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Report on the Regulatory Flexibility Act FY 2012

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

February 2013

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 Office of Advocacy is pleased to present to the President and Congress the fiscal year (FY) 2012 *Report on the Regulatory Flexibility Act*. In this report, we discuss federal agencies' FY 2012 compliance with the Regulatory Flexibility Act of 1980 (RFA), and Executive Order (E.O.) 13272. The RFA requires federal agencies to review proposed regulations that would have a significant impact on small entities—small businesses, small governmental jurisdictions, and small nonprofits—and to consider significant alternatives that would minimize the regulatory burden on them while achieving the rules' purposes.

In FY 2012, Advocacy's RFA efforts helped save $2.4 billion in first-year regulatory costs for small entities, while ensuring that agencies were able to meet their regulatory goals. In the current economic climate, minimizing unnecessary regulatory burdens on the small business sector so that small businesses are free to create much-needed jobs is among the highest priorities of the Office of Advocacy.

Thanks to the Small Business Regulatory Enforcement Fairness Act (SBREFA) and later laws and executive orders, the RFA has become more effective in reducing small firms' regulatory burden. President Obama has given us additional tools to improve the regulatory development process. In particular, E.O. 13563 requires federal agencies to create a systematic process for reviewing rules with an eye toward reducing the regulatory burden.

Regulations are more effective when small firms are part of the rulemaking process. To assist federal agencies in complying with the RFA, Advocacy trains agency personnel in RFA compliance, issues comment letters on proposed regulations, and participates in Small Business Regulatory Enforcement Fairness Act (SBREFA) panels. In fiscal year 2012, we updated our RFA training manual to reflect recent changes. The new edition of *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act* is available online for use by federal rule writers and small business stakeholders.

The office furthers the goal of reducing the regulatory burden on small entities through congressional testimony, advocacy for legislative reform, and vital economic research on small business issues. To ensure that information about our initiatives on behalf of small businesses is accessible to both government and nongovernmental entities, Advocacy uses web-based tools such as email alerts, regulatory alerts, the newsletter, *The Small Business Advocate*, and social media including a blog, Twitter, and Facebook.

We welcome your support of Advocacy's efforts on behalf of the dynamic small business sector.

Winslow Sargeant, Ph.D.
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1 History and Overview of the Regulatory Flexibility Act

In 1964, a guide for small business owners 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."[1]

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.[2] In 1976, this provision was expanded 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.[3]

In 1980, the White House Conference on Small Business made recommendations that led directly to the passage of the Regulatory Flexibility Act.[4] The RFA established in law 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 can 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. 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, however.

In 1994 the Government Accountability Office (GAO) reported that, based on Advocacy's annual reports, it had concluded that agency compliance with the RFA varied widely across the agencies. The 1995 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 the Office of Management and Budget'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 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 in-

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

2 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."

3 P.L. 94-305.

4 See Appendix B.

sight on the anticipated impact of the rule on small entities. The panels 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.[5] 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 the E.O. Agency compliance is detailed in the remainder of this report.

Finally, the executive order requires that the agencies provide "in any explanation or discussion accompanying publication in the *Federal Register*," a response to any written comment it has received on the rule from Advocacy. The requirement of early notification has since been codified by the Small Business Jobs Act of 2010. Also in 2010, as part of the Dodd-Frank Act, Congress created the Consumer Financial Protection Bureau (CFPB) and included the new agency with EPA and OSHA as an agency required to convene panels under SBREFA.

When President Obama issued Executive Order 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.[6] 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 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.[7] 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 have increased their efforts to comply with the Regulatory Flexibility Act.

5 See Appendix C.

6 See Appendix D.

7 See Appendix F.

2 The RFA and Executive Order 13272: Compliance and the Role of the Office of Advocacy

Oversight of compliance with both 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 2012, this more cooperative approach yielded $2.4 billion in foregone regulatory costs (Tables 2.2 and 2.3).

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

Executive Order 13272 Implementation

E.O. 13272 was signed in 2002, making this executive order now ten years old. In many ways, its few requirements have changed how many agencies 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 to 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 says that agencies must give appropriate consideration to Advocacy's written comments on a proposed rule and must address these comments in the final rule published in the *Federal Register*. This section of the E.O. was codified in 2010 as an amendment to the RFA by the Small Business Jobs Act. Most agencies complied with this provision in FY 2012.

The Office of 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 the 2012 revision incorporated the later amendments to the RFA. The guide is available on Advocacy's website at **http://www.sba.gov/content/guide-government-agencies-how-comply-with-regulatory-flexibility-act-0.**

Second, Advocacy must report annually to OIRA on agency compliance with the three agency provisions. In fiscal year 2012, overall agency compliance with E.O. 13272 was good and, in some agencies, improved. However, a few agencies continue to ignore the requirements and fail to provide Advocacy with copies of their draft regulations. A summary of agencies' FY 2012 compliance with E.O. 13272 can be found in Chapter 3, Table 3.1.

Finally, Advocacy is required to train federal regulatory agencies in how to comply with the RFA. In fiscal year 2012, Advocacy trained nearly 200 agency employees in RFA compliance. After ten years of E.O. 13272, RFA training continues to be a crucial tool in instilling small business consideration into the drafting of regulations that will affect them. 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.

Interagency Communications

Meetings and training sessions are some of the means by which Advocacy stays in contact with federal agencies on behalf of the small business community. 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 the assistance the office can lend. In FY 2012, Advocacy's communications with agencies included 28 formal comment letters (Charts 2.1-2.3 and Table 2.1).

More effective regulations that avoid excessive burdens on small firms are the result of these efforts. See the cost savings examples in Tables 2.2 and 2.3.

Roundtables

Advocacy has continued to develop its use of stakeholder roundtables, both to hear the concerns of small businesses and to provide federal agencies a means to hear those concerns. In FY 2012 Advocacy built on its practice of inviting agency heads, rule writers, and policy directors to these roundtables. Agency officials have reported to Advocacy that these roundtables have been helpful to them in addressing the requirements of the RFA, increasing agency access to small businesses, and improving agency understanding of economic impacts on small businesses. In FY 2012, Advocacy hosted 32 roundtables on a variety of topics; the following roundtables featured significant involvement from agency officials.

Environment: Chemical Disclosure Rule. At this roundtable on October 21, 2011, Ellie Clark of the EPA Office of Pollution Prevention and Toxics described the final rule requirements of the Chemical Disclosure Rule, which requires manufacturers and reporters of chemicals to report chemical inventories in 2012. There was considerable discussion about whether firms would be able to complete the electronic reporting by the regulatory deadline, and about the difficulty of reporting on waste chemicals that are recycled into valuable products. Eventually, EPA did extend the deadline by several months, based on the concerns raised at this meeting.

Environment: Underground Storage Tanks. On January 27, 2012, Carolyn Hoskinson, Director of the Underground Storage Tank Office at EPA, presented information about the EPA's pending proposal to update the existing underground storage tank (UST) regulations that have been basically unchanged since 1988. At the discussion, industry participants raised concerns about EPA's planned action to subject a new class of wastewater treatment (WWT) tanks to UST requirements. This led to a more informed collaboration between EPA and stakeholders about the types of WWT tanks that were subject to the requirements. EPA subsequently produced a lengthy paper to address this issue in the rulemaking. The final rule is still pending.

Federal Procurement. On July 19, 2012, Advocacy held a roundtable in Albuquerque, New Mexico, to discuss regulatory issues affecting small business participation in federal procurement programs. Representatives from SBA and

other federal agencies participated in this event, as well as staff from several congressional offices.

Finance: Integrated Mortgage Disclosures and Mortgage Loan Originator Compensation. The Office of Advocacy hosted financial roundtables on July 31, 2012, and September 26, 2012, where Consumer Financial Protection Bureau (CFPB) officials listened to small entity concerns and answered questions about the CFPB's proposed rulemakings 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), as well as the Mortgage Loan Originator Compensation proposed rulemaking. The Dodd-Frank Act requires the CFPB, in the former rulemaking, to establish new disclosure requirements and forms to combine the requirements of RESPA and TILA for most closed-end consumer credit transactions secured by real property. The latter rulemaking would implement statutory changes to Regulation Z's current loan originator compensation provisions. Roundtable participants discussed concerns about the way the CFPB was combining the statutory requirements and the economic burden and workability of the potential changes.

Finance: Mortgage Servicing. On September 21, 2012, CFPB listened to small entity concerns and answered questions on a conference call about its proposed rulemaking on mortgage servicing. Small entities are concerned that they may have to implement changes to correct problems that were not caused by them. The changes may be burdensome and are not within the small entity business model.

Homeland Security: Proposed Ammonium Nitrate Security Program Rule. On Tuesday, November 22, 2011, Advocacy hosted a small business roundtable on the Department of Homeland Security's (DHS) Proposed Ammonium Nitrate Security Program Rule. DHS staff from Infrastructure Protection and the Ammonium Nitrate Security Program attended the roundtable and provided a background briefing on the proposed rule and answered questions from small businesses in attendance. DHS's proposed rule would regulate the sale and transfer of ammonium nitrate pursuant to section 563 of the fiscal year 2008 Department of Homeland Security Appropriations Act, which seeks to prevent the use of ammonium nitrate in acts of terrorism. Advocacy followed up by submitting formal public comments to DHS outlining small business perspectives on the proposed rule.

Incorporation by Reference. Advocacy hosted small business roundtables on January 20 and May 9, 2012, to discuss the Incorporation by Reference (IBR) issue. At the roundtable on January 20, Emily Schleicher Bremer, an attorney advisor from the Administrative Conference of the United States (ACUS), provided the briefing on the ACUS recommendation on IBR, and small entity stakeholders discussed the issue.

At the roundtable on May 9, representatives from the Department of Transportation, the National Archives and Records Administration, and multiple interested industries presented and discussed several ongoing issues, including the ACUS recommendation to encourage IBR, the Office of the Federal Register's receipt of a rulemaking petition to define key terms associated with the practice, and OMB's request for comment on possible changes in its current IBR guidance. Advocacy organized a follow-up meeting with small business stakeholders and OMB to discuss small business perspectives on IBR. Advocacy also filed public comments with both the Office of the Federal Register and OMB, outlining small business perspectives on the IBR issue.

Minimum Wages and Overtime for Companion Care Workers. In February 2012, Advocacy hosted a small business roundtable on the Department of Labor's proposed rule that would

require some companion care workers to be paid minimum wages and overtime under the Fair Labor Standards Act (FLSA). DOL representatives Michael Hancock, Assistant Administrator for Policy at the Wage and Hour Division, and William Lesser, Deputy Associate Solicitor for the Division of Fair Labor Standards, provided an overview of the proposed revisions and answered questions. Participants expressed concern that DOL underestimated the costs of the overtime requirements, particularly costs for overnight shifts and live-in workers, and presented regulatory alternatives. Advocacy followed up by submitting public comments to DOL outlining small business feedback on the proposed rule. DOL has not finalized this rulemaking.

Motor Carrier Safety: Comprehensive Safety Assessment Program. On February 14, 2012, Advocacy hosted a small business roundtable on the Federal Motor Carrier Safety Administration's (FMCSA) Comprehensive Safety Assessment (CSA) Program. FMCSA Administrator Anne Ferro and key CSA program staff attended the roundtable and provided a background briefing about the program, including information about CSA's new Safety Measurement System (SMS) and its new Behavior Analysis and Safety Improvement Categories (BASICs). CSA is a FMCSA initiative to improve large truck and bus safety and ultimately reduce crashes, injuries, and fatalities related to commercial motor vehicles. Industry stakeholders asked questions and expressed concerns about the CSA program, including its usefulness and reliability.

Occupational Safety and Health (OSHA): Proximity Detection Systems Rule and Mine Safety and Health Management. On November 18, 2011, Roslyn Fontaine, Acting Director of the Office of Standards, Regulations and Variances, presented a regulatory update from the Mine Safety and Health Administration (MSHA) covering MSHA's proposed Proximity Detection Systems rule and its proposal for safety and health management programs for mines. OSHA staff attended the roundtable to observe and participate with small businesses in the discussion.

OSHA: Globally Harmonized System. On March 30, 2012, Dorothy Dougherty, Director, Directorate of Standards and Guidance, and Maureen Ruskin, Director of Chemical Hazards – Metals, from OSHA provided a briefing and answered questions about the final GHS rule. Other topics on the agenda included discussions of OSHA's new Memorandum on Employer Safety Incentive and Disincentive Policies, and an update on key pending MSHA rulemakings, including Examinations of Work Areas, Patterns of Violations, and Respirable Coal Mine Dust Practices.

OSHA: Illness and Injury Prevention Programs. At the May 9, 2012, roundtable (see Incorporation by Reference discussion), William Perry, Deputy Director of the Directorate of Standards and Guidance in OSHA, led a discussion of OSHA's plan for convening a SBREFA panel on its contemplated Illness and Injury Prevention Programs (I2P2).

OSHA: Labor Safety Issues. Advocacy's roundtables on May 18, August 10, and September 21, 2012, focused on small business perspectives related to labor safety issues. Cass R. Sunstein, Administrator of the Office of Information and Regulatory Affairs within the Office of Management and Budget, spoke at the first roundtable. Chief Counsel for Advocacy Winslow Sargeant introduced Administrator Sunstein. OSHA Directorate of Construction Director Jim Maddox and key program staff attended the roundtable on September 21 and listened to stakeholder concerns.

OSHA: Cranes and Derricks in Construction Final Rule. On September 12, 2012, Advocacy hosted a small business roundtable on OSHA's Cranes and Derricks in Construction final rule.

Jim Maddox, Director of OSHA's Directorate of Construction, and key program staff attended the roundtable, provided a background briefing, and listened to stakeholder concerns about the issue. Small businesses were concerned with new OSHA guidance suggesting that no operator may operate a crane of a capacity greater than that upon which they have been properly tested and certified. The concern was that such an interpretation could mean that currently trained and certified operators may no longer be authorized to operate cranes they are currently operating. Advocacy has conducted several follow-up activities.

Small Business Innovation Research Program. In FY 2012, Advocacy hosted several roundtables in Washington, D.C. and in the Small Business Administration's 10 regions to discuss the Small Business Innovation Research (SBIR) program. On May 28, 2012, Advocacy held a roundtable in Washington, DC, to discuss proposed regulations to implement the revised SBIR program. Representatives from the House and Senate Small Business Committees, the Small Business Office of Technology, and the National Academy of Sciences served as panelists for this roundtable. On June 18 and June 28, 2012, SBA Office of Technology Associate Administrator Sean Greene spoke at roundtables Advocacy hosted in Austin, Texas, and Boston, Massachusetts. The purpose of these roundtables was to inform and to solicit input from small business research and development stakeholders regarding the SBA proposed SBIR program regulations. Advocacy hosted a third roundtable on this topic on July 9, 2012, in New Orleans, Louisiana.

Taxation on Internet Commerce. Congressional staff attended both small business tax roundtables on the issue of taxation on internet commerce on February 23, 2012, and May 3, 2012. Some small business stakeholders contended that it is unfair for businesses which have a physical location to be responsible for collecting and remitting sales taxes while many online retailers do not. Other small businesses expressed concern with the disproportionate burden that small online retailers would face in comparison with large online retailers if required to collect and remit sales taxes. Small business representatives recommended that policymakers and legislators consider exempting small online retailers from collecting and remitting taxes from internet sales.

Small Business Pension-Related Issues. Advocacy hosted a roundtable on March 21, 2012, where staff from the IRS and Treasury met with small business stakeholders to discuss pension-related issues affecting small businesses. Small business representatives discussed the burdens associated with the "use it or lose it rule," which prohibits any contribution or benefit under a health flexible spending account (FSA) from being used in a subsequent plan year or period of coverage. After the roundtable, on May 30, 2012, the IRS issued Notice 2012-40, providing guidance on health FSAs. The IRS notice requested comments on the potential modification or elimination of the use it or lose it rule for health FSAs.

Voluntary Fiduciary Correction Program. On July 20, 2012, Advocacy hosted a roundtable where staff from the Employee Benefits Security Administration (EBSA) met with small businesses to discuss the voluntary fiduciary correction program, fee, filing, and electronic disclosure, and multiple employer plans and state-based employer plans. Small business stakeholders voiced concerns about EBSA's apparent new position on brokerage windows, which allow retirement plan participants to control certain investments made with their contributions. After the roundtable, on July 30, 2012, EBSA issued a revised guidance that addressed the small business concerns on brokerage windows.

Judicial Review of the RFA

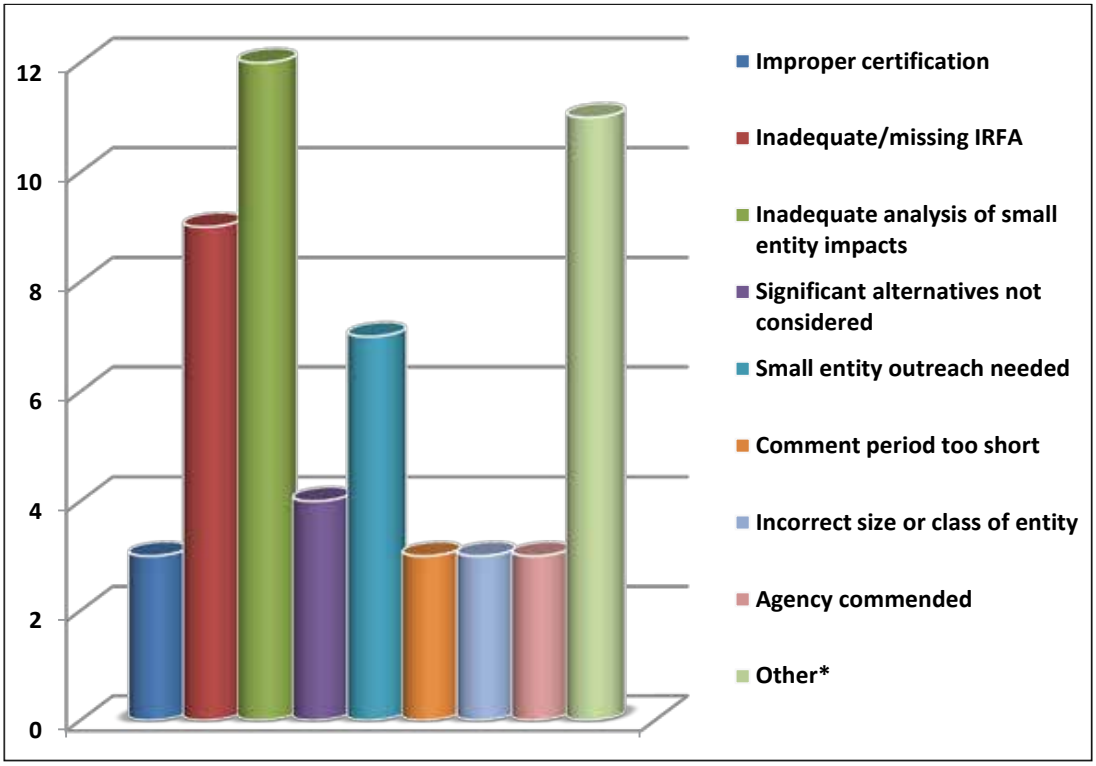
In 2012, the courts reiterated the findings of previous RFA cases and Congress.[7] In *National Association of Home Builders v. EPA*, 682 F. 3d 1032 (D.C. Cir. 2012), the court reviewed the issue of whether an agency's failure to convene a small business advocacy review panel before issuing a new rule was judicially reviewable. The court reiterated its findings in *Allied Local & Regional Manufacturers Caucus v. EPA,* 215 F.3d 61 (D.C.Cir. 2000) and said that the court "has no jurisdiction to review challenges" to an agency's compliance with section 609(b). In *Florida Wildlife Federation, Inc. v. Jackson*, 853 F. Supp. 1138 (N.D. Florida 2012), the court addressed the issue of indirect impacts and restated that when a rule's only effect on small entities will be indirect, an agency may properly make a certification. In *National Restaurant Association v. Solis*, 2012 WL 1921115 (D.D.C. 2012), the court reiterated that the requirements of the RFA are "purely procedural."

In addition, in *Louisiana Forestry Association v. Solis*, 2012 WL 3562451 (E.D. Pa. 2012), the court relied on the Senate committee report to address the RFA's requirement that an agency consider alternatives when promulgating rules. The court stated that Congress emphasized that the RFA does not require an agency to adopt a rule establishing differing compliance standards, exemptions, or any other alternative to the proposed rule. It requires that an agency, having identified and analyzed significant alternative proposals, describe those it considered and explain its rejection of any which, if adopted, would have been substantially less burdensome on the specified entities. Evidence that such an alternative would not have accomplished the stated objectives of the applicable statutes would sufficiently justify the rejection of the alternative.

Moreover, in *International Internship Programs v. Napolitano*, 853 F. Supp. 2d 86 (D.D.C. 2012), the court addressed the issue of agency decisions that were not "rules" under the RFA and found that in such an instance there is no claim for relief under the RFA. In addition, the court determined that an agency is not required to conduct a periodic small entity impact analysis pursuant to 5 USC §610 if the agency certified under §605(b) that the regulation would not have a significant economic impact on a substantial number of small entities.

7 For more detail, see Table A.2 in Appendix A.

Chart 2.1 Number of Specific Comments in Advocacy Comment Letters, FY 2012



*"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 2.2 Advocacy Comments: Major Reasons IRFAs Were Inadequate, FY 2012 (percent)

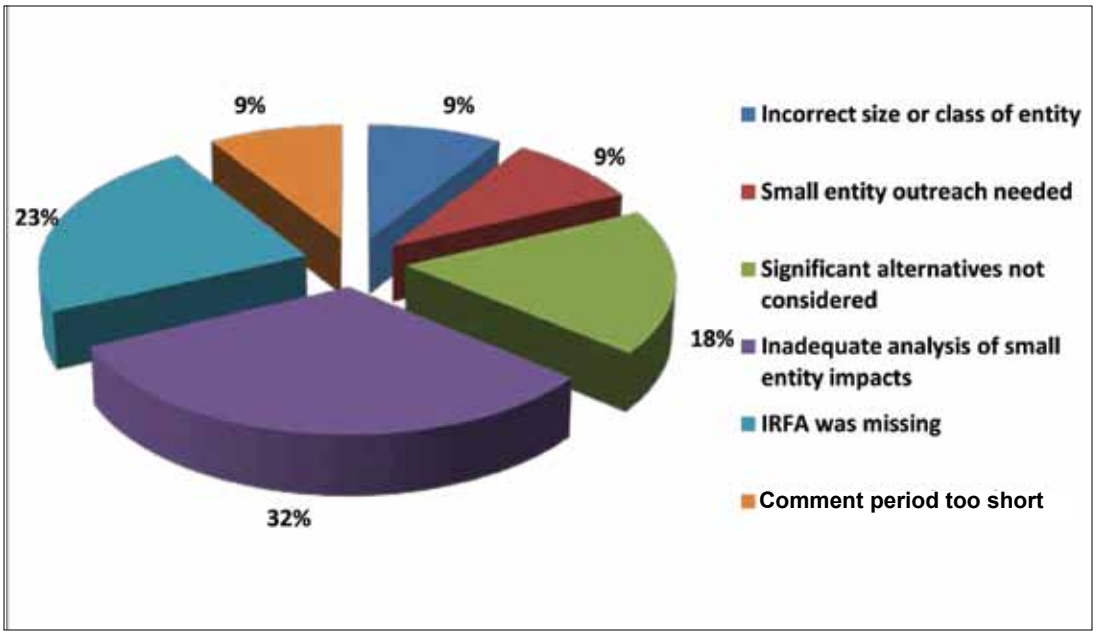


Chart 2.3 Advocacy Comments: Major Reasons Certifications Were Improper, FY 2012 (percent)

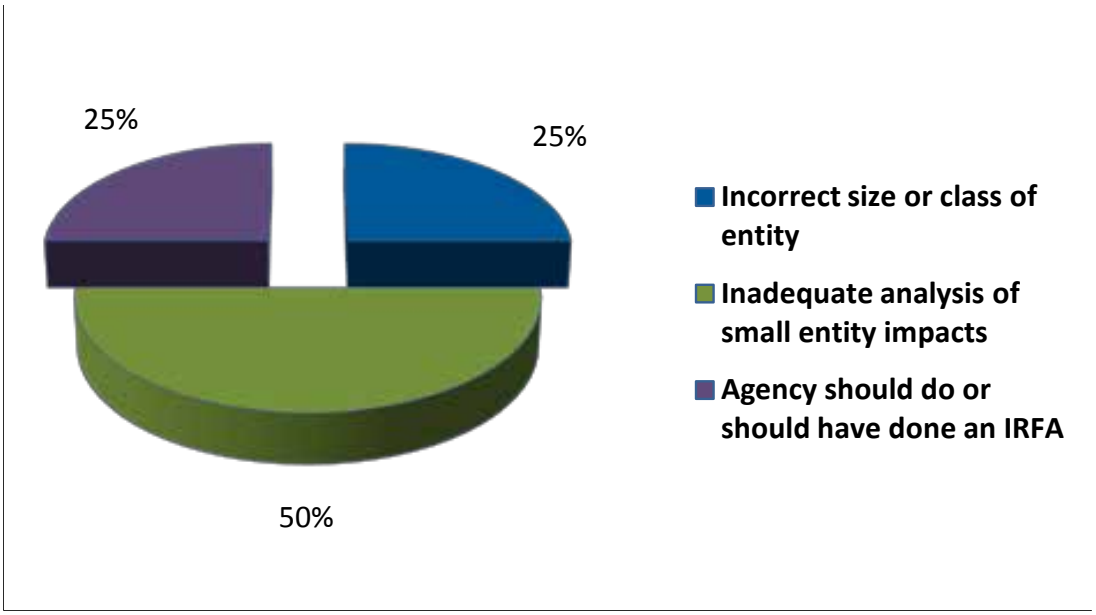


Table 2.1 Regulatory Comment Letters Filed by the Office of Advocacy, FY 2012

Date	Agency	Title	Where Published
10/3/2011	DOT	Comments on FAA's Draft Standard Operating Procedures (SOP) of the Aircraft Certification Service (AIR) Process for the Sequencing of Certification and Validations Projects.	76 Fed. Reg. 54528
10/5/2011	EPA	Comments on EPA's Integrated Risk Information System Program and the Toxicological Review of Hexavalent Chromium.	n/a
10/7/2011	DOE	Energy Conservation Program: Energy Conservation Standards for Direct Heating Equipment.	76 Fed. Reg. 43941
10/11/2011	FWS	Designation of Revised Critical Habitat for Southwestern Willow Flycatcher.	76 Fed. Reg. 50542
10/20/2011	EPA	Proposed Revisions to the Definition of Solid Waste.	76 Fed. Reg. 44094
10/25/2011	SEC	Conflict Minerals, File Number S7-40-10.	75 Fed. Reg. 80948
11/22/2011	HHS	Comments on the Department of Health and Human Services, National Toxicology Program's Report on Carcinogens.	76 Fed. Reg. 210
12/1/2011	DHS	Comments on the Department of Homeland Security's Proposed Ammonium Nitrate Security Program Rule.	76 Fed. Reg. 46908
12/6/2011	USDA	Traceability for Livestock Moving Interstate.	76 Fed. Reg. 50082
1/21/2012	EOP	Impact of Reverse Auctions on Small Businesses.	n/a
2/21/2012	EPA	Non-hazardous Secondary Materials that are Solid Waste.	76 Fed. Reg. 80452
3/12/2012	DOL	Application of the Fair Labor Standards Act to Domestic Service, Notice of Proposed Rulemaking.	76 Fed. Reg. 81190

Date	Agency	Title	Where Published
3/12/2012	EPA	Comments on EPA's Proposed Rule, 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 Plans.	77 Fed. Reg. 6628
3/14/2012	EPA	EPA's Integrated Risk Information System's Toxicological Review of Hexavalent Chromium.	n/a
3/27/2012	ACUS	Comments on Small Business Perspective on the Paperwork Reduction Act.	n/a
4/2/2012	DOJ	Delaying the Compliance Date for Certain Requirements of the Regulations Implementing Titles II and III of the Americans with Disabilities Act.	77 Fed. Reg. 16196
5/1/2012	ACUS	Comments on the Review of Regulatory Analysis Requirements and the April 24 Draft Recommendations.	n/a
5/22/2012	FCC	Comments on Proposed Mobile Device Interoperability in the Lower 700 MHz bands.	75 Fed. Reg. 9210
6/1/2012	OMB	Comments on Request for Information on Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities.	77 Fed. Reg. 19357
6/1/2012	NARA	Comments on Petition for Rulemaking on "Incorporation by Reference" and "Reasonably Available."	77 Fed. Reg. 11414
6/28/2012	NOAA	Comments on Proposed Sea Turtle Conservation Rule Imposing New Shrimp Trawling Requirements.	77 Fed. Reg. 27411
7/5/2012	FWS	Endangered and Threatened Wildlife and Plants; Revised Critical Habitat for the Northern Spotted Owl; Proposed Rule and Availability of Supplementary Documents.	77 Fed. Reg. 32483

Date	Agency	Title	Where Published
7/9/2012	CFPB	Reopening of Comment Period and Request for Comment on Truth in Lending (Regulation Z).	77 Fed. Reg. 33120
7/16/2012	SBA	Comments on Proposed Small Business Innovation Size Regulations.	77 Fed. Reg. 28510
7/24/2012	IRS	Notice 2012-40, Potential Modification of Use It or Lose It Rule.	n/a
8/30/2012	CFPB	Integrated Mortgage Disclosures under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z).	77 Fed Reg. 51116
9/10/2012	BLM	Oil and Gas: Well Stimulation, Including Hydraulic Fracturing on Federal Indian Lands.	77 Fed Reg. 27691
9/17/2012	State	Small Business Innovation Research.	n/a

n/a = not applicable.
See Appendix G for definitions of agency abbreviations.

Table 2.2 Regulatory Cost Savings, FY 2012

Agency	Subject Description	Cost Savings/ Impact Measures
DOL	***H-2B Wage Methodology Rule, 75 Fed. Reg. 61578.*** In October 2010, the Department of Labor published a proposed rule increasing wage rates for employees working under H-2B visas. The wage rates were to take effect in March 2011. DOL extended the effective date to November 30, 2011, citing small business concerns and Advocacy's comment letters. This resulted in savings for small businesses. In FY 2012, congressional action delayed the implementation of this rule twice, resulting in total cost savings of more than $1.1 billion. First, President Obama signed appropriations bills in November and December 2011 that included language prohibiting any FY 2012 federal funding to enforce the H-2B wage rule until October 1, 2012. In addition, on September 28, 2012, the President signed into law H.J. Res. 117, which provides fiscal year 2013 appropriations for continuing projects and activities of the federal government through Wednesday, March 27, 2013. Under Sec. 101(a) of H.J. Res. 117, the DOL lacks the appropriated funds to implement the H-2B rule increasing the wage rates.	The first delayed implementation resulted in $703 million in one-time cost savings for small businesses. The second delayed implementation from H.J. Res. 117 resulted in a one-time cost savings to small businesses of $406.75 million. In total, small business saved one-time costs of $1.10975 billion as a result of the delays.

Agency	Subject Description	Cost Savings/ Impact Measures
DOT	***2010-2011 Hours of Service Rule RIN 2126-AB26.*** On Tuesday, December 27, 2011, the Federal Motor Carrier Safety Administration (FMCSA) finalized its Hours of Service (HOS) for Drivers rule. The proposed rule, which was published on December 29, 2010, would have reduced the daily maximum driving limit, reduced the maximum on-duty time limit, instituted mandatory breaks, and altered the current 34-hour restart provision. Following publication of the proposed rule, Advocacy hosted a small business roundtable (attended by the FMCSA Administrator and staff) on February 9, 2011, to discuss the proposed rule and obtain small business input. Advocacy also attended FMCSA's public listening session on the proposed rule on February 17, 2011, and filed public comments on February 25, 2011. Advocacy's comments reflected the concerns of small business representatives in the trucking industry. Advocacy's comments recommended that FMCSA consider retaining its current regulations, assess potential unintended effects, and consider other costs and operational impacts before proceeding. The final rule made several changes from the proposed rule; most notably, it left the existing 11-hour daily driving hours limit in place, left the existing 14-hour daily duty hours in place, and reduced the limitations on the 34-hour restart period.	The changes to the final rule resulted in annual cost savings for small businesses of $815 million.
EPA	***2012 Construction General Permit (Final Rule) 77 FR 12866 (Feb. 29, 2012).*** In February 2012, the Environmental Protection Agency published the Construction General Permit (Final Rule), which requires all construction activities disturbing more than one acre to install special controls and measures to limit the amount of erosion that goes into U.S. waters as a result of storm water runoff. Advocacy worked closely with EPA and industry on revising the required controls to be less costly and more cost-effective during interagency review of the draft final rule.	The revisions made to the requirements created cost savings to small entities amounting to $150 million in the first year and annually.

Agency	Subject Description	Cost Savings/ Impact Measures
EPA	***National Emission Standards for Hazardous Air Pollutants for Reciprocating Internal Combustion Engines (June 2012).*** In June 2012, the Environmental Protection Agency published a proposal to revise the current air pollution requirements for existing stationary reciprocating internal combustion engines (RICE), which include diesel-fuel/compression ignition (CI) engines and gas-fired/spark ignition (SI) engines. Advocacy had earlier proposed that existing SI and CI engines in areas remote from human activity not be subject to emissions standards, catalyst retrofits, and testing requirements. Instead, Advocacy suggested that EPA adopt management practices that would include periodic inspection and replacement of maintenance items, such as engine oil and filter, spark plugs, hoses, and belts. The June proposal adopted Advocacy's suggestion for SI engines in remote areas. An engine would generally be considered to be in a sparsely populated area if there are five or fewer buildings intended for human occupancy within 0.25 mile distance of the engine. Under the current rule, the capital and annual costs for four-stroke SI engines above 500 HP are estimated by EPA at $310 million and $150 million, respectively. Under the new proposal, the capital and annual costs are estimated at $30 million and $12 million respectively.	The cost savings from the new proposal for modifying the rule for SI engines are estimated at $138 million annually.

Agency	Subject Description	Cost Savings/ Impact Measures
SBA	***Small Business Size Standards: Professional, Scientific and Technical Services.*** On February 10, 2012, the Small Business Administration (SBA) published the final regulation concerning its periodic review of size standards. For NAICS code 54 (Professional, Scientific, and Technical Services), the SBA size standard threshold pre-proposal was at $4.5 million. SBA proposed increasing it to $19 million. Based on SBA's own assessment, it received about 1,200 comments addressing the proposed changes. Advocacy, in meetings with industry and trade groups, proposed an alternative size standard threshold between $5 million and $14 million. In the final regulation, SBA decided to set the size standard threshold for NAICS code 54 at $7 million.	For codes 541310 (Architectural Services), 541330 (Engineering Services), and 541370 (Surveying and Mapping), annual small business cost savings totaled $134.5 million.
DOJ	***Amendment of Americans with Disabilities Act Title III Regulations.*** On September 15, 2010, the Department of Justice published a final rule that amends the agency's regulations implementing Title III of the Americans with Disabilities Act (ADA). Requirements for swimming pools, wading pools, and spas were to be implemented on March 15, 2012. On January 31, 2012, DOJ released guidance on these pool requirements, in particular, pool lift rules. Small businesses contacted Advocacy and DOJ regarding this guidance document, seeking an extension of the compliance date due to this new guidance document. On March 15, 2012, DOJ extended the compliance date by 60 days and sought public comment. Advocacy submitted a comment letter recommending a further extension of the compliance date. DOJ extended the compliance date to March 15, 2013.	The extension of the compliance date leads to $99.6 million in one-time cost savings for small businesses.

See Appendix G for definitions of agency abbreviations.

Table 2.3 Summary of Cost Savings, FY 2012 (dollars)[1]

Rule / Intervention	First-year Costs	Annual Costs
H-2B Wage Rule (DOL)[2]	705,779,726	
2010-2011 Hours of Service Rule (DOT)[3]	815,000,000	815,000,000
2012 Construction General Permit (EPA)[4]	150,000,000	150,000,000
National Emissions Standards for Hazardous Air Pollutants for Reciprocating Internal Combustion Engines (EPA)[5]	138,000,000	138,000,000
Small Business Size Standards,: Professional, Scientific, and Technical Services (SBA)[6]	134,457,859	134,457,859
H-2B Wage Rule (DOL)[7]	406,750,000	
Amendment of Americans with Disabilities Act Title II and Title III Regulations (DOJ)[8]	99,658,231	
TOTAL	**2,449,645,816**	**1,237,457,859**

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, cost savings are limited to those attributable to small business. These are best estimates. First-year cost savings consist of either capital or annual costs that would be incurred in the rule's first year of implementation. Recurring annual cost savings are listed where applicable.
2. Source: Advocacy calculations based on DOL Regulatory Impact Analysis (RIA).
3. Source: Exhibit 8-2 Final DOT RIA.
4. Source: 77 FR 12866 (February 29, 2012).
5. Source: EPA RIA, pp. 4-10, **www.epa.gov/ttn/atw/rice/ricepg.html**.
6. Source: Industry analysis and FPDS data pull on 10/03/2012.
7. Source: DOL analysis.
8. Source: DOJ Small Business Impact Analysis.

3 Advocacy Review of Agency RFA Compliance in Fiscal Year 2012

The following section provides an overview of RFA and Executive Order 13272 compliance by the agencies, as well as reports on individual agencies' compliance for fiscal year 2012.

Regulatory Agendas

Section 602 of the RFA requires that in April and October each agency publish a regulatory flexibility agenda in the *Federal Register*. This agenda must provide specific information about the subject of any rule which the agency anticipates proposing, if that regulation is likely to have a significant economic impact on a substantial number of small entities. Section 602 requires the agencies to provide these agendas to the Chief Counsel for Advocacy for comment. It also requires the agencies to provide the agendas directly to small businesses or their representatives through publications "likely to be obtained" by small businesses, and to solicit comment on the agendas from small entities who will be subject to the listed regulations. These regulatory agendas are useful for putting small entities on notice of forthcoming regulations, and they are often the subject of discussion at Advocacy roundtables.

In FY 2012, regulatory flexibility agendas were published in the *Federal Register* on February 13, 2012. Agendas were provided to Advocacy on that date.

The SBREFA Panel Process

Section 609 of the RFA requires a "covered agency" to convene a small business advocacy review (SBAR or SBREFA) panel whenever a draft regulation is anticipated to have a significant economic impact on a substantial number of small entities. With the passage of the Dodd-Frank Act in 2010, the Consumer Financial Protection Bureau joined the Occupational Safety and Health Administration and the Environmental Protection Agency as the only covered agencies in the federal government. Since 1996, Advocacy has participated in 55 SBREFA panels, which are composed of representatives of the covered agency, Advocacy, and OMB's Office of Information and Regulatory Affairs. In FY 2012, the CFPB conducted three panels, EPA initiated one new panel, and OSHA conducted no SBREFA panels. Panels to date are listed in Appendix Table A.3.

Retrospective Review of Existing Regulations

RFA Section 610 requires federal agencies to examine existing rules for regulatory burden on small entities. The purpose of the review, which must be performed within 10 years for final rules that have a significant economic impact on a substantial number of small entities, is "to determine whether such rules should be continued without change, or should be amended or rescinded, consistent with the stated objectives of applicable statutes, to minimize any significant economic impact of the rules upon a substantial number of such small entities."[8] Agencies report planned section 610 reviews in the fall semiannual Unified Agenda of Regulatory and Deregulatory Actions.[9] As noted earlier, President Obama has endorsed a broader review of existing regulations to make regulations more effective and less burdensome. Executive Order 13563, signed January 18, 2011, instructed agencies to develop a plan for

8 5 U.S.C. 610(a).

9 The Unified Agenda is available online at **www.reginfo.gov**. Section 610 reviews can be found using the 'Advanced Search' feature.

periodic retrospective review of all existing regulations and E.O. 13579, signed July 11, 2011, said that independent agencies should also promote the goals outlined in E.O. 13563.[10] OMB issued a series of memoranda implementing this requirement.[11] In response, agencies developed plans, some with the benefit of significant public input, and published these plans online.[12] The White House has posted the plans and agency updates online.[13]

The Office of Advocacy provided comments through OMB on agency plans and will monitor agency compliance with their plans, including the continuation of periodic reviews beyond this initial implementation period. Advocacy also welcomes input from small entities to help identify future regulatory candidates for retrospective review.

RFA Compliance by Agency and Issue

Department of Agriculture, Animal and Plant Health Inspection Service

Issue: Identification and Documentation of the Traceability of Livestock Moving Interstate. On August 11, 2011, the Animal and Plant Health Inspection Service (APHIS) proposed to establish national official identification and documentation requirements for the traceability of livestock moving interstate. Under the proposed rule, livestock, such as cattle and poultry, that are moved in interstate transit are required to be officially identified with a tag and accompanied by an interstate certificate of veterinary inspection or other documentation. Small businesses were concerned that APHIS had concluded that the rule would not have a significant economic effect on a substantial number of small businesses. Small businesses were particularly concerned that the agency did not consider the costs associated with the time, labor, and equipment needed to comply. Advocacy wrote a public comment letter encouraging APHIS to conduct more outreach to the cattle community and publish an initial regulatory flexibility analysis for this rule that includes estimates of the time, labor, and equipment costs that small cattle operations will incur from having to tag all cattle. A final rule has not yet been proposed.

Department of the Interior, Bureau of Land Management

Issue: Managing Flowback Water from Hydraulic Fracturing Operations. On May 11, 2012, the Bureau of Land Management (BLM) proposed a rule requiring detailed plans for managing flowback water from hydraulic fracturing operations, public disclosure of chemicals used in hydraulic fracturing operations, and confirmation that wells used in fracturing meet certain construction standards including requiring cement bond logs on surface casings. Several small businesses indicated that BLM's assumptions regarding the processes of well stimulation and hydraulic fracturing underestimate the costs that will be incurred by businesses under this rule. Advocacy published a comment letter encouraging BLM to consider less costly and less prescriptive alternatives to the proposed rule and to publish a revised economic analysis and IRFA. A final rule has not yet been proposed.

10 See Appendices D and E.

11 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).

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

13 **http://www.whitehouse.gov/21stcenturygov/actions/21st-century-regulatory-system**.

Department of the Interior, Fish and Wildlife Service

Issue: Designation of Critical Habitat for the Northern Spotted Owl (NSO). In February 2012, the Fish and Wildlife Service (FWS) proposed a revised critical habitat designation for the NSO on more than 13 million acres in California, Oregon, and Washington, including more than 1 million acres of private land. On June 1, 2012, FWS released an economic analysis on the NSO critical habitat designation. FWS has certified that the proposed critical habitat designation will not have a significant economic impact on a substantial number of small entities. Small businesses contacted Advocacy, citing concern that FWS's certification undercounts the number of small businesses affected by the rule and underestimates the economic impact of this rule on small business. In a public comment letter, Advocacy encouraged FWS to reevaluate the economic impacts of its critical habitat designation on small businesses, so that the agency can better analyze regulatory alternatives that minimize the impact of this rulemaking. FWS has not finalized the rulemaking.

Department of Justice

Issue: Americans with Disabilities Act Regulations on Public Pools and Spas. In September 2010, the Department of Justice (DOJ) published a final rule that amends the agency's regulations implementing Title III of the Americans with Disabilities Act (ADA). Title III sets standards for making buildings accessible for people with disabilities and requires existing facilities to remove barriers that conflict with these standards when such modifications are "readily achievable." The provisions regarding accessible entry and exit to existing swimming pools, wading pools, and spas were to be implemented on March 15, 2012.

On January 31, 2012, DOJ released guidance on these pool requirements. Small businesses contacted Advocacy and DOJ regarding this guidance document, seeking an extension of the compliance date. On March 15, 2012, DOJ extended the compliance date by 60 days and sought public comment on further extensions. Advocacy submitted a public comment letter recommending an extension of the compliance date. DOJ extended the compliance date to March 15, 2013. The extension of the compliance date led to $99.6 million in one-time cost savings for small businesses.

Department of Labor

Issue: H-2B Visa Wage Rule. In October 2010, the Department of Labor (DOL) released a proposed rule that changed the methodology for calculating the wages of H-2B visa workers, increasing these wages by $1.23 to $9.72 per hour. The H-2B visa program provides employers facing a shortage of seasonal workers a legal method to temporarily hire nonagricultural foreign workers. Some of the top industries that utilize the H-2B program are landscaping, lodging, construction, restaurants, and seafood processing.

Advocacy has consistently worked with small businesses on the H-2B wage rule, holding two roundtables and writing five public comment letters to DOL citing the negative impact the wage increase will have on small businesses. Based on Advocacy's involvement in this issue, DOL has provided multiple extensions of the effective date of this rule, postponing its implementation date until November 30, 2011. In FY 2012, congressional action delayed the implementation of this rule twice. In November and December 2011, President Obama signed two appropriations bills that included language prohibiting any FY 2012 federal funding to enforce the H-2B wage rule until October 1, 2012. In September 2012, President Obama signed another appropriations bill that included language prohibiting funding of the H-2B rule until March 27, 2013. These delays in implementation resulted in one-time cost savings to small businesses of over $1.1 billion.

Issue: Fair Labor Standards Act (FLSA) Application to Domestic Service. In December 2011, the Department of Labor released a proposed rule that would require some companion care workers, such as those hired by staffing agencies, to be paid minimum wages and overtime under the FLSA. Companion care workers are nonmedical 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. Advocacy held a small business roundtable in which small staffing agencies expressed concern that the overtime pay requirements will add significant burdens and costs, particularly for overnight shifts and live-in workers. In a public comment letter, Advocacy recommended that DOL publish a supplemental initial regulatory flexibility analysis (IRFA) to reevaluate the impact of this rule on small business, and consider regulatory alternatives to this rulemaking that would accomplish the agency's goals without harming small businesses. DOL has not finalized this rulemaking.

Issue: Application of the Longshore and Harbor Workers Compensation Act. The American Recovery and Reinvestment Act of 2009 (ARRA) contained amendments to the Longshore and Harbor Workers Compensation Act (LHWCA), a federal program that requires employment injury protection for workers injured on the navigable waters of the United States or adjoining areas. The ARRA exempted *all* entities conducting repair and dismantling of recreational vessels from LHWCA insurance, provided that their workers are subject to coverage under a state workers' compensation law (which is significantly less expensive). Before this change, the statute exempted only vessels under 65 feet in length. Small businesses and members of Congress contacted Advocacy citing concerns that DOL's 2011 regulations implementing the ARRA actually increased the number of manufacturers, builders, and repair shops required to buy federal insurance because it created a more restrictive definition of "recreational vessel." Small businesses were also concerned with another provision that set confusing parameters for when an employee doing both recreational and commercial repair work would be required to obtain LHWCA coverage. In December 2011, DOL released a final rule that adopted regulatory alternatives suggested by Advocacy and small business groups, which minimize the economic impact of this rulemaking. This rule resulted in small business cost savings that were unquantifiable.

Issue: Nondisplacement of Qualified Workers under Service Contracts. In March 2010, DOL released a proposed rule that implements Executive Order 13495, which states that the federal government's procurement interests in economy and efficiency are served when a winning contractor and subcontractor (successor contractors) to a federal service contract hire the losing contractor's (predecessor contractor) employees. This rule requires that any federal service contract and contract solicitations over $100,000 include a clause that requires successors and their subcontractors to offer qualified employees of the predecessor contractor a right of first refusal of employment.

Small business stakeholders expressed concern that there may be problems with implementing this executive order that may add to the compliance costs and regulatory burdens for small contractors. In particular, small contractors were concerned that the deadlines outlined in the proposal may have a negative impact on a successor contractor's ability to perform a follow-on contract.

Based on an Advocacy public comment letter, DOL adopted flexibilities in these deadlines. DOL also clarified the interaction of this rule with current federal requirements, such as those under SBA's HUBZone program and the Department of Homeland Security's Employment Eligibility Verification (E-Verify) Program. This rule resulted in small business cost savings that were unquantifiable.

Department of the Treasury, Internal Revenue Service

Issue: Potential Modification of Use It or Lose It Rule. On May 30, 2012, the Internal Revenue Service (IRS) issued Notice 2012-40 to provide guidance for health flexible spending accounts (health FSAs). Among other things, the IRS notice requests comments on the potential modification or elimination of the "use it or lose it rule" for health FSAs. The use it or lose it rule prohibits any contribution or benefit under an FSA from being used in a subsequent plan year or period of coverage. Thus, under this rule, unused amounts in the health FSA are forfeited at the end of the plan year. The IRS notice observed that, under changes in tax law pursuant to the Patient Protection and Affordable Care Act of 2010, the use it or lose it rule may no longer be necessary.

On July 24, 2012, Advocacy submitted a public comment letter commending the IRS for issuing Notice 2012-40 and considering eliminating a rule that burdens small business. Advocacy's comment letter recommended that the IRS revoke the use it or lose it rule. Instead of requiring the forfeit of unused amounts in a health FSA at the end of a plan year, Advocacy suggested that the IRS should permit an employer to give plan participants the choice of receiving the unused taxable cash or making a tax-deferred contribution to the employer's Internal Revenue Code section 401(k), section 403(b), or section 457(b) plan.

Consumer Financial Protection Bureau

Issue: Qualified Residential Mortgages. On July 9, 2012, the Office of Advocacy submitted a public comment letter to the Consumer Financial Protection Bureau (CFPB) on the reopening of the comment period on Regulation Z; Docket No.CFPB-2012-0022 Truth in Lending as it pertains to qualified residential mortgages (QRM). This matter was originally proposed by the Board of Governors of the Federal Reserve on May 11, 2011. The proposed rule addressed the new ability-to-repay requirements that will apply to consumer credit transactions secured by a dwelling. It also addressed the definition of a qualified mortgage (QM). In the QM proposal, the Federal Reserve set forth two alternatives: Alternative 1 would provide for a legal safe harbor from the ability to repay requirements; Alternative 2 would provide a rebuttable presumption of compliance. Small banks expressed concerns about the definition of QM. Advocacy asserted that community banks would no longer originate mortgage loans if the rules provided only a rebuttable presumption of compliance. A safe harbor, on the other hand, would allow small lenders to operate within known boundaries and allow consumers to obtain affordable loans. Advocacy encouraged the CFPB to give full consideration to the comments from small banks.

In addition, the CFPB requested comment on new data that the CFPB received from the Federal Housing Finance Agency. The CFPB proposed to use the data to analyze whether a lender complied with the ability-to-repay requirements. The CFPB asserted that loan performance, as measured by the delinquency rate, was an appropriate metric to evaluate whether a consumer had the ability to repay those loans at the time the loan was made. Advocacy questioned that assertion because a consumer's circumstances may have changed after a loan was made.

Issue: Integrated Mortgage Disclosures under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z) (RESPA/TILA). On August 30, 2012, the Office of Advocacy submitted a public comment letter to the CFPB on the proposed rule on Integrated Mortgage Disclosures under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z) (RESPA/TILA). The comment focused on the proposed amendment to 12 CFR § 1026.4, which revises the test for determining the finance

charge for residential mortgage loans. The proposed amendments to section 1026.4 replace the current "some fees in, some fees out" approach to the finance charge with a simpler, more inclusive test based on the general definition of finance charge in TILA section 106(a). Under proposed section 1026.4, the current exclusions from the finance charge would be largely eliminated for closed-end transactions secured by real property or a dwelling. Advocacy expressed concern that the proposed revisions could result in small community banks exiting the marketplace, leading to less competition and higher prices for consumers. This rule was the subject of a Small Business Regulatory Enforcement Fairness Act panel that convened on February 21, 2012. In light of the information that the CFPB gleaned from the small banking industry representatives, Advocacy suggested that the CFPB consider alternatives to these proposed changes.

Advocacy also expressed concerns about the lack of adequate notice because small entities that relied solely on the *Federal Register* for their information had less than 10 business days to submit comments. As a result, the comment deadline was extended to November 6, 2012, to coincide with the remainder of the proposal.

Environmental Protection Agency

Issue: Proposed Revisions to the Definition of Solid Waste (Recycling) Final Rule. On October 20, 2011, Advocacy submitted a public comment letter on the proposed revisions to the 2008 final rule regarding the Environmental Protection Agency's (EPA) Revisions to the Definition of Solid Waste (DSW). The 2008 final rule excludes certain secondary materials from regulation as hazardous under three very specific circumstances, including when materials are transferred to another company for recycling under specific conditions. These regulatory alternatives significantly reduced small business costs. EPA essentially proposed to eliminate the exclusion for the so-called transfer-based exclusion, and to make significant modifications to the legitimate recycling requirements.

Advocacy submitted a public comment letter stating that EPA should allow implementation of the 2008 final rule with some small revisions. The 2008 DSW final rule was crafted from 16 years of compromise and litigation between industry stakeholders, environmental organizations, and EPA. Advocacy urged EPA to retain the 2008 final rule provisions, particularly those related to the transfer-based exclusion and the requirements for legitimate recycling.

EPA conducted an extensive risk analysis of the 2008 rule prior to the final rule being promulgated, and concluded that there would be no net risks to future environmental and human health and safety from the rule. Advocacy believes that the 2008 rule will yield substantial economic savings to tens of thousands of small business generators, well in excess of EPA's current estimate, while still meeting the statutory goals of protecting human health and the environment and promoting recycling. EPA has not yet issued a new revised rule.

Issue: Proposed Revisions to Nonhazardous Secondary Materials that are Solid Waste (NHSM). On February 21, 2012, Advocacy submitted a public comment letter on the proposed revisions to the final rule regarding nonhazardous materials that are solid waste when used as fuels. The rule was promulgated on March 21, 2011. Nonhazardous secondary materials are materials that are left over after an industrial or other process. In many cases, these materials are burned in boilers as fuel. This use of secondary materials in boilers is a form of recycling that avoids the expense of sending these secondary materials to a landfill, paying for substitute fuel, and contributing to the release of additional greenhouse gases. If the material is determined to be a "nonwaste," then the burning of the material

is regulated under the industrial boilers rule. If the material is determined to be a "solid waste," then the boiler is regulated as a commercial industrial solid waste incinerator (CISWI), which is regulated under a separate, more stringent air pollution standard, generally making it impracticable for combustion.

EPA's failure to designate certain fuels as nonwastes would require disruption of manufacturing processes at many sites, including cement kilns, steel mills, paper mills, and other manufacturing plants. Advocacy asked EPA to make the nonwaste designation for (1) off-specification used oil, (2) pulp and paper processing residuals, (3) scrap tires in stockpiles, (4) animal manure, (5) treated wood, and (6) pulp and paper sludges. Advocacy did not see a clear difference between these wastes and the nonwaste secondary materials proposed by EPA. EPA has not yet issued a new final rule.

Issue: National Emissions Standards for Hazardous Air Pollutant Emissions: Hard and Decorative Chromium Electroplating and Chromium Anodizing Tanks. On March 12, 2012, Advocacy submitted a public comment letter to the EPA on the supplemental notice of proposed rulemaking, National Emissions Standards for Hazardous Air Pollutant Emissions: Hard and Decorative Chromium Electroplating and Chromium Anodizing Tanks. EPA's notice presented a new technology and a new residual risk analysis that would result in stricter emissions limits for hexavalent chromium. 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. Also, EPA had not demonstrated that the proposed requirements were technically feasible because of a lack of data on the use of alternatives to perfluorooctyl sulfonates (PFOS) fume suppressants. At Advocacy's request, EPA collected further data from small businesses and included studies on the effectiveness, availability and cost of non-PFOS fume suppressants. EPA signed the final rule on September 19, 2012.

Issue: SBREFA Panels. In 2011, EPA convened two panels that were not completed. EPA has subsequently published proposed and/or final rules within the scope of these panels, after making the required certifications under section 605(b).

Greenhouse Gas Emissions from Electric Utilities. In January 2011, EPA signed a settlement agreement requiring EPA to propose greenhouse gas (GHG) emission standards for new and existing coal-fired electric utilities.[14] The Office of Advocacy filed public comments on the settlement agreement, raising concerns about the amount of time allowed for regulatory development, including SBREFA panels.[15] EPA convened a SBREFA panel in June 2011.[16] Advocacy objected in writing to the convening because EPA was, at that time, unprepared to discuss its regulatory approach or alternatives.[17] EPA met with small entity representatives in the context of the panel, but ceased work on the panel soon afterwards. No panel report has been prepared. EPA published a proposed rule for GHG emission standards for *new* coal-fired electric utilities in April 2012, certifying that the rule would have no significant economic impact on a substantial number of small entities.[18] EPA has not an-

14 See **http://www.epa.gov/airquality/cps/settlement.html**.

15 See **http://www.sba.gov/content/letter-dated-011911-environmental-protection-agency.**

16 Although EPA lists its SBREFA panels on its public website (**http://epa.gov/sbrefa/sbar-panels.html**), the listing for "Greenhouse Gas Emissions from Electric Utility Steam Generating Units" no longer appears on the site.

17 See **http://www.sba.gov/content/letter-dated-06132011-environmental-protection-agency**.

18 See **http://yosemite.epa.gov/opei/RuleGate.nsf/(LookupRIN)/2060-AQ91** for more information on the status of GHG emission standards for new coal-fired electric utilities.

nounced plans to propose GHG emission standards for existing coal-fired electric utilities.[19]

Emissions from Petroleum Refineries. In January 2011, EPA signed a settlement agreement requiring EPA to propose GHG emission standards for new and existing petroleum refineries.[20] In August 2011, EPA convened a SBREFA panel encompassing this and other emission standards under consideration, including a reconsideration of New Source Performance Standards (NSPS) issued in 2008 and the NESHAP Risk and Technology Review required under Clean Air Act section 112.[21] Advocacy again objected in writing.[22] EPA met with small entity representatives, but soon after ceased work on the panel. No panel report has been prepared. In September 2012, EPA published a final rule resolving the reconsideration of the 2008 NSPS, certifying that the rule would have no significant economic impact on a substantial number of small entities.[23] Also in September 2012, EPA submitted to OMB for review under Executive Order 12866 a draft proposed rule, which, by EPA's description, would cover the remaining issues except GHG emission standards.[24]

Federal Communications Commission

Issue: Broadband Competition. On May 22, 2012, the Office of Advocacy submitted a comment to the Federal Communications Commission (FCC) regarding several proceedings involving attempts to support competition in the broadband marketplace. The comments focused on (1) the FCC's notice of proposed rulemaking promoting interoperability in the 700 MHz commercial spectrum, (2) the FCC's ongoing special access proceeding, and (3) an industry petition for examination of the FCC's rules regarding copper retirement.

700 MHz Interoperability. Currently, there are two distinct sets of technical specifications for devices operating in the Lower 700 MHz spectrum band, resulting in a lack of interoperability between devices operated by different service providers within the band. In 2009, an alliance consisting of four Lower 700 MHz A Block licensees filed a petition for rulemaking requesting the FCC to require that all mobile devices for the 700 MHz band be capable of operating over all frequencies in the band. In April 2012, the FCC issued a notice of proposed rulemaking seeking to resolve whether a single, unified band class for devices in the Lower 700 MHz band would result in harmful interference with the operations of Lower 700 MHz B and C Block licensees, and whether such interference can be mitigated. In public comments to the FCC, Advocacy echoed concerns that the lack of 700 MHz interoperability is preventing full and productive use of valuable spectrum to deploy mobile broadband, particularly in rural areas. Advocacy urged the FCC to move forward with a final rule, if technologically feasible, that would provide for interoperability in the lower 700 MHz spectrum by requiring all lower 700 MHz licensees to provide only devices that are capable of operating in Band Class 12. No final rule has been issued.

Special Access. Special access services are the broadband "last mile" facilities through which applications travel to reach businesses and the cell towers that transmit these applications to wireless devices. These facilities are largely

19 See **http://yosemite.epa.gov/opei/RuleGate.nsf/(LookupRIN)/2060-AR33** for more information on the status of GHG emission standards for existing coal-fired electric utilities.

20 See **http://www.epa.gov/airquality/cps/settlement.html**.

21 See **http://epa.gov/sbrefa/refinery.html**.

22 See **http://www.sba.gov/content/letter-dated-08042011-environmental-protection-agency**.

23 77 F.R. 56422 (September 12, 2012).

24 See **http://yosemite.epa.gov/opei/RuleGate.nsf/byRIN/2060-AQ75**.

owned by incumbent local exchange carriers (ILECs such as AT&T, Verizon, and CenturyLink/Qwest). Competitive carriers must lease access to these facilities in order to provide services to their customers. In recent years, competitive carriers have petitioned the FCC to reexamine its special access rules to ensure that the rates, terms, and conditions available to competitive carriers for special access are fair and reasonable. Advocacy provided public comments to the FCC about the importance of special access for ensuring a competitive broadband marketplace that offers small business consumers affordable, high-quality business broadband services, and encouraged the FCC to move forward in addressing the concerns raised by competitive carriers. The FCC recently suspended its pricing flexibility rules and will not be granting further instances of pricing flexibility until it has thoroughly reviewed its special access rules. It has also initiated a long-awaited mandatory data request from carriers regarding special access rates that will inform the review of its rules.

Legacy Copper Retirement. In many cases, legacy copper wire infrastructure provides the only last mile facility connecting many business customer locations. FCC regulations grant competitive carriers the right to lease wholesale access to copper loops from ILECs so that they can offer Ethernet and DSL broadband services to business customers. When ILECs install new fiber connections, they often retire their legacy copper loops. In so doing, they eliminate the only alternative to the ILEC fiber connection, which is not subject to the same FCC open access requirements as copper. In its public comment letter to the FCC, Advocacy repeated its concerns shared by small businesses that allowing ILECs to retire copper loops without regard to effects on competition may be impeding the ability of small business consumers to get access to affordable, high speed broadband. Advocacy encouraged the FCC to engage with competitive and incumbent carriers to determine what can be done to fix some of these issues in a way that allows incumbent carriers to retire unused copper without harming consumers, many of which are small businesses. The FCC has not yet indicated that it intends to move forward on this issue.

Securities and Exchange Commission

Issue: Conflict Minerals. On December 23, 2010, the Securities and Exchange Commission (SEC) issued a proposed rule that would require businesses that file with the SEC and manufacture products that require tin, tantalum, tungsten, and gold to report whether the minerals originated in the Democratic Republic of Congo (DRC) or a neighboring country. Under the proposed rule, if a business discovers that its minerals do originate in the DRC or one of its neighbors, more reporting would be required. The businesses would be required to report on the measures they took to exercise "due diligence" on the source and chain of custody of the minerals. The proposed rule would also require businesses to provide independent verification of these steps through an independent private sector audit of the reporting.

In the proposed rule's initial regulatory flexibility analysis, the SEC estimated that approximately 793 small entities would be subject to the proposal. The proposed rule stated that the costs of compliance are "difficult to assess but are likely insignificant." On October 6, 2011, the SEC issued a notice to extend the period to submit comments for the proposed rule until November 1, 2011.

Small business stakeholders had been in contact with Advocacy to express concern about the proposed rule. Small businesses contended that the SEC underestimated both the costs the proposed rule will impose and the number of small businesses that would be affected. Most small businesses that would be subject to the proposed rule participate in a complex supply chain composed of numerous other businesses.

The proposed rule would affect most manufacturers of electronics, aerospace, automotive, jewelry, health care devices, and industrial machinery. Even firms that do not necessarily file with the SEC might be affected if they were part of the supply chain to SEC-filing companies for these metals. Because the SEC did not take into account the complexity of supply chains and the number of small firms that are part of those supply chains, it appeared that the SEC had underestimated the number of small firms that would be affected by the proposed rule. On October 25, 2011, Advocacy filed a public comment letter recommending that the SEC publish an amended IRFA that would more accurately describe the costs and burdens of the proposed rule, and more accurately detail the number of small entities that would be affected.

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

Table 3.1 displays agency compliance with E.O. 13272's three agency requirements:[25]

- "issue written procedures and policies…" (Section 3(a)).
- "[n]otify Advocacy of any draft rules that may have a significant economic impact on a substantial number of small entities under the Act" (Section 3(b)).
- "[g]ive every appropriate consideration to any comments provided by Advocacy regarding a draft rule" (Section 3(c)).

25 The 2010 SBJA 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 3.1 Agency Compliance with the Small Business Jobs Act of 2010 and E.O. 13272, FY 2012

Department	Written Procedures	Notify Advocacy	Response to Comments	Comments
Agriculture	√	√	√	
Commerce	√	√	√	
Defense	√	√	√	
Education	√	√	√	
Energy	√	√	-[1]	
General Services Administration	√	√	√	
Health and Human Services	√	X	X	Does not notify Advocacy of draft rules and infrequently gives Advocacy appropriate consideration in comments.
Homeland Security	√	√	-	
Housing and Urban Development	√	√	-	
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 OSHA/MSHA	√	√	√	
State	X	√	-	
Transportation	√	√	√	
Treasury	√	√	-	
Veterans Affairs	√	√	-	

Department	Written Procedures	Notify Advocacy	Response to Comments	Comments
Other Agencies				
Consumer Financial Protection Bureau	-	√	√	
Consumer Product Safety Commission	√	√	√	
Environmental Protection Agency	√	√	√	
Equal Employment Opportunity Commission	√	√	-	
Federal Acquisition Regulation Council	√	√	√	
Federal Communications Commission	√	√	-	
Federal Reserve Board	X	√	-	
National Labor Relations Board	X	√	-	
Securities and Exchange Commission	X	√	√	
Small Business Administration	√	√	√	

1 Advocacy cannot evaluate compliance since the agency did not publish any final rules upon which Advocacy commented.
√ The agency complied with the requirement.
X The agency did not comply with the requirement.
- Not applicable in FY 2012.

Conclusion

In FY 2012, most agencies continued to comply with the requirements of the RFA and E.O 13272. Advocacy's training has helped additional agencies understand and comply with the analytical process mandated by the RFA to produce better and more informed regulatory decisions. The agencies' willingness to attend Advocacy roundtables and hear the concerns of small businesses has been a welcome development; the inexplicable circumstances that led to the late publication of the agencies' regulatory flexibility agendas will need to be addressed. The Office of Advocacy will continue working with federal agencies to ensure that they fulfill their obligations under the RFA, while meeting their regulatory goals.

Appendix A Supplementary Tables

Table A.1 Federal Agencies Trained in RFA Compliance, 2003-2012

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

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

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

Department of Defense
- Defense Logistics Agency
- Department of the Air Force
- Department of the Army, Training and Doctrine Command
- United States Strategic Command

Department of Education

Department of Energy
- Federal Energy Regulatory Commission

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
- United States Citizenship and Immigration Service
- United States Coast Guard
- United States Customs and Border Protection

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

Department of Veterans Affairs
- National Cemetery Administration

Office of the Director of National Intelligence

Office of Management and Budget
- Office of Federal Procurement Policy

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

Table A.2 RFA Related Case Law, FY 2012

National Association of Home Builders v. EPA, 682 F. 3d 1032 (D.C. Cir. 2012).

In 2008, the Environmental Protection Agency (EPA) issued a rule regulating renovation and remodeling activities that create health hazards arising from lead paint. The rule had an opt-out provision that exempted owner-occupied housing from a rule regulating renovation and remodeling activities that created health hazards arising from lead paint if the homeowner certified that no pregnant women or young children lived there. In 2010, EPA amended the rule to eliminate the opt-out provision. The National Association of Home Builders (NAHB) petitioned for review of the amended rule on the grounds that it violated the Administrative Procedure Act (APA) and that EPA failed to convene a small business advocacy review panel before issuing the new rule, in violation of the RFA. It should be noted that EPA convened such a review panel prior to promulgating the original Renovation Rule. It did not do so again before issuing the amended rule. The plaintiffs asserted that this failure violated the RFA.

The court found that the RFA rendered the plaintiff's claim unreviewable. Section 611(c) of the RFA provides that "[c]ompliance or noncompliance by an agency with the provisions of this chapter shall be subject to judicial review only in accordance with this section." 5 USC § 611(c) (emphasis added). Section 611(a) (2) grants this court "jurisdiction to review any claims of noncompliance with sections 601, 604, 605(b), 608(b) and 610. The section further provides that "[a]gency compliance with sections 607 and 609(a) shall be judicially reviewable in connection with judicial review of section 604." Absent from these lists of reviewable claims is a claim alleging noncompliance with section 609(b)—the provision that requires the convening of small business advocacy review panels. The court reiterated its findings in *Allied Local & Regional Manufacturers Caucus v. EPA* 215 F.3d 61 (D.C.Cir. 2000) that the court "has no jurisdiction to review challenges" to an agency's compliance with that section.

The plaintiffs argued that even if they could not directly obtain review of agency compliance with section 609(b), the statute authorizes review of compliance with the final regulatory flexibility analysis requirement. They asserted that the court could regard the failure to convene a panel as a failure that renders the final regulatory flexibility analysis defective. The court disagreed because section 611(a)(2) expressly authorizes judicial review of agency compliance with sections 607 and 609(a) in connection with judicial review of section 604, but does not authorize review of compliance with section 609(b)—even in connection with a section 604 claim.

The plaintiffs also asserted that the failure to convene a review panel was arbitrary and capricious. The court stated that the RFA grants jurisdiction to review claims of noncompliance with section 604, the final regulatory impact analysis provision, "in accordance with" the APA in determining whether the agency complied with the overall requirement that an agency's decision making be neither arbitrary nor capricious. However, this applies in matters that may best be described as quasi-procedural rather than procedural. Such issues focus not on the kind of procedure that an agency must use to generate a record, but rather on the kind of decision making record the agency must produce to survive judicial review. These requirements flow not from the APA's procedural dictates, but from its substantive command that agency decision making not be arbitrary or capricious. Since a small business advocacy review panel is a purely procedural device, courts may not, under the guise of the APA's arbitrary-and-capricious review standard,

impose procedural requirements that the APA's procedural provisions do not themselves impose. Thus, courts may not, under the guise of APA review, enforce compliance with a procedural requirement that the RFA clearly excludes from judicial review.

Florida Wildlife Federation, Inc. v. Jackson, 853 F. Supp. 1138, (N.D. Florida 2012).

Environmental groups brought actions against the Environmental Protection Agency (EPA) and numerous state environmental agencies challenging both the EPA administrator's determination that a numeric nutrient standard for Florida's lakes and flowing waters was needed to replace the state's narrative standard, as well as a rule adopting a numeric nutrient standard. The plaintiffs asserted that EPA violated the RFA by preparing a certification rather than issuing an initial or final regulatory flexibility analysis. The court found that EPA's certification was unassailable because the rule and its numeric nutrient criteria only indirectly have an impact on small entities. The direct effect is on the state of Florida. It will fall to the state to implement the criteria. When a rule's only effect on small entities will be indirect, an agency may properly make a certification.

International Internship Programs v. Napolitano, 853 F. Supp. 2d 86 (D.D.C. 2012).

The sponsor of a cultural exchange program brought action against the Department of Homeland Security (DHS), the United States Citizenship and Immigration Services (USCIS) and others, alleging defendants violated the APA and the RFA in denying its petitions for cultural visas for participants in an international internship program.

Q-1 visas were introduced to create an international cultural exchange program in order to enhance the knowledge of diversity in other cultures. In 1992, USCIS published a final rule to implement Q-1 visas. As part of the final publication, USCIS certified that the rule would not have a significant economic impact on a substantial number of small entities. The plaintiff conceded that USCIS complied with the RFA when it first promulgated Q-1 visas. However, the plaintiff asserted that USCIS amended the Q-1 visa regulations when it denied the petitions for cultural visas. The court denial of the sponsor's petitions for cultural visas did not effectively amend regulations governing cultural visas or promulgate a rule, so as to require an RFA analysis. At most, the denials represent interpretive rules (USCIS interpreted each statutory component as part of its review of the visa petitions). USCIS's decisions were not "rules" under the RFA; therefore, the plaintiff failed to state a claim for relief under the RFA.

In addition, the court rejected the plaintiff's assertion that USCIS was required to conduct a periodic small entity impact analysis pursuant to 5 USC §610. By certifying under §605(b) that the regulations will not have a significant economic impact on a substantial number of small entities, USCIS exempted itself from the periodic reviews.

Louisiana Forestry Association v. Solis, 2012 WL 3562451 (E.D. Pa. 2012).

Employer associations brought action to challenge a Department of Labor (DOL) regulation governing the calculation of the minimum wage that U.S. employers had to offer in order to recruit unskilled, nonagricultural foreign workers as part of the H-2B visa program. The employer associations argued that DOL failed to perform a reasonable, good faith RFA analysis. They asserted that DOL: (1) failed adequately to consider the impact the wage rule would have on small entities; and (2) failed to consider reasonable alternatives to the proposed rule.

The court found that both contentions lacked merit. The court stated that the scope of the RFA analysis is determined by the substantive law under which the rule was issued. Section 604(a)(6) of the RFA requires that the agency provide "a description of the steps the agency has taken to minimize the significant economic impact on small entities *consistent with the stated objectives of the applicable statutes*." (Emphasis added). Citing Senate Report 96-878, the court further explained that the RFA's legislative history makes clear that its requirements "are not intended as a basis for a substantive challenge to the exercise of discretion by the agency in determining what rule ultimately to promulgate," and that it should not be construed in a way that weakens "legislatively mandated goals in the name of cost reduction."

In the present case, the statute's stated goal was to provide for the admission of H–2B workers if unemployed persons capable of performing such service or labor could not be found in the United States. The court was of the opinion that DOL reasonably concluded that adopting a standard that would permit small businesses to pay their H–2B workers wages below the prevailing wage as calculated by the rule's methodology would likely have an adverse effect on the wages of U.S. workers, which would contradict the objectives of the statute.

In terms of alternatives, the plaintiffs pointed to several alternatives raised in comments on the notice of proposed rulemaking that the DOL did not specifically address in its final regulatory flexibility analysis and argued that DOL erred in failing to consider those alternatives. The court stated that section 604 of the RFA requires that an agency explain "why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected." However, in enacting 604, Congress emphasized that it does not require that an agency adopt a rule establishing differing compliance standards, exemptions, or any other alternative to the proposed rule. It requires that an agency, having identified and analyzed significant alternative proposals, describe those it considered and explain its rejection of any which, if adopted, would have been substantially less burdensome on the specified entities. Evidence that such an alternative would not have accomplished the stated objectives of the applicable statutes would sufficiently justify the rejection of the alternative.

In the present case, DOL considered nine proposed alternatives and addressed the remaining comments in a general paragraph. In that paragraph, DOL explained that it rejected those alternatives because they would "at worst reduce and at best not improve the efficiency and consistency of the prevailing wage determination process, or would directly or indirectly adversely affect the wages of U.S. workers who might take H–2B jobs." The court further stated that the plaintiffs offered no arguments as to why, in their opinion, the DOL did not reasonably reject each of the proposed alternatives that they list on efficiency grounds or because they would have an adverse effect on the wages of U.S. workers, in contravention of the stated objectives of the statute. Thus, the court found that DOL's explanation of its rejection of those alternatives satisfied the RFA's requirements.

National Restaurant Association v. Solis, 2012 WL 1921115 (D.D.C. 2012).

National trade and industry associations whose members employed tipped employees brought action against the Department of Labor alleging that the APA and the RFA were violated in promulgating a regulation concerning an employer's obligation to inform tipped employees of the "tip credit" requirements of the Federal Labor Standards Act. The plaintiffs asserted that the defendants violated the APA by failing to conduct a regulatory flexibility analysis in connection with the final rule. In the final rule, the agency stated:

> [B]ecause the final rule will not impose any measurable costs on employers, both large and small entities, the Department has determined that it would not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act.... The Department certified to the Chief Counsel for Advocacy to this effect at the time the NPRM was published. The Department received no contrary comments that questioned the Department's analysis or conclusions in this regard. Consequently, the Department certifies once again pursuant to 5 USC §604 that the revisions being implemented in connection with promulgating this final rule will not have a significant economic impact on a substantial number of small entities. Accordingly, the Department need not prepare a regulatory flexibility analysis.

The plaintiffs asserted that the certification was arbitrary and capricious because it was made without the benefit of comments about the compliance costs associated with the new rule. The plaintiffs also noted that there was nothing in the administrative record indicating that DOL considered the costs to small businesses of providing the required notice or the costs of additional recordkeeping or that DOL contemplated the potential economic exposure to many small businesses to regulatory violations and enforcement actions. Plaintiffs submitted that if they had had proper notice of the rule prior to its promulgation, they would have "overwhelmed the agency with information about the cost behind this proposal."

The court disagreed. It stated that the original rule would have required employers to inform employees of their intention to take the tip credit, so it is difficult to understand why the final rule's requirement that employers inform employees of the additional requirements of section 3(m) would impose a significant financial burden. In response to the court's questions at the hearing, the plaintiffs explained that the final rule was particularly burdensome because it requires employers to inform employees whenever the tip credit changes, so a poster or one-time written information sheet would not do. They asserted that all restaurant employers have been deprived of the opportunity to explain to the Department and show the Department the cost associated with the proposed rule. The court disagreed with the plaintiffs because the regulations in existence prior to the promulgation of the final rule already required successive communications with employees when the tip credit changed and the employers did not call for this requirement to be changed in their comments.

The court held that DOL complied with the requirements of the RFA when it concluded that no regulatory flexibility analysis was necessary because the rule would not have an impact on a substantial number of small entities. In doing so, it reiterated that the requirements of the RFA are "purely procedural." Although the RFA "directs agencies to state, summarize, and describe, the Act in and of itself imposes no substantive constraint on agency decision-making."

Table A.3 SBREFA Panels through Fiscal Year 2012

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 Guideline[1]	06/06/97	08/08/97	12/17/97	
Stormwater Phase II	06/19/97	08/07/97	01/09/98	12/08/99
Transportation Equipment Cleaning Effluent Guidelines	07/16/97	09/23/97	06/25/98	08/14/00
Centralized Waste Treatment Effluent Guideline	11/06/97	01/23/98	01/13/99 09/10/03	12/22/00
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

* See Appendix F for abbreviations.
NPRM= notice of proposed rulemaking
1 Proposed rule withdrawn August 18, 1999; EPA does not plan to issue a final rule.
2 Proposed rule withdrawn April 26, 2004; EPA does not plan to issue a final rule.
3 EPA has ceased action on this panel.
4 Proposed rule withdrawn December 31, 2003; OSHA does not plan to issue a final rule.
5 Integrated Mortgage Disclosures under the Real Estate Settlement Procedures Act (RESPA or Regulation X) and the Truth in Lending Act (TILA or Regulation Z).

Rule*	Date Convened	Date Completed	NPRM	Final Rule Published
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	
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
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[2]	07/16/01	10/12/01	06/24/02	
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

* See Appendix F for abbreviations.
NPRM= notice of proposed rulemaking
1 Proposed rule withdrawn August 18, 1999; EPA does not plan to issue a final rule.
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5 Integrated Mortgage Disclosures under the Real Estate Settlement Procedures Act (RESPA or Regulation X) and the Truth in Lending Act (TILA or Regulation Z).

Rule*	Date Convened	Date Completed	NPRM	Final Rule Published
Section 126 Petition (2005 CAIR Rule)	04/27/05	06/27/05	08/24/05	04/28/06
FIP for Regional Nox/So2 (2005 CAIR 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
Nonroad 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		
National Emission Standards for Hazardous Air Pollutants for Coal- and Oil-fired Electric Utility Steam Generating Units	10/27/10	03/02/11		
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		

* See Appendix F for abbreviations.
NPRM= notice of proposed rulemaking
1 Proposed rule withdrawn August 18, 1999; EPA does not plan to issue a final rule.
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3 EPA has ceased action on this panel.
4 Proposed rule withdrawn December 31, 2003; OSHA does not plan to issue a final rule.
5 Integrated Mortgage Disclosures under the Real Estate Settlement Procedures Act (RESPA or Regulation X) and the Truth in Lending Act (TILA or Regulation Z).

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		
Greenhouse Gas Emissions from Electric Utility Steam Generating Units[3]	06/09/11			
Control of Air Pollution from Motor Vehicles: Tier 3 Motor Vehicle Emission and Fuel Standards	08/04/11	10/14/11		
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			
Occupational Safety and Health Administration				
Tuberculosis[4]	09/10/96	11/12/96	10/17/97	
Safety and Health Program Rule	10/20/98	12/19/98		
Ergonomics Program Standard	03/02/99	04/30/99	11/23/99	11/14/00
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		

* See Appendix F for abbreviations.
NPRM= notice of proposed rulemaking
1 Proposed rule withdrawn August 18, 1999; EPA does not plan to issue a final rule.
2 Proposed rule withdrawn April 26, 2004; EPA does not plan to issue a final rule.
3 EPA has ceased action on this panel.
4 Proposed rule withdrawn December 31, 2003; OSHA does not plan to issue a final rule.
5 Integrated Mortgage Disclosures under the Real Estate Settlement Procedures Act (RESPA or Regulation X) and the Truth in Lending Act (TILA or Regulation Z).

Rule*	Date Convened	Date Completed	NPRM	Final Rule Published
Occupational Exposure to Hexavalent Chromium	01/30/04	04/20/04	10/04/04	02/28/06
Cranes and Derricks in Construction	08/18/06	10/17/06	10/09/08	08/09/10
Occupational Exposure to Beryllium	09/17/07	01/15/08		
Occupational Exposure to Diacetyl and Food Flavorings Containing Diacetyl	05/05/09	07/02/09		
Consumer Financial Protection Bureau				
Integrated Mortgage Disclosures under RESPA/TILA[5]	02/21/12	04/23/12	08/23/12	
Mortgage Servicing	04/09/12	06/11/12	09/17/12	
Residential Mortgage Loan Origination	05/09/12	07/12/12	09/07/12	

* See Appendix F for abbreviations.
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Appendix B
The Regulatory Flexibility Act

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

Congressional Findings and Declaration of Purpose

(a) The Congress finds and declares that —

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

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

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

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

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

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

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

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

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

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

Regulatory Flexibility Act

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

§ 601. Definitions

For purposes of this chapter —

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

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

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

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

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

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

(7) the term "collection of information" —

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

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

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

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

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

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

§ 602. Regulatory agenda

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

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

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

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

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

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

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

§ 603. Initial regulatory flexibility analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 604. Final regulatory flexibility analysis

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

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

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

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

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

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

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

(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 C
Executive Order 13272

Presidential Documents

Executive Order 13272 of August 13, 2002

The President

Proper Consideration of Small Entities in Agency Rulemaking

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

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

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

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

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

(c) may provide comment on draft rules to the agency that has proposed or intends to propose the rules and to the Office of Information and Regulatory Affairs of the Office of Management and Budget (OIRA).

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

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

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

(c) Give every appropriate consideration to any comments provided by Advocacy regarding a draft rule. Consistent with applicable law and appropriate protection of executive deliberations and legal privileges, an agency shall include, in any explanation or discussion accompanying publication in the **Federal Register** of a final rule, the agency's response to any written comments submitted by Advocacy on the proposed rule that preceded the

final rule; provided, however, that such inclusion is not required if the head of the agency certifies that the public interest is not served thereby.

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

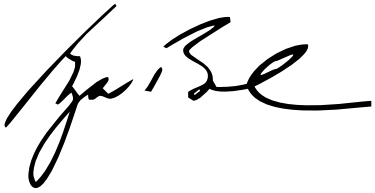
Sec. 4. *Definitions.* Terms defined in section 601 of title 5, United States Code, including the term ''agency,'' shall have the same meaning in this order.

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

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

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

Sec. 8. *Judicial Review.* This order is intended only to improve the internal management of the Federal Government. This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or equity, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.



THE WHITE HOUSE,
August 13, 2002.

Appendix D
Executive Order 13653 and Memorandum

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 E
Executive Order 13579

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 F
Executive Order 13610

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 G Abbreviations

A&E	architecture and engineering
ACUS	Administrative Conference of the United States
ADA	Americans with Disabilities Act
AIR	Aircraft Certification Service
ANPRM	advance notice of proposed rulemaking
APA	Administrative Procedure Act
APHIS	Animal and Plant Health Inspection Service
ARRA	American Recovery and Reinvestment Act
BASICs	Behavior Analysis and Safety Improvement Categories
BLM	Bureau of Land Management
CAIR	clean air interstate rule
CFPB	Consumer Financial Protection Bureau
CI	compression ignition
CISWI	Commercial and Industrial Solid Waste Incineration (rule)
CMS	Centers for Medicare and Medicaid Services
CSA	Comprehensive Safety Assessment Program
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
DRC	Democratic Republic of Congo
DSW	definition of solid waste
EBSA	Employee Benefits Security Administration
E.O.	Executive Order
EOP	Executive Office of the President
EPA	Environmental Protection Agency
EPCA	Energy Policy and Conservation Act
FCC	Federal Communications Commission
FIP	federal implementation plan
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
GHG	greenhouse gas
GHS	Globally Harmonized System (of classification and labeling of chemicals)
HHS	Department of Health and Human Services
HOS	hours of service

I2P2	injury and illness prevention programs
IBR	Incorporation by Reference
ILEC	incumbent local exchange carrier
IRFA	initial regulatory flexibility analysis
IRS	Internal Revenue Service
LDV/LDT	light-duty vehicles / light-duty trucks
LHWCA	Longshore and Harbor Workers Compensation Act
MHz	megahertz
MSHA	Mine Safety and Health Administration
MSO	Musculoskeletal Reporting rule
NAHB	National Association of Home Builders
NARA	National Archives and Records Administration
NESHAP	National Environmental Standards for Hazardous Air Pollutants
NHSM	nonhazardous secondary materials
NOAA	National Oceanic and Atmospheric Administration
NPRM	notice of proposed rulemaking
NSO	northern spotted owl
NSPS	New Source Performance Standards
NTTAA	National Technical Transfer Advancement Act
OIRA	Office of Information and Regulatory Affairs
OMB	Office of Management and Budget
OSHA	Occupational Safety and Health Administration
PFOS	perfluoroocytl sulfonates
P.L.	Public Law
QM	qualified mortgage
QRM	qualified residential mortgage
RESPA	Real Estate Settlement Procedures Act
RFA	Regulatory Flexibility Act
RIA	regulatory impact analysis
RICE	reciprocating internal combustion engines
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
SI	spark ignition
SMS	Safety Measurement System
SOP	standard operating procedure
State	Department of State
TILA	Truth in Lending Act
Treasury	Department of the Treasury
USCIS	United States Citizenship and Immigration Service
USDA	United States Department of Agriculture
UST	underground storage tanks
WWT	wastewater treatment tank