.S. Forest Service.
In *National Ski Areas Association v. U.S. Forest Service,*[44] the U.S. Forest Service issued a directive obligating ski area permit holders to either obtain water rights for the federal government or to transfer existing water rights to the federal government.[45] The Court held that the directive was a "legislative rule" because it established new legally binding duties.[46] As such, the

30 *Id.* at 2.

31 *Id.* at 3.

32 *Id.* at 10.

33 *Id.*

34 *United States v. Osborne,* No. 1:11CV1029, 2013 WL 1283934 (N.D. Ohio Mar. 27, 2013).

35 *Id.* at 1.

36 *Id.* at 3.

37 *Id.* at 4

38 *Allina Health Servs. v. Sebelius,* 904 F. Supp. 2d 75 (D.D.C. 2012).

39 *Id.* at 86.

40 *Id.* at 87.

41 *Lovgren v. Locke,* 701 F.3d 5 (1st Cir. 2012).

42 *Id.* at 35.

43 *Associated Fisheries of Maine, Inc. v. Daley,* 127 F.3d 104, 116 (1st Cir. 1997).

44 *Nat'l Ski Areas Ass'n v. U.S. Forest Serv.*, No. 12-cv-00048-WJM, 2012 U.S. Dist. WL 6618263 (D. Co. Dec. 19, 2012).

45 *Id.* at 1.

46 *Id.* at 3.

Table A.2 RFA-related Case Law through FY 2013, continued

Administrative Procedure Act's (APA) notice-and-comment requirements applied and the Forest Service's "informal input opportunities" during the rulemaking process did not suffice.[47] The RFA applied because it pertains to any rule subject to notice-and-comment rulemaking under section 553(b) of the APA.[48] The Court held that the Forest Service failed to comply with the RFA because it did not conduct a small business analysis while creating the multifarious directive on state and federal water rights.[49]

47 *Id.* at 2.

48 5 U.S.C. § 553(b); see also § 601(2).

49 *Nat'l Ski Areas Ass'n v. U.S. Forest Serv.,* No. 12-cv-00048-WJM, 2012 U.S. Dist. WL 6618263, 5 (D. Co. Dec. 19, 2012).

Table A.3 SBREFA Panels through FY 2013

Rule	Date Convened	Date Completed	NPRM	Final Rule Published
Environmental Protection Agency				
Nonroad Diesel Engines	03/25/97	05/23/97	09/24/97	10/23/98
Industrial Laundries Effluent Guideline1	06/06/97	08/08/97	12/17/97	Withdrawn 8/18/99
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	09/10/03 01/13/99	12/22/00
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
FIP for Regional NOx 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
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
LDV/LDT Emissions and Sulfur in Gas	08/27/98	10/26/98	05/13/99	02/10/00
Diesel Fuel Sulfur Control Requirements	11/12/99	03/24/00	06/02/00	01/18/01
Lead Renovation and Remodeling Rule	11/23/99	03/03/00	01/10/06	04/22/08
Metals Products and Machinery	12/09/99	03/03/00	01/03/01	05/13/03
Concentrated Animal Feedlots	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

See Appendix H for abbreviations. NPRM = notice of proposed rulemaking

Table A.3 SBREFA Panels through FY 2013, continued

Rule	Date Convened	Date Completed	NPRM	Final Rule Published
Stage 2 Disinfectant Byproducts Long Term 2 Enhanced Surface Water Treatment	04/25/00	06/23/00	08/11/03 08/18/03	01/04/06 01/05/06
Construction and Development Effluent Limitations Guidelines	07/16/01	10/12/01	06/24/02	Withdrawn 4/26/04
Nonroad Large SI 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
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 Interstate Rule)	04/27/05	06/27/05	08/24/05	04/28/06
FIP for Regional Nox/So2 (2005 Clean Air Interstate Rule)	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
Non-Road Spark-Ignition Engines/Equipment	08/17/06	10/17/06	05/18/07	10/08/08
Total Coliform Monitoring (TCR Rule)	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
Revision of New Source Performance Standards for New Residential Wood Heaters	08/04/10	10/26/11	01/03/14	
National Emission Standards for Hazardous Air Pollutants for Coal- and Oil-fired Electric Utility Steam Generating Units	10/27/10	03/02/11	05/03/11	02/16/12
Stormwater Regulations Revision to Address Discharges from Developed Sites	12/06/10	10/04/11		
Formaldehyde Emissions from Pressed Wood Products	02/03/11	04/04/11	06/10/13	

See Appendix H for abbreviations. NPRM = notice of proposed rulemaking

Table A.3 SBREFA Panels through FY 2013, continued

Rule	Date Convened	Date Completed	NPRM	Final Rule Published
National Emission Standards for Hazardous Air Pollutants (NESHAP) Risk and Technology Review (RTR) for the Mineral Wool and Wool Fiberglass Industries	06/02/11	10/26/11	11/12/11	9/19/12
Greenhouse Gas Emissions from Electric Utility Steam Generating Units	06/09/11		04/14/13	EPA ceased action on this panel
Control of Air Pollution from Motor Vehicles: Tier 3 Motor Vehicle Emission and Fuel Standards	08/04/11	10/14/11	05/21/13	
Petroleum Refinery Sector Risk and Technology Review and New Source Performance Standards	08/04/11			
Long Term Revisions to the Lead and Copper Rule	08/14/12	08/16/13		
National Emissions Standards for Hazardous Air Pollutants (NESHAP): Brick and Structural Clay Products and Clay Products	06/12/13			
Occupational Safety and Health Administration				
Tuberculosis	09/10/96	11/12/96	10/17/97	Withdrawn 12/31/03
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
Confined Spaces in Construction	09/26/03	11/24/03	11/28/07	
Electric Power Generation, Transmission, and Distribution	04/01/03	06/30/03	06/15/05	
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

See Appendix H for abbreviations. NPRM = notice of proposed rulemaking

Table A.3 SBREFA Panels through FY 2013, continued

Rule	Date Convened	Date Completed	NPRM	Final Rule Published
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		
Consumer Financial Protection Bureau				
Integrated Mortgage Disclosures under the Real Estate Settlement Procedures Act (RESPA or Regulation X) and the Truth in Lending Act (TILA or Regulation Z)	02/21/12	04/23/12	08/23/12	
Mortgage Servicing under the Real Estate Settlement Procedures Act (RESPA or Regulation X) and the Truth in Lending Act (TILA or Regulation Z)	04/09/12	06/11/12	09/17/12	02/14/13
Loan Originator Compensation Requirements under Regulation Z	05/09/12	07/12/12	09/07/12	02/15/13

See Appendix H for abbreviations. NPRM = notice of proposed rulemaking

Appendix B
History of the Regulatory Flexibility Act

A 1964 guide for small business described how government affects the economic environment for businesses, noting that the actions of the federal government, whether through legislation or "an administrative ruling of an Executive Department or regulatory agency, can mean literally life or death to a business enterprise."[50]

As part of the effort to promote better policies for small businesses, Congress in 1974 established the position of chief counsel for advocacy within the Small Business Administration."[51] In 1976, this provision was expanded in Public Law 94-305 to create the independent Office of Advocacy headed by a presidential appointee, thus strengthening the chief counsel's ability to be an effective small business advocate.[52]

President Jimmy Carter in 1979 ordered the heads of executive departments and agencies to adopt measures that would ensure that "federal regulations will not place unnecessary burdens on small businesses and organizations," and to report their plans for implementation to the Office of Advocacy. Advocacy was to "work closely with … the Office of Management and Budget "to ensure that the effort would be consistent with government-wide regulatory reform. In transmitting a similar request to the heads of independent agencies, President Carter wrote, "I believe it is essential that we minimize the regulatory burden on small businesses and organizations where it is possible to do so without undermining the goals of our social and economic programs."[53]

In 1980, the White House Conference on Small Business made recommendations that led directly to the passage of the Regulatory Flexibility Act (RFA). The RFA established in statute the principle that government agencies must consider the effects of their regulatory actions on small entities, and where possible mitigate them. Where the imposition of one-size-fits-all regulations had resulted in disproportionate effects on small entities, it was hoped that this new approach would result in less burden for these small entities while still achieving the agencies' regulatory goals.

Under the RFA, agencies provide a small business impact analysis, known as an initial regulatory flexibility analysis (IRFA), with every proposed rule published for notice and comment, and a final regulatory flexibility analysis (FRFA) with every final rule. When an agency has a factual basis to determine that the rule would not have a "significant economic impact on a substantial number of small entities," the head of the agency may certify to that effect and forego the IRFA and FRFA requirements. The RFA requires the chief counsel to report on an annual basis on agency compliance with the RFA. In 1994 the Government Accounting Office reported that, based on Advocacy's annual reports, it had

50 William Ruder and Raymond Nathan, *The Businessman's Guide to Washington*, Englewood Cliffs, NJ: Prentice-Hall, Inc., 1964, 1.

51 PL 93-386, the Small Business Act of 1974, directed the SBA administrator to "designate an individual within the Administration to be known as the Chief Counsel for Advocacy to… represent the views and interests of small businesses before other Federal agencies whose policies and activities may affect small businesses."

52 P.L. 94-305.

53 Memorandum to the Heads of Executive Departments and Agencies, November 16, 1979.

concluded that agency compliance with the RFA varied widely across the agencies.[54]

While the 1980 statute authorized the chief counsel to appear as *amicus curiae* in any action to review a rule, compliance with the RFA was not reviewable by the courts. In 1995, the White House Conference on Small Business recommended strengthening the RFA, and in 1996, President Clinton signed the Small Business Regulatory Enforcement Fairness Act (SBREFA). This new law provided for judicial review of agency compliance with key sections of the RFA. It also established a requirement that the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA) convene panels consisting of the head of the agency, the administrator of OMB's Office of Information and Regulatory Affairs (OIRA), and the chief counsel for advocacy, whenever the agencies were developing a rule for which an IRFA would be required. These panels were to meet with representatives of the affected small business community to review the agencies' plans, including any draft proposals and alternative approaches to those proposals, and to provide insight on the anticipated impact of the rule on small entities. The panels would then issue a report, including any recommendations for providing flexibility for small entities.

In August 2002, President Bush signed Executive Order 13272, which required 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 with it.

The executive order also required 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 "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. These requirements of early notification and written responses were codified by the Small Business Jobs Act of 2010. In 2010, as part of the Dodd-Frank Act, Congress created the Consumer Financial Protection Bureau and required the new agency to convene panels under SBREFA.

When President Obama issued E.O. 13563, Improving Regulation and Regulatory Review, he imposed 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. This memo reminded the agencies of their responsibilities under the RFA, and 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.

On May 11, 2012, President Obama issued E.O. 13610, Identifying and Reducing Regulatory Burdens, 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 own 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 increased their efforts to comply with the RFA.

54 U.S. General Accounting Office, *Regulatory Flexibility Act: Status of Agencies' Compliance.* Report to the Chairman, Committee on Small Business, House of Representatives, and the Chairman, Committee on Governmental Affairs, U.S. Senate. Report number GAO/GGD-94-105, April 1994.

Appendix C
Text of the Regulatory Flexibility Act

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

Congressional Findings and Declaration of Purpose

(a) The Congress finds and declares that —

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

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

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

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

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

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

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

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

(b) It is the purpose of this Act [enacting this chapter and provisions set out as notes under this section] to establish as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve

this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.

Regulatory Flexibility Act

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

§ 601. Definitions

For purposes of this chapter —

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

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

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

(4) the term "small organization" means any not-for-profit enterprise which is independently owned and operated and is not dominant in its field, unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the *Federal Register*;

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

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

(7) the term "collection of information" —

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

(i) answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, 10 or more

persons, other than agencies, instrumentalities, or employees of the United States; or

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

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

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

§ 602. Regulatory agenda

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

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

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

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

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

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

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

§ 603. Initial regulatory flexibility analysis

(a) Whenever an agency is required by section 553 of this title, or any other law, to publish general notice of proposed rulemaking for any proposed rule, or publishes a notice of proposed rulemaking for an interpretative rule involving the internal revenue laws of the United States, the agency shall prepare and make available for public comment an initial regulatory flexibility analysis. Such analysis shall describe the impact of the proposed rule on small entities. The initial regulatory flexibility analysis or a summary shall be published in the *Federal Register* at the time of the publication of general notice of proposed rulemaking for the rule. The agency shall transmit a copy of the initial regulatory flexibility analysis to the Chief Counsel for Advocacy of the Small Business Administration. In the case of an interpretative rule involving the internal revenue laws of the United States, this chapter applies to interpretative rules published in the *Federal Register* for codification in the Code of Federal Regulations, but only to the extent that such interpretative rules impose on small entities a collection of information requirement.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 604. Final regulatory flexibility analysis

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

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

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

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

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

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

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

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

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

§ 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

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

that makes compliance or timely compliance with the provisions of section 603 of this title impracticable.

(b) Except as provided in section 605(b), an agency head may not waive the requirements of section 604 of this title. An agency head may delay the completion of the requirements of section 604 of this title for a period of not more than one hundred and eighty days after the date of publication in the *Federal Register* of a final rule by publishing in the *Federal Register*, not later than such date of publication, a written finding, with reasons therefor, that the final rule is being promulgated in response to an emergency that makes timely compliance with the provisions of section 604 of this title impracticable. If the agency has not prepared a final regulatory analysis pursuant to section 604 of this title within one hundred and eighty days from the date of publication of the final rule, such rule shall lapse and have no effect. Such rule shall not be repromulgated until a final regulatory flexibility analysis has been completed by the agency.

§ 609. Procedures for gathering comments

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

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

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

(3) the direct notification of interested small entities;

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

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

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

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

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

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

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

(5) not later than 60 days after the date a covered agency convenes a review panel

pursuant to paragraph (3), the review panel shall report on the comments of the small entity representatives and its findings as to issues related to subsections 603(b), paragraphs (3), (4) and (5) and 603(c), provided that such report shall be made public as part of the rulemaking record; and

(6) where appropriate, the agency shall modify the proposed rule, the initial regulatory flexibility analysis or the decision on whether an initial regulatory flexibility analysis is required.

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

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

(1) the Environmental Protection Agency,

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

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

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

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

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

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

§ 610. Periodic review of rules

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

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

(1) the continued need for the rule;

(2) the nature of complaints or comments received concerning the rule from the public;

(3) the complexity of the rule;

(4) the extent to which the rule overlaps, duplicates or conflicts with other Federal rules, and, to the extent feasible, with State and local governmental rules; and

(5) the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule.

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

§ 611. Judicial review

(a)

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

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

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

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

(i) one year after the date the analysis is made available to the public, or

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

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

(A) remanding the rule to the agency, and

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

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

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

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

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

§ 612. Reports and intervention rights

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

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

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

Appendix D

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

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.

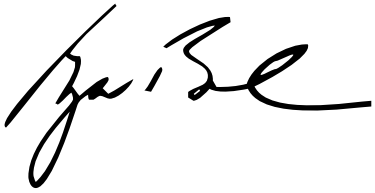
Sec. 4. *Definitions.* Terms defined in section 601 of title 5, United States Code, including the term ''agency,'' shall have the same meaning in this order.

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 E

Executive Order 13563 and Memorandum, Improving Regulation and Regulatory Review

Federal Register
Vol. 76, No. 14
Friday, January 21, 2011

Presidential Documents

Title 3—

The President

Executive Order 13563 of January 18, 2011

Improving Regulation and Regulatory Review

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to improve regulation and regulatory review, it is hereby ordered as follows:

Section 1. *General Principles of Regulation.* (a) Our regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation. It must be based on the best available science. It must allow for public participation and an open exchange of ideas. It must promote predictability and reduce uncertainty. It must identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends. It must take into account benefits and costs, both quantitative and qualitative. It must ensure that regulations are accessible, consistent, written in plain language, and easy to understand. It must measure, and seek to improve, the actual results of regulatory requirements.

(b) This order is supplemental to and reaffirms the principles, structures, and definitions governing contemporary regulatory review that were established in Executive Order 12866 of September 30, 1993. As stated in that Executive Order and to the extent permitted by law, each agency must, among other things: (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.

(c) In applying these principles, each agency is directed to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible. Where appropriate and permitted by law, each agency may consider (and discuss qualitatively) values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

Sec. 2. *Public Participation.* (a) Regulations shall be adopted through a process that involves public participation. To that end, regulations shall be based, to the extent feasible and consistent with law, on the open exchange of information and perspectives among State, local, and tribal officials, experts in relevant disciplines, affected stakeholders in the private sector, and the public as a whole.

(b) To promote that open exchange, each agency, consistent with Executive Order 12866 and other applicable legal requirements, shall endeavor to provide the public with an opportunity to participate in the regulatory process. To the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally

be at least 60 days. To the extent feasible and permitted by law, each agency shall also provide, for both proposed and final rules, timely online access to the rulemaking docket on regulations.gov, including relevant scientific and technical findings, in an open format that can be easily searched and downloaded. For proposed rules, such access shall include, to the extent feasible and permitted by law, an opportunity for public comment on all pertinent parts of the rulemaking docket, including relevant scientific and technical findings.

(c) Before issuing a notice of proposed rulemaking, each agency, where feasible and appropriate, shall seek the views of those who are likely to be affected, including those who are likely to benefit from and those who are potentially subject to such rulemaking.

Sec. 3. *Integration and Innovation.* Some sectors and industries face a significant number of regulatory requirements, some of which may be redundant, inconsistent, or overlapping. Greater coordination across agencies could reduce these requirements, thus reducing costs and simplifying and harmonizing rules. In developing regulatory actions and identifying appropriate approaches, each agency shall attempt to promote such coordination, simplification, and harmonization. Each agency shall also seek to identify, as appropriate, means to achieve regulatory goals that are designed to promote innovation.

Sec. 4. *Flexible Approaches.* Where relevant, feasible, and consistent with regulatory objectives, and to the extent permitted by law, each agency shall identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public. These approaches include warnings, appropriate default rules, and disclosure requirements as well as provision of information to the public in a form that is clear and intelligible.

Sec. 5. *Science.* Consistent with the President's Memorandum for the Heads of Executive Departments and Agencies, "Scientific Integrity" (March 9, 2009), and its implementing guidance, each agency shall ensure the objectivity of any scientific and technological information and processes used to support the agency's regulatory actions.

Sec. 6. *Retrospective Analyses of Existing Rules.* (a) To facilitate the periodic review of existing significant regulations, agencies shall consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned. Such retrospective analyses, including supporting data, should be released online whenever possible.

(b) Within 120 days of the date of this order, each agency shall develop and submit to the Office of Information and Regulatory Affairs a preliminary plan, consistent with law and its resources and regulatory priorities, under which the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives.

Sec. 7. *General Provisions.* (a) For purposes of this order, "agency" shall have the meaning set forth in section 3(b) of Executive Order 12866.

(b) Nothing in this order shall be construed to impair or otherwise affect:

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

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

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

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

THE WHITE HOUSE,
January 18, 2011.

[FR Doc. 2011–1385
Filed 1–20–11; 8:45 am]
Billing code 3195–W1–P

Presidential Documents

Memorandum of January 18, 2011

Regulatory Flexibility, Small Business, and Job Creation

Memorandum for the Heads of Executive Departments and Agencies

Small businesses play an essential role in the American economy; they help to fuel productivity, economic growth, and job creation. More than half of all Americans working in the private sector either are employed by a small business or own one. During a recent 15-year period, small businesses created more than 60 percent of all new jobs in the Nation.

Although small businesses and new companies provide the foundations for economic growth and job creation, they have faced severe challenges as a result of the recession. One consequence has been the loss of significant numbers of jobs.

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601–612, establishes a deep national commitment to achieving statutory goals without imposing unnecessary burdens on the public. The RFA emphasizes the importance of recognizing "differences in the scale and resources of regulated entities" and of considering "alternative regulatory approaches . . . which minimize the significant economic impact of rules on small businesses, small organizations, and small governmental jurisdictions." 5 U.S.C. 601 note.

To promote its central goals, the RFA imposes a series of requirements designed to ensure that agencies produce regulatory flexibility analyses that give careful consideration to the effects of their regulations on small businesses and explore significant alternatives in order to minimize any significant economic impact on small businesses. Among other things, the RFA requires that when an agency proposing a rule with such impact is required to provide notice of the proposed rule, it must also produce an initial regulatory flexibility analysis that includes discussion of significant alternatives. Significant alternatives include the use of performance rather than design standards; simplification of compliance and reporting requirements for small businesses; establishment of different timetables that take into account the resources of small businesses; and exemption from coverage for small businesses.

Consistent with the goal of open government, the RFA also encourages public participation in and transparency about the rulemaking process. Among other things, the statute requires agencies proposing rules with a significant economic impact on small businesses to provide an opportunity for public comment on any required initial regulatory flexibility analysis, and generally requires agencies promulgating final rules with such significant economic impact to respond, in a final regulatory flexibility analysis, to comments filed by the Chief Counsel for Advocacy of the Small Business Administration.

My Administration is firmly committed to eliminating excessive and unjustified burdens on small businesses, and to ensuring that regulations are designed with careful consideration of their effects, including their cumulative effects, on small businesses. Executive Order 12866 of September 30, 1993, as amended, states, "Each agency shall tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives, taking into account,

among other things, and to the extent practicable, the costs of cumulative regulations."

In the current economic environment, it is especially important for agencies to design regulations in a cost-effective manner consistent with the goals of promoting economic growth, innovation, competitiveness, and job creation.

Accordingly, I hereby direct executive departments and agencies and request independent agencies, when initiating rulemaking that will have a significant economic impact on a substantial number of small entities, to give serious consideration to whether and how it is appropriate, consistent with law and regulatory objectives, to reduce regulatory burdens on small businesses, through increased flexibility. As the RFA recognizes, such flexibility may take many forms, including:

- extended compliance dates that take into account the resources available to small entities;
- performance standards rather than design standards;
- simplification of reporting and compliance requirements (as, for example, through streamlined forms and electronic filing options);
- different requirements for large and small firms; and
- partial or total exemptions.

I further direct that whenever an executive agency chooses, for reasons other than legal limitations, not to provide such flexibility in a proposed or final rule that is likely to have a significant economic impact on a substantial number of small entities, it should explicitly justify its decision not to do so in the explanation that accompanies that proposed or final rule.

Adherence to these requirements is designed to ensure that regulatory actions do not place unjustified economic burdens on small business owners and other small entities. If regulations are preceded by careful analysis, and subjected to public comment, they are less likely to be based on intuition and guesswork and more likely to be justified in light of a clear understanding of the likely consequences of alternative courses of action. With that understanding, agencies will be in a better position to protect the public while avoiding excessive costs and paperwork.

This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person. Nothing in this memorandum shall be construed to impair or otherwise affect the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

The Director of the Office of Management and Budget is authorized and directed to publish this memorandum in the *Federal Register*.

THE WHITE HOUSE,
Washington, January 18, 2011

[FR Doc. 2011–1387
Filed 1–20–11; 8:45 am]
Billing code 3110–01–P

Appendix F

Executive Order 13579, Regulation and Independent Regulatory Agencies

Federal Register
Vol. 76, No. 135
Thursday, July 14, 2011

Presidential Documents

Title 3—

The President

Executive Order 13579 of July 11, 2011

Regulation and Independent Regulatory Agencies

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to improve regulation and regulatory review, it is hereby ordered as follows:

Section 1. *Policy.* (a) Wise regulatory decisions depend on public participation and on careful analysis of the likely consequences of regulation. Such decisions are informed and improved by allowing interested members of the public to have a meaningful opportunity to participate in rulemaking. To the extent permitted by law, such decisions should be made only after consideration of their costs and benefits (both quantitative and qualitative).

(b) Executive Order 13563 of January 18, 2011, ''Improving Regulation and Regulatory Review,'' directed to executive agencies, was meant to produce a regulatory system that protects ''public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation.'' Independent regulatory agencies, no less than executive agencies, should promote that goal.

(c) Executive Order 13563 set out general requirements directed to executive agencies concerning public participation, integration and innovation, flexible approaches, and science. To the extent permitted by law, independent regulatory agencies should comply with these provisions as well.

Sec. 2. *Retrospective Analyses of Existing Rules.* (a) To facilitate the periodic review of existing significant regulations, independent regulatory agencies should consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned. Such retrospective analyses, including supporting data and evaluations, should be released online whenever possible.

(b) Within 120 days of the date of this order, each independent regulatory agency should develop and release to the public a plan, consistent with law and reflecting its resources and regulatory priorities and processes, under which the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives.

Sec. 3. *General Provisions.* (a) For purposes of this order, ''executive agency'' shall have the meaning set forth for the term ''agency'' in section 3(b) of Executive Order 12866 of September 30, 1993, and ''independent regulatory agency'' shall have the meaning set forth in 44 U.S.C. 3502(5).

(b) Nothing in this order shall be construed to impair or otherwise affect:

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

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

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

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

THE WHITE HOUSE,
July 11, 2011.

[FR Doc. 2011–17953
Filed 7–13–11; 11:15 am]
Billing code 3195–W1–P

Appendix G

Executive Order 13610, Identifying and Reducing Regulatory Burdens

Federal Register
Vol. 77, No. 93
Monday, May 14, 2012

Presidential Documents

Title 3—

The President

Executive Order 13610 of May 10, 2012

Identifying and Reducing Regulatory Burdens

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to modernize our regulatory system and to reduce unjustified regulatory burdens and costs, it is hereby ordered as follows:

Section 1. *Policy.* Regulations play an indispensable role in protecting public health, welfare, safety, and our environment, but they can also impose significant burdens and costs. During challenging economic times, we should be especially careful not to impose unjustified regulatory requirements. For this reason, it is particularly important for agencies to conduct retrospective analyses of existing rules to examine whether they remain justified and whether they should be modified or streamlined in light of changed circumstances, including the rise of new technologies.

Executive Order 13563 of January 18, 2011 (Improving Regulation and Regulatory Review), states that our regulatory system ''must measure, and seek to improve, the actual results of regulatory requirements.'' To promote this goal, that Executive Order requires agencies not merely to conduct a single exercise, but to engage in ''periodic review of existing significant regulations.'' Pursuant to section 6(b) of that Executive Order, agencies are required to develop retrospective review plans to review existing significant regulations in order to ''determine whether any such regulations should be modified, streamlined, expanded, or repealed.'' The purpose of this requirement is to ''make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives.''

In response to Executive Order 13563, agencies have developed and made available for public comment retrospective review plans that identify over five hundred initiatives. A small fraction of those initiatives, already finalized or formally proposed to the public, are anticipated to eliminate billions of dollars in regulatory costs and tens of millions of hours in annual paperwork burdens. Significantly larger savings are anticipated as the plans are implemented and as action is taken on additional initiatives.

As a matter of longstanding practice and to satisfy statutory obligations, many agencies engaged in periodic review of existing regulations prior to the issuance of Executive Order 13563. But further steps should be taken, consistent with law, agency resources, and regulatory priorities, to promote public participation in retrospective review, to modernize our regulatory system, and to institutionalize regular assessment of significant regulations.

Sec. 2. *Public Participation in Retrospective Review.* Members of the public, including those directly and indirectly affected by regulations, as well as State, local, and tribal governments, have important information about the actual effects of existing regulations. For this reason, and consistent with Executive Order 13563, agencies shall invite, on a regular basis (to be determined by the agency head in consultation with the Office of Information and Regulatory Affairs (OIRA)), public suggestions about regulations in need of retrospective review and about appropriate modifications to such regulations. To promote an open exchange of information, retrospective analyses of regulations, including supporting data, shall be released to the public online wherever practicable.

Sec. 3. *Setting Priorities.* In implementing and improving their retrospective review plans, and in considering retrospective review suggestions from the

public, agencies shall give priority, consistent with law, to those initiatives that will produce significant quantifiable monetary savings or significant quantifiable reductions in paperwork burdens while protecting public health, welfare, safety, and our environment. To the extent practicable and permitted by law, agencies shall also give special consideration to initiatives that would reduce unjustified regulatory burdens or simplify or harmonize regulatory requirements imposed on small businesses. Consistent with Executive Order 13563 and Executive Order 12866 of September 30, 1993 (Regulatory Planning and Review), agencies shall give consideration to the cumulative effects of their own regulations, including cumulative burdens, and shall to the extent practicable and consistent with law give priority to reforms that would make significant progress in reducing those burdens while protecting public health, welfare, safety, and our environment.

Sec. 4. *Accountability.* Agencies shall regularly report on the status of their retrospective review efforts to OIRA. Agency reports should describe progress, anticipated accomplishments, and proposed timelines for relevant actions, with an emphasis on the priorities described in section 3 of this order. Agencies shall submit draft reports to OIRA on September 10, 2012, and on the second Monday of January and July for each year thereafter, unless directed otherwise through subsequent guidance from OIRA. Agencies shall make final reports available to the public within a reasonable period (not to exceed three weeks from the date of submission of draft reports to OIRA).

Sec. 5. *General Provisions.* (a) For purposes of this order, ''agency'' means any authority of the United States that is an ''agency'' under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(5).

(b) Nothing in this order shall be construed to impair or otherwise affect:

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

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

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

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

THE WHITE HOUSE,
May 10, 2012.

[FR Doc. 2012–11798
Filed 5–11–12; 11:15 am]
Billing code 3295–F2–P

Appendix H
Abbreviations

ACUS	Administrative Conference of the United States
ADA	Americans with Disabilities Act
ANPRM	advance notice of proposed rulemaking
APA	Administrative Procedure Act
APHIS	Animal and Plant Health Inspection Service
BLM	Bureau of Land Management
CAIR	Clean Air Interstate Rule
CFPB	Consumer Financial Protection Bureau
CISWI	Commercial and Industrial Solid Waste Incineration (rule)
CMS	Centers for Medicare and Medicaid Services
CWA	Clean Water Act
DHS	Department of Homeland Security
DOE	Department of Energy
DOI	Department of the Interior
DOJ	Department of Justice
DOL	Department of Labor
DOT	Department of Transportation
DSW	definition of solid waste
EBSA	Employee Benefits Security Administration
E.O.	Executive Order
EPA	Environmental Protection Agency
FAR	Federal Acquisition Regulatory Council
FCC	Federal Communications Commission
FDIC	Federal Deposit Insurance Corporation
FLSA	Fair Labor Standards Act
FMCSA	Federal Motor Carrier Safety Administration
FRFA	final regulatory flexibility analysis
FSA	flexible spending account
FWS	Fish and Wildlife Service
FY	fiscal year
GAO	Government Accountability Office
HHS	Department of Health and Human Services
IBR	Incorporation by Reference
ILEC	incumbent local exchange carrier
IRFA	initial regulatory flexibility analysis
IRS	Internal Revenue Service
JOBS Act	Jumpstart Our Business Startups Act
MSHA	Mine Safety and Health Administration
NAHB	National Association of Home Builders

NAICS	North American Industry Classification System
NARA	National Archives and Records Administration
NESHAP	National Environmental Standards for Hazardous Air Pollutants
NHSM	nonhazardous secondary materials
NMFS	National Marine Fisheries Service
NOAA	National Oceanic and Atmospheric Administration
NPRM	notice of proposed rulemaking
NSPS	New Source Performance Standards
OCC	Office of the Comptroller of the Currency
OFCCP	Office of Federal Contract Compliance Programs
OIRA	Office of Information and Regulatory Affairs
OMB	Office of Management and Budget
OSHA	Occupational Safety and Health Administration
P.L.	Public Law
RESPA	Real Estate Settlement Procedures Act
RFA	Regulatory Flexibility Act
RIA	regulatory impact analysis
SBA	Small Business Administration
SBIR	Small Business Innovation Research
SBJA	Small Business Jobs Act
SBREFA	Small Business Regulatory Enforcement Fairness Act
SEC	Securities and Exchange Commission
SER	small entity representative
SMS	Safety Measurement System
SOP	standard operating procedure
State	Department of State
TILA	Truth in Lending Act
Treasury	Department of the Treasury
USCIS	U.S. Citizenship and Immigration Service
USDA	U.S. Department of Agriculture