U.S. SMALL BUSINESS ADMINISTRATION

OFFICE OF ADVOCACY

REGULATION • RESEARCH • OUTREACH

Background Paper on the Office of Advocacy

2009 - 2016

The mission, activities, and accomplishments of the Office of Advocacy from 2009 to 2016

Release Date: October 2016

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.

The views expressed by Advocacy here do not necessarily reflect the position of the Administration or the SBA because Advocacy is an independent entity within the U.S. Small Business Administration.

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Chief Counsels for Advocacy

Milton D. Stewart, 1978–1981

Frank S. Swain, 1981–1989

Thomas P. Kerester, 1992–1993

Jere W. Glover, 1994–2001

Thomas M. Sullivan, 2002–2008

Winslow L. Sargeant, 2010–2015

Darryl L. DePriest, 2015–present

First Chief Counsel, Milton D. Stewart

From left to right: DePriest, Swain, Kerester, Glover, Sullivan, and Sargeant

Foreword

The Office of Advocacy takes great pride in presenting to its many stakeholders this *Background Paper on the Office of Advocacy: 2009 – 2016.* In preparation for the change in administrations that will follow the 2016 election, I directed Advocacy's staff to prepare this resource to help the new administration's transition team understand the mission, responsibilities, and activities of our office. It includes a history of Advocacy and extensive reference materials that make it the most comprehensive single publication on Advocacy ever published. Although the paper is designed to be of special use to the transition team and new staff, we are again making the entire paper available to the general public and posting it on our website. We are also continuing an Advocacy tradition of publicly releasing our transition paper before the election.

This document updates the last edition of the background paper, published in 2008. Much has happened since then that will be covered in this report, including important new legislation, Executive Orders, and special initiatives. Advocacy has accomplished a lot in the last eight years, and in the pages that follow we have summarized these accomplishments. The report is organized so that its various chapters can be used as freestanding reference sources for specific areas such as Advocacy history, economic research, or regulatory issues. It is exhaustively documented and includes 21 appendices with reference materials.

Since 2009, Advocacy has reviewed annually from 1200 to 1500 public regulatory notices. Through its electronic e-notify system, Advocacy also annually receives from agencies about 600 notifications of regulatory activity. More than 500 regulatory proposals are annually reviewed in confidential interagency consultations prior to their publication. From FY 2009 through FY 2016, Advocacy hosted 201 regulatory roundtables on a wide variety of issues at which public stakeholders and agency officials could share information in an informal setting. During the same period, Advocacy submitted 256 formal public comment letters to 59 agencies throughout government. Advocacy also provided Regulatory Flexibility Act training to more than 1,100 policymakers and regulatory development officials in these agencies. From FY 2009 through FY 2016, the office's regulatory advocacy resulted in one-time cost savings of nearly $46 billion, with annually recurring savings of nearly $25 billion.

Also since 2009, Advocacy published almost 200 research or data products, and it introduced a variety of new products in more user-friendly formats. Advocacy presented testimony before 14 congressional hearings. It sponsored six major conferences or symposia, and the electronic circulation of our monthly

newsletter, *The Small Business Advocate,* grew to 37,000. Advocacy's regional advocates participated in nearly 3,000 outreach events and brought Advocacy's work to communities throughout the country, including visits by Advocacy staff to all 50 states. Advocacy devoted resources to two special initiatives, one on innovation and the other on international trade, and the office now formally participates in U.S. trade negotiations, using its regulatory experience to advance the interests of American small businesses and reduce regulatory trade barriers to large new markets.

Advocacy's whole team made this record possible, and I am very proud of the work that they do. In the last eight years, the office has seen the retirement of a number of long-time professional staff members, but we have been fortunate in recruiting many exceptionally qualified professionals to fill positions opened by these retirements. We now have a great mix of young, old, and in between, ranging from new hires to staff with more than 35 years of service. The new look of some Advocacy products, and our increasing use of social media, reflect the fresh ideas that Advocacy's changing staff have brought to our mission.

I want to especially thank my predecessor as Chief Counsel, Dr. Winslow Sargeant, for his outstanding leadership of Advocacy through most of the period covered by this transition paper.

Dr. Sargeant's accomplishments were many. Of special importance was the reinvigoration of our Office of Economic Research with the hiring of a new Chief Economist and several exceptional economists. The ten regional advocates that he hired, and who are all still on our team, have been outstanding and extended the reach of Advocacy across the United States. Dr. Sargeant's private sector business experience gave him special qualifications to guide Advocacy's aforementioned innovation initiative. Winslow left Advocacy in great shape, and I have very much appreciated his support and good counsel.

In closing, I would like to thank Advocacy's extended family of stakeholders for all the support that they provide to us. We could not be successful without the daily help of our friends in small business organizations and trade associations, congressional offices, and executive branch agencies. We pledge to them that Advocacy will do everything possible to ensure a smooth transition.

Darryl L. DePriest
Chief Counsel for Advocacy

October 31, 2016

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Chapter 1
Introduction

"The Office of Advocacy will, if we are successful, be a key point of effective spokesmanship and policy leverage for small business within the executive branch of the Government….There is surely challenge enough here for anyone with an appetite for hard work and a zest for entrepreneurship of ideas and program policy innovation."

- Milton D. Stewart, first Chief Counsel for Advocacy (1978 – 1981)[1]

At the end of each administration, Advocacy compiles a document to help the new transition team – whoever the election winner might be – understand the mission, responsibilities, and activities of the office. This *Background Paper on the Office of Advocacy: 2009 – 2016* includes a history of the office and a wealth of reference materials that make it the most comprehensive single publication on Advocacy's mission, history, and activities ever published.[2]

The primary audience for this document is the team that will be working on transition issues and other personnel who may be new to Advocacy and the Small Business Administration (SBA). However, Advocacy is proud to continue the tradition of making this document available to its wide range of stakeholders and the general public through its posting on the office's website. Advocacy believes strongly that good public policy requires openness, transparency, and accessible information.

Since its inception, Advocacy has taken its direction from its small entity stakeholders. Advocacy actively solicits input from small businesses and small business trade associations; members of Congress and their staffs; officials in executive branch agencies throughout the federal government, including the White House; state and local governments; economists and other researchers; organizations supporting

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[1] Hearing before the Senate Select Committee on Small Business, "Nomination of Milton Stewart to be Chief Counsel for Advocacy of the Small Business Administration;" April 14, 1978; p. 362.

[2] Previous editions of this paper are available online. See *Background Paper on the Office of Advocacy: 1994 – 2000* (November 1, 2000), webarchive.loc.gov/all/20100616132947/www.sba.gov/advo/advo_backgr00.html; and *Background Paper on the Office of Advocacy: 2001 – 2008* (October 24, 2008), webarchive.loc.gov/all/20100616132855/www.sba.gov/advo/backgr08.pdf.

women, minority, and veteran entrepreneurship; the nationwide network of SBA resource partners; and, of course, some 29 million small businesses. All of these are Advocacy's "customers." Advocacy strives in all of its work to listen to its customers and, consistent with its statutory mission, to provide them with the best possible economic research, regulatory advocacy, and counsel on small business issues.

Advocacy Background and Mission

Executive Summary. This section surveys the history and development of Advocacy and its mission. The main points can be summarized as follows:

- There was early recognition by Congress of the importance of competition to our economy, and that small business is a major source of competition, innovation, technological change, and productivity growth. Small business is also the vehicle by which millions enter the economic and social mainstream of American society.
- The vital importance of small business and competition to our economy and the need for policies that support the development, growth, and health of small business have been restated over and over again in the legislation and executive orders that have defined Advocacy's mission. These findings form an overarching theme throughout Advocacy's development and inform everything that the office does.
- Public Law 94-305, approved in July 1976, remains the basic legislative charter for Advocacy today. It sets out core duties relating to economic research, the representation of small business interests before government agencies, and communication with stakeholders. It further provides the Chief Counsel with a variety of tools to perform these duties with flexibility and independence.
- Some elements of Advocacy's current responsibilities have developed incrementally. For example, Advocacy's core Public Law 94-305 mission to represent small business interests before government agencies has antecedents in the 1970 Executive Order 11518 and the 1974 Public Law 93-386. And this same important duty was strengthened by the Regulatory Flexibility Act of 1980, the Small Business Regulatory Enforcement Fairness Act of 1996, the 2002 Executive Order 13272, and the Small Business Jobs Act of 2010.
- Advocacy has often been called upon to perform duties not specified in Public Law 94-305, but still comporting with its purposes. These have included extensive support of all three White House Conferences on Small Business, resulting in landmark small business legislation still in force today. Similarly, the White House delegated to Advocacy responsibility for the President's annual *State of Small Business* report from it first edition in 1982 until its legislative termination and last report in 2000.
- Each step in the development of Advocacy's office and mission was informed by and accomplished only with the strong support of the small business community itself, including numerous business organizations and trade associations, and countless individual small firms who made their needs known to their elected representatives.

The mission of Advocacy. Advocacy's mission is to be an independent voice for small businesses inside the government in the formulation of public policy, and to encourage policies that support their start-up, development, and growth. We will elaborate on the "nuts and bolts" of how Advocacy carries

out that mission in succeeding chapters, but here we will discuss the origination and importance of this mission.

In a collection of studies on the economic contributions of small business that was published with Advocacy support in 1999, entitled *Are Small Firms Important?- Their Role and Impact*,[3] the editor summarized two key findings in the introductory essay:

- Small firms are an integral part of the renewal process that pervades and defines market economies. New and small firms play a crucial role in experimentation and innovation, which lead to technological change and productivity growth. *In short, small firms are about change and competition because they change market structure.* The U.S. economy is a dynamic organization always in the process of becoming, not an established one that has arrived.
- Small firms are the essential mechanism by which millions enter the economic and social mainstream of American society. Small business is the vehicle by which millions access the American dream by creating opportunities for women, minorities, and immigrants.…The American economy is a democratic system, as well as an economic system, that invites change and participation.[4]

Small business has been the bedrock of the U.S. economy throughout its history. Small business is the source of competition, and competition fosters innovation and keeps capitalism efficient. The U.S. has long been committed to preserving competition, and preserving competition means that the birth and growth of small businesses should be encouraged and that anticompetitive practices or barriers that harm small business development and growth should be discouraged.

Early federal efforts assisting smaller firms. The national commitment to healthy competition is reflected in a series of laws to outlaw anticompetitive practices, enacted as early as 1890 following a period of rapid industrialization, urbanization, and economic concentration. These include the Sherman Antitrust Act (1890), the Clayton Act (1914), the Federal Trade Commission Act (1914), and the Robinson-Patman Act (1936). These laws focus on defining and punishing anticompetitive practices.

With the onset of the Great Depression, followed directly by World War II, Congress recognized that, beyond proscription, there was a role for government to take the initiative to address problems that impeded small firm creation and growth. These problems were not necessarily the result of illegal anticompetitive conduct, but they nevertheless were real and were not addressed by the marketplace itself.

The free market economy provides an extraordinarily fertile "seedbed" for small businesses to start, grow, and thrive; but market imperfections often weigh disproportionately on smaller firms. These market imperfections include such classic problems as poor market information, unequal access to financing, and unfair trade practices. But they can also result from unwarranted or excessive

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[3] Zoltan J. Acs, editor (1999). *Are Small Firms Important? – Their Role and Impact.* Boston: Kluwer Academic Publishers.

[4] Ibid., pp. 16-17.

government regulation, inequitable taxation, paperwork burdens imposed by all levels of government, and other policies that act as barriers to small business formation and growth.

Early examples of a more active role for government in addressing market imperfections were focused on finance. As early as 1934, responding to the economic turmoil of the Great Depression, the Reconstruction Finance Corporation (RFC) was authorized to lend money directly, or with the participation of private sector lenders, to firms unable to obtain credit elsewhere on reasonable terms. The RFC also made loans to both business and other victims of disasters.

The Small Business Act of 1942 created the Smaller War Plants Corporation (SWPC) to assist small firms in the vital role they played as part of the defense industrial base during World War II. The SWPC was a temporary wartime agency; when it was terminated in 1946, its functions reverted to the RFC and to an Office of Small Business within the Department of Commerce. In 1944, the Servicemen's Readjustment Act gave the Veterans Administration authority to guarantee loans to veterans for the purpose of starting or expanding a business. With the Korean War, another wartime agency, the Small Defense Plants Administration (SDPA), was established in 1950. The SDPA worked closely with the RFC, the former primarily providing procurement and counseling services, while the latter retained financial services.[5]

The Small Business Act. President Eisenhower signed the Small Business Act of 1953 in July of that year.[6] It clearly recognized the keystone importance of competition to the U.S. economy and the critical role small business plays in ensuring that competition. The Small Business Act created the SBA in which were centralized a variety of programs and services aimed directly at smaller firms. Many of these programs and services had resided in SBA's various predecessor agencies, including notably the RFC and the SDPA (which were terminated) and in the Department of Commerce; but now for the first time a single agency had for its primary mission the promotion and protection of small business. The Small Business Act's preamble includes an eloquent statement of congressional intent:

> The essence of the American economic system of private enterprise is free competition. Only through full and free competition can free markets, free entry into business, and opportunities for the expression and growth of personal initiative and individual judgment be assured. The preservation and expansion of such competition is basic not only to the economic well-being but to the security of this Nation. Such security and well-being cannot be realized unless the actual and potential capacity of small business is encouraged and developed. It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect insofar as is possible the

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[5] For more information on SBA's predecessor agencies, see: Deane Carson, editor (1973), *The Vital Majority – Small Business in the American Economy.* Washington: U.S. Government Printing Office.

[6] The Small Business Act was originally enacted as Title II of Public Law 83-163 (July 30, 1953), 67 Stat. 232. This law terminated the prior Reconstruction Finance Corporation and created the SBA. Its Title II was made a separate Act by Public Law 85-536 (July 18, 1958), 72 Stat. 384, 15 U.S.C. § 631 *et seq.*

> interests of small business concerns in order to preserve free competitive enterprise … and to maintain and strengthen the overall economy of the Nation.[7]

Executive Order 11518. With the creation of SBA in 1953, small firms now had a federal agency whose exclusive mission was to provide them with a variety of services and assistance. But a significant unmet need was becoming apparent as new laws and regulations governed more aspects of American life. Small firms' vital interests were being profoundly affected by – but rarely represented in – the legislative, regulatory, and administrative processes of government.

In the 1960s, business organizations and trade associations increased their attention to the problems small businesses faced with government, especially in comparison with larger firms that could afford their own representatives in Washington. This growing concern for the health of small business was embraced by President Nixon, who in March 1970 signed Executive Order 11518, "providing for the increased representation of the interests of small business concerns before departments and agencies of the United States Government."[8] The preamble to Executive Order 11518 noted that:

- …the existence of a strong and healthy free enterprise system is directly related to the well being and competitive strength of small business concerns and their opportunities for free entry into business, growth, and expansion;
- …the departments and agencies of the United States Government exercise, through their regulatory and other programs and practices, a significant influence on the well being and competitive strength of business concerns…and their opportunities for free entry into business, growth and expansion;
- …the policy of the Executive Branch of the United States Government continues to be, as was described by President Dwight D. Eisenhower, "to strive to eliminate obstacles to the growth of small business;" and
- …the Small Business Administration is the agency within the Executive Branch of the United States Government especially responsible for and with an established program of advocacy in matters relating to small business…[9]

The executive order directed that the SBA, "…as the spokesman for and advocate of the small business community, shall advise and counsel small business concerns in their dealings with the departments and agencies of the United States Government to the end that the views of small business concerns will be fully heard, their rights fully protected, and their valid interests fully advanced."[10] The order further provided that agencies:

> …shall call upon the Small Business Administration for advice, guidance, and assistance when considering matters which can be construed as materially affecting the well being or competitive

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[7] 15 U.S.C. § 631(a).

[8] Executive Order 11518, 35 Fed. Reg. 4939 (March 20, 1970).

[9] Ibid.

[10] Ibid., § 1.

strength of small business concerns or their opportunities for free entry into business, growth, or expansion. In taking action on such matters, these departments and agencies shall act in a manner calculated to advance the valid interests of small business concerns.[11]

Executive Order 11518 also authorized SBA's active participation in investigations, hearings, and other proceedings before departments and agencies, and to ensure that the views of small business were presented on "matters affecting the well being or competitive strength of small business concerns."[12]

Public Law 93-386. In 1973, several business organizations, including notably the Smaller Business Association of New England (SBANE), began an effort to strengthen SBA's advocacy role and to have it assigned to a special office dedicated for that purpose. It was Rep. Margaret Heckler (R–Mass.) who, with the endorsement of former Congressman and then-SBA Administrator Thomas S. Kleppe, drafted legislation to establish the first statutory Chief Counsel for Advocacy. This legislation was adopted as part of a regular SBA authorization bill then under consideration; and in August 1974, President Ford signed it as Public Law 93-386.[13]

The new Chief Counsel for Advocacy was to be named by the SBA Administrator, and the statute specified the position's duties in representing small business interests within the federal government. Among these duties, the Chief Counsel was to:

- develop proposals for changes in the policies and activities of any agency…and communicate such proposals to the appropriate Federal agencies;[14] and

- represent the views and interests of small businesses before other Federal agencies whose policies and activities may affect small businesses.[15]

Both Executive Order 11518 and Public Law 93-386 were important milestones in institutionalizing the mission of small business advocacy within the federal government. Both recognized the need for and importance of such advocacy, and both were championed by private sector business organizations. But one more major step remained to create the modern Office of Advocacy, which has now endured for 40 years.

Public Law 94-305. Although Public Law 93-386 had established a Chief Counsel for Advocacy within SBA, it did not explicitly provide for staffing or administrative powers for this function. While SBA

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[11] Ibid., § 2.

[12] Ibid., § 3.

[13] Public Law 93-386, Small Business Amendments of 1974 (August 23, 1974), 88 Stat. 742. Section 10 established the position and enumerated the duties of the Chief Counsel for Advocacy.

[14] § 5(e)(3) of the Small Business Act, as amended by Public Law 93-386, subsequently recodified as § 203(3) of Public Law 94-305 (June 4, 1976), 15 U.S.C. § 634 c(a)(3).

[15] § 5(e)(4) of the Small Business Act, as amended by Public Law 93-386, subsequently recodified as § 203(4) of Public Law 94-305 (June 4, 1976), 15 U.S.C. § 634c(a)(4).

administrators had been supportive and did provide some staffing for Advocacy, there were questions about where the new office should fit in SBA's organizational structure, and the effectiveness of the new position remained limited.[16] By 1976, it was apparent that the role of the Chief Counsel should be clarified and strengthened, and Congress was again encouraged by private sector business organizations to consider new legislation. At a hearing conducted by the Senate Select Committee on Small Business, chaired by Sen. Gaylord Nelson (D-Wisc.), John Lewis, executive vice president of the National Small Business Association, addressed the need for a small business advocate within government:

> The question will occur, why do not the National Small Business Association or other small business associations do the job? Why look for a Government agency? The National Small Business Association does effectively represent the interests of small business, but neither it nor any other small business organization can get behind the closed doors of Government before decisions are made…Even if the small business organizations of the country were organized into one cohesive and powerful force, advocacy within Government and by Government would still be essential to do the infighting for small business.[17]

At the same hearing, James D. "Mike" McKevitt, counsel for the National Federation of Independent Business (NFIB), expressed strong support for a strengthened Office of Advocacy:

> NFIB believes that Advocacy will be the watchword of the future and that the Small Business Administration has no program that will be more important to the small business community…Advocacy should be one of the primary functions of the Agency and it should be expanded and given the power necessary to represent the small business community within the Federal Government and before Congress…[The Chief Counsel for Advocacy] must have the freedom to speak out on issues of importance and to represent the interests of small business within the Administration and before Congress.[18]

As the Senate Small Business Committee hearing was being conducted, a major SBA reauthorization bill had just gone into conference to resolve differences between the House and Senate versions of the legislation. The final bill agreed upon included a title that reflected many of the recommendations made at this hearing and that became the Office of Advocacy's basic charter when Public Law 94-305 was signed by President Ford on June 4, 1976.[19]

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[16] In 1976, the Office of Advocacy employed twelve, including the Chief Counsel. SBA's advisory councils were under Advocacy, and a plan was under consideration to place Advocacy under an Assistant Administrator also responsible for public affairs and communications. (Testimony of SBA Administrator Mitchell P. Kobelinski, Hearing before the Senate Select Committee on Small Business, "Oversight of the Small Business Administration: The Office of the Chief Counsel for Advocacy and How it Can be Strengthened" (March 29, 1976), pp. 10 and 27.)

[17] Ibid., p. 82.

[18] Ibid., pp. 121-122.

[19] Title II, Public Law 94-305 (June 4, 1976), 15 § U.S.C. 634a *et seq.* See Appendix A.

The new Office of Advocacy. Public Law 94-305 provided the basic legislative framework under which Advocacy operates today. It significantly upgraded the position and duties of the Chief Counsel for Advocacy, and it provided for the tools to perform these duties with flexibility and independence.

Presidential appointment with Senate confirmation. The Chief Counsel was now to be appointed from civilian life by the President and confirmed by the Senate.[20] In 1976, the only other Senate-confirmed presidential appointee at SBA was the Administrator; and subsequently the Congress has conferred this status on only two other positions at SBA, the Inspector General in 1978,[21] and the Deputy Administrator in 1990.[22]

Public law hiring authority. In addition to direct appointment by the President, Public Law 94-305 gave the Chief Counsel special hiring authorities outside of normal civil service procedures to ensure that the Advocacy staff has the skills to represent small business on any public policy issue.[23] This flexibility allows the Chief Counsel to rapidly change the professional mix of the staff as dictated by trends in the economy or changes in regulatory or legislative priorities, as well as to consult with outside experts and authorities. Although the use of this "public law hiring authority" was at first in consultation with the Administrator, the Congress explicitly removed the consultative requirement in 1994, giving the Chief Counsel full independence in hiring decisions.[24]

No prior clearance on Advocacy work products. Public Law 94-305 authorized the Chief Counsel to prepare and publish such reports as deemed appropriate. Further, it stipulates that such reports "shall not be submitted to the Office of Management and Budget or to any other Federal agency or executive department for any purpose prior to transmittal to the Congress and the President."[25] Accordingly, the Office of Advocacy does not circulate its work products for clearance with the SBA Administrator, the Office of Management and Budget, or any other federal agency prior to publication. These include testimony, reports to Congress, economic research, comments on regulatory proposals, comments on legislation, publications, press releases, and website content.

Assistance from government agencies. Public Law 94-305 provided that "Each department, agency, and instrumentality of the Federal Government is authorized and directed to furnish to the Chief Counsel for Advocacy such reports and other information as he deems necessary to carry out his functions…"[26]

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[20] 15 U.S.C. § 634a.

[21] Public Law 95-452, Inspector General Act of 1978 (October 12, 1978), 92 Stat. 1101, 5 U.S.C. App.

[22] § 222, Public Law 101-574, Small Business Administration Reauthorization and Amendments Act of 1990 (November 15, 1990), 104 Stat. 2823, 15 U.S.C. § 633(b)(1).

[23] 15 U.S.C. § 634d.

[24] § 610(1), Public Law 103-403, Small Business Administration Reauthorization and Amendments Act of 1994 (October 22, 1994), 108 Stat. 4204, 15 U.S.C. § 634d.

[25] 15 U.S.C. § 634f.

[26] 15 U.S.C. § 634e.

Duties of the Chief Counsel for Advocacy. Public Law 94-305 enumerated the duties of the upgraded Chief Counsel for Advocacy in two sections. One restated the exact duties specified in the prior Public Law 93-386.[27] These duties related primarily to communicating with small businesses and organizations representing them and, importantly, to representing the views and interests of small businesses before other federal agencies whose policies and activities may affect them. We will look more closely at these aspects of Advocacy's work in Chapters 3, 4, and 5 of this paper.

The other section in Public Law 94-305 relating to the Chief Counsel's duties was entirely new.[28] It authorized a major economic research component in Advocacy's activities, a function that had not been part of the previous Chief Counsel's duties.[29] The legislation specified a wide range of topics for examination, including the role and contributions of small business in the American economy, the direct costs and other effects of government regulation on small business, the impact of the tax structure on small business, the ability of financial markets and institutions to meet small business credit needs, the financial and other needs of minority-owned enterprises, the reasons for small business successes and failures, and other specified topics.[30] We will look at the economic research activities of today's Advocacy in Chapter 2.

Additional duties. Public Law 94-305 has remained Advocacy's statutory charter for 40 years now, and it has proved remarkably durable through numerous changes in the leadership of both the executive and legislative branches of government. But even though relatively few technical changes have been made to Advocacy's basic charter over the years,[31] a number of important additional responsibilities have still accrued to the office. The first Chief Counsel of the new Office of Advocacy, Milton D. Stewart, was confirmed by the Senate in July 1978. Even as he was organizing his new office, the first of these new duties arrived.

White House Conference on Small Business. Executive Order 12061, signed by President Carter in May 1978, created a White House Commission on Small Business whose principal duty was to organize the first White House Conference on Small Business.[32] The Conference was preceded by state and regional conferences across the country in which more than 25,000 participants met to discuss and debate issues and problems of concern to the small business community. They developed recommendations on a wide variety of topics, and elected from their own numbers 1,682 delegates to go to Washington in January

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[27] § 203, Public Law 94-305, 15 U.S.C. § 634c, restated those duties previously set forth in § 5(e) of the Small Business Act, which was repealed by § 208 of Public Law 94-305.

[28] § 202, Public Law 94-305, 15 U.S.C. § 634b.

[29] SBA did have a Chief Economist and an Office of Economic Research and Statistics prior to Public Law 94-305, but these functions were not under the direction of the Chief Counsel for Advocacy. Also, SBA's economic research activities were ancillary to agency program administration.

[30] See Appendix A for the full statutory text.

[31] See Chapter 6 for a listing of these.

[32] Executive Order 12061, 43 Fed. Reg. 21865 (May 18, 1978).

1980 to draft an "Agenda for Action" comprising 60 recommendations for the President and the Congress to consider.[33]

The new Office of Advocacy was from its beginning deeply involved in supporting this effort. The Chief Counsel acted as counsel to the conference. Advocacy prepared issue papers and other background materials for the use of delegates in their deliberations, provided logistical support and technical expertise at the conference itself, assisted in the preparation of its final report, and played an important role in advancing its action agenda both before Congress and within the executive branch for years to come.

The enduring importance of the 1980 White House Conference on Small Business is difficult to overstate. Its recommendations led directly to the enactment of key small business legislation during both the Carter and Reagan administrations, including notably the Regulatory Flexibility Act of 1980,[34] the Equal Access to Justice Act of 1980,[35] the Paperwork Reduction Act of 1980,[36] the Prompt Payment Act of 1982,[37] and the Small Business Innovation Development Act of 1982.[38] All of these laws have been amended and strengthened over the years. Many of the top conference recommendations related to tax reform, and a number of these were also enacted in 1981 and 1982, including reductions in the personal and corporate tax rates, estate tax relief, and simplified and increased depreciation provisions.[39]

That so much landmark legislation could be approved in such a short time span shows what can be done when the small business community itself speaks with one voice, is supported by informed policymakers within government (keeping them informed is an important role for Advocacy), and has the legislative leadership of key members of Congress.[40] More than two-thirds of the recommendations of the 1980 White House Conference on Small Business were adopted in whole or in part, either through legislative

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[33] *America's Small Business Economy: Agenda for Action;* Report to the President by the White House Commission on Small Business; April, 1980. One measure of the intense interest this conference elicited was the fact that, in addition to the almost 1,700 elected delegates who came to Washington, nearly 3,600 other participants and observers attended.

[34] Public Law 96-354 (September 19, 1980), 5 U.S.C. § 601 *et seq.*

[35] Public Law 96-481 (October, 21, 1980), 5 U.S.C. § 504.

[36] Public Law 96-511 (December 11, 1980), 5 U.S.C. § 3501 *et seq.*

[37] Public Law 97-177 (May 21, 1982), 31 U.S.C. § 3901 *et seq.*

[38] Public Law 97-219 (July 22, 1982), 15 U.S.C. § 638.

[39] These provisions are to be found in the Economic Recovery Tax Act of 1981 (Public Law 97-34 (July 13, 1981), 95 Stat. 172) and in the Tax Equity and Fiscal Responsibility Act of 1982 (Public Law 97-248 (September 3, 1982), 96 Stat. 324).

[40] Many Members of Congress deserve special recognition for their efforts to enact recommendations of the 1980 White House Conference on Small Business, but perhaps none more so than the Chairmen and Ranking Members of the House and Senate Committees on Small Business during this period: Rep. Neal Smith (D-Iowa), Rep. Silvio Conte (R-Mass.), Rep. Parren Mitchell (D-Md.), Rep. Joseph McDade (R.-Pa.), Sen. Gaylord Nelson (D-Wisc.), and Sen. Lowell Weicker (R-Conn.).

or administrative action.[41] This watershed event and the action agenda it produced could not have been as successful as they were without the full engagement and support of Advocacy. Similar support was provided in the subsequent White House Conferences on Small Business held in 1986 and 1995.

The State of Small Business. Public Law 96-302 included a title designated the Small Business Economic Policy Act of 1980.[42] Its "Declaration of Small Business Economic Policy" reiterated the importance of small business for "the purpose of preserving and promoting a competitive free enterprise economic system" and stated that the federal government must

> …foster the economic interests of small businesses; insure a competitive economic climate conducive to the development, growth and expansion of small businesses; establish incentives to assure that adequate capital and other resources at competitive prices are available to small businesses; reduce the concentration of economic resources and expand competition; and provide an opportunity for entrepreneurship, inventiveness, and the creation and growth of small businesses.[43]

Importantly for Advocacy, the Small Business Economic Policy Act of 1980 required the President to transmit to Congress an annual "Report on Small Business and Competition," which was popularly known as *The State of Small Business*.[44] This report included a wide variety of information concerning the role of small firms in the economy; economic trends that affected the small business sector and competition; the composition of the small business sector, including data on firms owned by minorities and women; the effects on small business and competition of various government policies, programs, activities and regulations; procurement data; and other information.

Although Advocacy was not mentioned in the Economic Policy Act itself, from the first *State of Small Business* in 1982, the White House delegated to Advocacy the responsibility for the preparation of this report. *The State of Small Business* became Advocacy's largest and most anticipated regular research product; it had a wide circulation and provided vital information to policymakers both in and out of government. The statutory requirement for the President's "Report on Small Business and Competition" was terminated by the Federal Reports Elimination and Sunset Act of 1995,[45] which took effect in 2000, the final year in the series. The Chief Counsel elected to use his discretionary authority to continue the publication of a similar annual report, *The Small Business Economy,* whose first edition was for the year

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[41] House Report 99-1036 (Summary of Activities, 99th Congress, House Committee on Small Business; January 2, 1987), p. 450. Unfortunately, one recommendation that was not adopted was that Advocacy's budget should be not less than five percent of SBA's overall salary and expense budget.

[42] Title III, Public Law 96-302 (July 2, 1980), 94 Stat. 848, 15 U.S.C. §§ 631a, 631b.

[43] 15 U.S.C. § 631a(a).

[44] 15 U.S.C. § 631b.

[45] § 3003, Public Law 104-66 (December 21, 1995), 109 Stat. 734, 31 U.S.C. § 1113 note. *See also*, House Document 103-7, A List of Reports Pursuant to Clause 2, Rule III of the Rules of the House of Representatives (January 5, 1993).

2001. The former report from the President to the Congress became an Advocacy report to the President and the Congress. Publication of this report continued until 2012, when much of the information it included was being published in new Advocacy products and, importantly, was posted on Advocacy's website for easier stakeholder access and more timely updating. More information on these economic research and data products will be presented in Chapter 2.

Equal Access to Justice Act. Public Law 96-481, the Equal Access to Justice Act of 1980 (EAJA),[46] as amended, is a federal fee shifting statute that provides for the award of attorney fees and other expenses to eligible individuals and small entities that are parties to litigation against the government. An eligible party may receive an award when it prevails over the government, unless the government's position was "substantially justified" or special circumstances make an award unjust. It was intended to encourage those who had a good case in a dispute with a government agency to pursue their case without the fear that they would bear an unreasonable financial burden even if they did win. It was also intended to act as a disincentive for agencies to initiate adversarial actions of questionable merit. The Chairman of the Administrative Conference of the United States was required to submit an annual report to Congress on various matters relating to the implementation of EAJA, after consultation with the Chief Counsel for Advocacy. This function ended for Advocacy when this report was terminated by the Federal Reports Elimination and Sunset Act of 1995.[47] However, Advocacy continues to maintain a close working relationship with the Administrative Conference.

Other new initiatives. As we have seen, the new Office of Advocacy was from its inception given a variety of new tasks other than those specifically referenced in its standing charter, Public Law 94-305. Advocacy also actively responded to new areas of interest such as women's business advocacy. The Chief Counsel had had a designated specialist in women's business enterprise issues, but this function was upgraded with the establishment within Advocacy of an Office of Women in Business in response to the 1978 Executive Order 12050 (Establishing a National Advisory Committee for Women)[48] and its 1979 successor, Executive Order 12135 (The President's Advisory Committee for Women).[49] Both orders promoted equality for women in all aspects of American life, including full participation in the economy. An Interagency Committee on Women's Business Enterprise, also originally headquartered at Advocacy, coordinated the efforts of other departments and agencies in this area.[50]

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[46] 5 U.S.C. § 504.

[47] § 3003, Public Law 104-66 (December 21, 1995), 109 Stat. 734, 31 U.S.C. § 1113 note. *See also*, House Document 103-7, A List of Reports Pursuant to Clause 2, Rule III of the Rules of the House of Representatives (January 5, 1993).

[48] Executive Order 12050, 43 Fed. Reg. 14431 (April 4, 1978).

[49] Executive Order 12135, 44 Fed. Reg. 27639 (May 9, 1979).

[50] House Report 96-1542 (Summary of Activities, 96th Congress, House Committee on Small Business; December 29, 1980), p. 242.

Similarly, the Chief Counsel had a designated specialist in veterans business advocacy; and in May 1982, plans were announced to create an upgraded Office of Veterans Business Enterprise within Advocacy.[51] An SBA reorganization plan subsequently transferred both the Office of Veterans Business Enterprise and the Office of Women in Business out of Advocacy and into a new SBA Office of Associate Deputy Administrator for Special Programs.[52] Although the forerunners of both SBA's current Office of Women's Business Ownership and its Office of Veterans Business Development began in Advocacy, each appropriately received its own legislative charter later.[53]

The Regulatory Flexibility Act. Perhaps no other single law after Advocacy's basic charter has had more influence on the office's mission and activities than the Regulatory Flexibility Act (RFA).[54] We will return to a more detailed discussion of the RFA in Chapter 3, but because of its importance in Advocacy's work, a few introductory remarks are in order here. Enacted in 1980, 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. It arose from years of frustration with ever-increasing federal regulation that often had disproportionate adverse consequences for large numbers of smaller entities. Jim Morrison, a congressional staff member for both the House and Senate Small Business Committees who worked on the original legislation, recalled that:

> New agencies had been given sweeping grants of authority to address national concerns like the environment, worker safety, and pension security. Older agencies had been handed new mandates. Coordination and guidance on how to regulate were lacking. It was a regulatory Wild West. Congress was recoiling from thunderous protests by regulated businesses, communities, and nonprofit organizations.[55]

Often, agencies can achieve their statutory or other public policy objectives with a more focused and informed regulatory approach, rather than the imposition of top-down, one-size-fits-all rules.[56] One of the top five recommendations of the 1980 White House Conference on Small Business included the

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[51] *Advocacy Notes;* June, 15, 1982.

[52] *Advocacy Notes;* August 15, 1982.

[53] SBA's Office of Women's Business Ownership was authorized by § 412, Public Law 103-403 (October 22, 1994), 108 Stat. 4193, 15 U.S.C. § 656(g). SBA's Office of Veterans Business Development was authorized by §201(b)(2), Public Law 106-50 (August 17, 1999), 113 Stat. 235, 15 U.S.C. § 657b.

[54] Public Law 96-354 (September 19, 1980), 5 U.S.C. § 601 *et seq.* See Appendix B.

[55] From "The RFA at 25: Some Reflections," *The Small Business Advocate,* September 2005. This special edition of Advocacy's monthly newsletter, which commemorated the 25th anniversary of the Regulatory Flexibility Act, is reprinted in its entirety in Appendix S.

[56] Advocacy has sponsored significant research relating to regulation and its disproportionate burden on small business, dating back to 1980. Information on these economic research studies can be accessed on Advocacy's website at www.sba.gov/category/advocacy-navigation-structure/research-and-statistics/other-topics and webarchive.loc.gov/all/20100617185001/www.sba.gov/advo/research/regulation.html for older archived studies.

sunset review and economic impact analysis of regulations, and RFA legislation incorporating these features moved swiftly through Congress after the Conference.[57]

The RFA directed agencies to analyze the impact of their regulatory actions and to review existing rules, planned regulatory actions, and actual proposed rules for their impacts on small entities in particular. Depending on a proposed rule's expected impact, agencies were required by the RFA to certify that there would not be a significant economic impact on a substantial number of small entities, or to prepare an initial regulatory flexibility analysis (IRFA) if such an impact was expected. A final regulatory flexibility analysis (FRFA) was also required for final rules with significant impacts.

The Office of Advocacy was from the beginning closely involved with this new regulatory review process. Agencies were required to transmit to the Chief Counsel their regulatory agendas,[58] their initial regulatory flexibility analyses,[59] and their certifications of rules without significant effects.[60] In addition, the Chief Counsel was tasked to report annually to the President and the Congress on agency compliance with the RFA,[61] and was authorized to appear as *amicus curiae* in any action brought in a court of the United States to review a rule.[62] Unfortunately, the original 1980 RFA legislation did not provide for judicial review of agency RFA compliance.

The Small Business Regulatory Enforcement Fairness Act. After the enactment of the RFA, Advocacy monitored agency compliance with its provisions and reported annually to the President and the Congress on its findings. It soon became evident that the law was not strong enough. Some agencies made good faith - even exemplary - efforts to comply with the RFA; they considered the effects of their proposals on small entities, and worked with them to craft better rules. Other agencies used elastic interpretations of the law's application to exempt most of their rules from RFA coverage or they made cursory, boilerplate certifications and analyses. Still others completely ignored the RFA. It was difficult to change longstanding regulatory cultures at some agencies; and in the absence of judicial review, efforts to achieve RFA compliance met with limited success.

One of the top ten recommendations of the 1986 White House Conference on Small Business called for RFA judicial review for all agencies.[63] But a new act of Congress would be required for that, and consensus remained elusive. Evidence continued to mount that the RFA needed to be strengthened. Chief Counsel for Advocacy Frank Swain testified before the Senate Committee on Small Business in

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[57] *America's Small Business Economy: Agenda for Action;* Report to the President by the White House Commission on Small Business; April, 1980. Public Law 96-354 (September 19, 1980), 5 U.S.C. § 601 *et seq.* See Appendix B.

[58] 5 U.S.C. § 602.

[59] 5 U.S.C. § 603.

[60] 5 U.S.C. § 605.

[61] 5 U.S.C. § 612(a).

[62] 5 U.S.C. §§ 612(b), 612(c).

[63] Report to the President of the United States by the White House Conference on Small Business; November 1986; p. 25.

1989 that "agency compliance with the RFA runs the gamut from near total compliance to near total disregard for this Act."[64]

In 1993, the top small business recommendation in the first report of the Vice-President's National Performance Review (NPR) was to allow judicial review of agency RFA compliance.[65] The report observed that:

> While SBA's Office of Advocacy can ask agencies to follow the RFA, no mechanism for enforcing compliance exists. As a result, federal agency compliance is spotty at best….For the RFA to succeed at its goal of avoiding needless government regulatory burdens on small entities, sanctions for non-compliance with the RFA must be created.[66]

In April 1994, the General Accounting Office released a report reviewing Advocacy's annual reports on RFA compliance, which found that they indicated agencies' compliance with the RFA varied widely from one agency to another.[67] It also noted that "the RFA does not authorize SBA or any other entity to compel rulemaking agencies to comply with the act's provisions."[68]

In June 1995, the third White House Conference on Small Business met in Washington. It followed 59 state-level and six regional conferences to develop recommendations and elect delegates for the final Washington conference. Of the 60 recommendations made to the President and the Congress in its final National Conference Recommendation Agenda, the highest number of votes went to a recommendation to strengthen the RFA, including the establishment of RFA judicial review and direct small business participation in the rulemaking process.[69]

With such strong support from so many quarters in both the private sector and government, the time was at last right for enactment of RFA judicial review, which became law when President Clinton signed

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[64] Hearing before the Senate Committee on Small Business, "The Regulatory Flexibility Act of 1980: An Essential Protection for Small Business;" October 17, 1989; p. 49.

[65] Recommendation SBA01, The National Performance Review, *From Red Tape to Results: Creating a Government that Works Better and Costs Less;* September 7, 1993. The National Performance Review was established in March, 1993. It was an interagency task force with the mission of reforming government operations, and was directed by Vice-President Gore during the Clinton Administration. In 1998, it was renamed the National Partnership for Reinventing Government.

[66] Ibid.

[67] United States General Accounting Office, "Regulatory Flexibility Act: Status of Agencies' Compliance;" GGD-94-105 (April 27, 1994). Available at www.gao.gov/products/GGD-94-105.

[68] Ibid., p. 18. The NPR also noted that RFA judicial review was supported by a wide spectrum of major business associations, including the American Small Business Association, the American Trucking Association, the National Association for the Self-Employed, the National Association of Manufacturers, the National Federation of Independent Business, National Small Business United, the National Society of Public Accountants, the Small Business Legislative Council, and the U.S. Chamber of Commerce.

[69] NCRA #183, The Regulatory Flexibility Act; *Foundation for a New Century,* A Report to the President and Congress by the White House Conference on Small Business Commission (September, 1995), pp. 27 and 36.

the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).[70] The new legislation included a variety of provisions of major importance to small business, including amendments to the RFA to permit judicial review based on RFA compliance.[71] This long-sought authority finally set in place an RFA enforcement mechanism, and it was to greatly affect Advocacy's work with other agencies as we shall see in Chapter 3.

SBREFA also established for the first time a formal procedure for the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA) to solicit direct input from small entities on the effects of their proposals *prior* to the beginning of the normal notice and comment periods for these rules. Under SBREFA, these agencies must notify Advocacy when they are preparing to publish an initial regulatory flexibility analysis (IRFA) and provide Advocacy with information on the potential impacts of the proposed rule. In most cases, a SBREFA review panel is then convened, on which sit representatives of the Chief Counsel for Advocacy, OMB's Office of Information and Regulatory Affairs, and the agency proposing the rule.[72] The panel reviews materials related to the proposal and, importantly, the advice and recommendations of small entity representatives (SERs) on the rule's potential effects and possible mitigation strategies. The panel then issues a report on the comments of the SERs and on its own findings related to RFA issues. SBREFA requires the rulemaking agency to consider the panel report findings and, where appropriate, modify the proposed rule or its IRFA.[73] Although SBREFA's review panel process originally applied specifically to proposals of EPA and OSHA, its coverage was extended by the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010 to include the new Consumer Finance Protection Bureau.[74]

The SBREFA panel process has institutionalized in specific circumstances what Advocacy seeks to accomplish more broadly with all agencies whose proposals have significant small entity effects – early intervention in the regulatory process. Early intervention and constructive engagement with regulatory agencies are far more productive for all concerned than coming to the table late when a rule is about to be finalized. This approach was underscored with the next major milestone in the development of Advocacy's mission, Executive Order 13272.

Executive Order 13272. SBREFA was a major step forward in achieving better agency compliance with the RFA. The provision of judicial review was especially important, and the development of case law based on RFA compliance issues has, as expected, helped focus many agencies' attention on the need to consider small entity impacts early in their rulemakings. However important this "negative" sanction is, the small business community and Advocacy would much prefer that RFA compliance not require litigation, which is basically a remedy of last resort.

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[70] Title II, Public Law 104-121, Contract with America Advancement Act of 1996 (March 29, 1996), 110 Stat. 857.

[71] Ibid., § 242, 110 Stat. 865, 5 U.S.C. § 611.

[72] The Chief Counsel may in certain circumstances waive the requirement for a SBREFA panel.

[73] Ibid., § 244, 110 Stat. 867, 5 U.S.C. § 609.

[74] Public Law 111–203, title X, § 1100G(a) (July 21, 2010), 124 Stat. 2112.

Since the enactment of the RFA in 1980, Advocacy has sought to help agencies develop a regulatory culture that internalizes the RFA's purposes. Advocacy takes every opportunity to show regulatory officials how consideration of the potential effects of their proposals on small entities and the adoption of mitigation strategies can actually improve their regulations, both by reducing costs to small entities and the economy as a whole, and by improving compliance with such rules by those regulated, all while still achieving agencies' regulatory objectives.

Recognizing the importance of Advocacy's participation early in the regulatory process and the need for improved RFA compliance among some agencies, President George W. Bush in August 2002 signed Executive Order 13272 (Proper Consideration of Small Entities in Agency Rulemaking).[75] The order provided that:

> Each agency shall establish procedures and policies to promote compliance with the Regulatory Flexibility Act, as amended…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.[76]

Executive Order 13272 further mandated that agencies:

- Issue written procedures and policies, consistent with the Regulatory Flexibility 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. These procedures and policies are to be submitted to Advocacy for comment prior to adoption, and made public when finalized.[77]
- Notify Advocacy of any draft rules that may have a significant economic impact on a substantial number of small entities under the Act.[78]
- Give every appropriate consideration to any comments provided by Advocacy regarding a draft rule. In most cases, an agency must provide in its explanation or discussion accompanying publication of a final rule its response to any written comments from Advocacy on the proposed rule that preceded it.[79]

The order also specifically provided that Advocacy could provide comments on draft rules to both the agency that has proposed or intends to propose the rules and to OMB's Office of Information and Regulatory Affairs (OIRA), with which Advocacy works closely.[80] Advocacy was also mandated to provide

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[75] Executive Order 13272, 67 Fed. Reg. 53461 (August 13, 2002). See Appendix C.

[76] Ibid., § 1.

[77] Ibid., § 3(a).

[78] Ibid., § 3(b).

[79] Ibid., § 3(c).

[80] Ibid., § 2(c).

RFA compliance training to agencies,[81] and to report not less than annually to the OMB Director on agency compliance with the executive order.[82]

Executive Order 13272 formally integrated Advocacy into the White House's review process of significant regulations, a process overseen by OMB's Office of Information and Regulatory Affairs. The requirement for agencies to notify Advocacy in advance of significant rulemakings, to give consideration to any Advocacy comments, and to respond to such comments with the publication of a final rule have all strengthened Advocacy's working relationship with many agencies and federal policymakers. It has also encouraged better RFA analyses. The requirement for consideration of and response to Advocacy comments was subsequently codified in the RFA itself, an important outcome of the Executive Order.[83]

The Small Business Jobs Act of 2010. As just noted, Executive Order 13272 required that agencies notify Advocacy of proposed significant rulemakings, consider Advocacy comments on such proposed rules, and provide appropriate responses to those comments in the explanatory statement or discussion accompanying the publication of a final rule resulting from such proposals. These requirements were subsequently codified in the RFA, one of two important provisions affecting Advocacy in the Small Business Jobs Act of 2010.[84]

The 2010 Jobs Act also included an extremely important provision concerning Advocacy's budgetary independence. Since the enactment of its charter in 1976, Advocacy operated with a great degree of independence from the SBA in which it was housed, a subject to which we will return in Chapter 6. However, Advocacy was still very much attached to SBA with respect to the budget process. Prior to the Jobs Act, for budgetary purposes, Advocacy was treated in much the same way as any SBA program office, in fact with less independence than certain other functions that had their own statutory budget accounts.[85] Advocacy participated in every step of the budget process in the same way as most other SBA offices and programs. This meant the preparation of annual budget requests and justifications that "competed" with those of other SBA offices and programs for a share of the agency's annual request to Congress.

The Jobs Act amended Advocacy's statutory authority to require that each budget submitted by the President shall include a separate statement of the amount of appropriations requested for Advocacy, and that these funds be designated in a separate Treasury account. The Act also requires SBA to provide Advocacy with office space, equipment, an operating budget, and communications support, including the maintenance of such equipment and facilities.[86]

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[81] Ibid., § 2(b).

[82] Ibid., § 6.

[83] Public Law 111–240, title I, § 1601(a) (September 27, 2010), 124 Stat. 2551, 5 U.S.C. § 604(a).

[84] Ibid.

[85] Notably, the Office of the Inspector General and disaster operations.

[86] Public Law 111–240, title I, § 1601(b) (Sept. 27, 2010), 124 Stat. 2551, 15 U.S.C. § 634g.

Before FY 2012, Advocacy was fully integrated within SBA's Executive Direction budget. In recognition of the office's independent status and newly separate appropriations account, Advocacy's FY 2013 Congressional Budget Justification and FY 2011 Annual Performance Report were for the first time presented in a separate appendix to SBA's submission. This new format is analogous to that employed by the Office of the Inspector General, which also has a separate appropriations account. It is intended to improve the transparency of Advocacy operations and costs, more clearly identify the resources available to Advocacy, and provide a basis for performance measurement.

The Jobs Act budgetary amendment to Advocacy's charter also provided that funds appropriated to Advocacy would remain available until expended. This has proven an extremely valuable feature of the legislation due to uncertainties that can arise in the obligation of funds for economic research contracts due to contracting procedures and other reasons.

This completes our survey of Advocacy's background and the development of its mission.[87] We began this section by noting that Advocacy's mission was to be an independent voice for small businesses inside the government in the formulation of public policy and to encourage policies that support their startup, development, and growth. Its creation was premised on the belief that small business needs representation in the legislative, regulatory, and administrative processes of government that profoundly affect them, and that good policy requires good information.

We have seen how each step in the development of Advocacy's office and mission was informed by and accomplished only with the strong support of the small business community itself, including numerous business organizations and trade associations, and countless individual small firms who made their needs known to their elected representatives. We have outlined how Advocacy's role has been strengthened over the years, and how new tools were developed to address unsolved problems.

We will examine how today's Office of Advocacy carries out its mission in the next four chapters, which are broadly organized by the responsibilities of Advocacy's four main operating divisions, its Office of Economic Research, Office of Interagency Affairs, Office of Information, and Office of Regional Affairs. But first, we should cover one more important base; i.e., a description of the small business community whose interests Advocacy represents, and the role that small businesses play in today's economy.

The Small Business Constituency

Advocacy's Office of Economic Research prepares a number of publications that summarize important small business statistics.[88] First, for general research purposes, Advocacy defines a small business as an

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[87] For additional information on the history of Advocacy and reflections from those who helped shape the office, see: *The Small Business Advocate,* June 1996. This special edition of Advocacy's monthly newsletter, which marked the 20th anniversary of the Office of Advocacy, is reprinted in its entirety in Appendix R. A special 40th anniversary edition of *The Small Business Advocate* is also reprinted as Appendix U.

[88] Office of Advocacy, *Small Business Profile,* 2016. This resource can be accessed at www.sba.gov/advocacy/small-business-profiles-states-and-territories-2016. *Frequently Asked Questions,* 2016, can be accessed at www.sba.gov/advocacy/frequently-asked-questions-about-small-business. *Small Business Owner Facts,*

independent firm having fewer than 500 employees.[89] With this in mind, small firms, according to the most recent data:

- represent 99.9 percent of all U.S. businesses and 99.7 percent of all employers;
- employ 56.8 million or 48 percent of all private sector employees;
- account for 42 percent of the private sector payroll;
- generated 63 percent of net new jobs between 1993 and 2013;
- account for 46 percent of private sector output;
- supplied 26 percent of the total value of eligible federal prime contracts in FY 2015;
- hire 37 percent of high-tech workers (e.g., scientists, engineers, computer specialists);
- are 50 percent home-based and 3 percent franchises; and
- are 97.7 percent of all exporters.

The number of small businesses. In 2013 there were 28.8 million small businesses in the U.S., including 5.8 million employers and 23.0 million non-employers.

Job creation by small firms. From 1993 through 2013, small businesses created 63 percent of net new jobs. In the most recent year with data (2013), small firms accounted for 1.1 million net new jobs. Firms with from 250 to 500 employees had a net gain of 257,000 new jobs, with the balance created by firms with fewer than 250 employees.

Employment by firm size. Small businesses accounted for 48 percent of all private sector employment. Of this amount, firms with 1-19 employees accounted for 17.3 percent of all private sector employment; those with 20-99 employees had 16.7 percent; and firms with 100-499 employees had 14.1 percent of all employment.

Women, minority and veteran entrepreneurs. Data collected by the Bureau of the Census in its Survey of Business Owners, part of its Economic Census and conducted once every five years, found that:

- Of the 27.6 million non-farm businesses in 2012, women owned 9.9 million firms. In 2014, 7.2 percent of women were self-employed.
- In 2012, individuals identifying themselves as members of minority groups owned 8.0 million U.S. firms; Hispanic Americans owned 3.3 million firms; African Americans, 2.6 million firms; Asian Americans, 1.9 million; American Indians or Alaska Natives, 272,000 firms; and Native Hawaiian or other Pacific Islanders, 55,000 firms. In 2014, 7.1 percent of minority individuals were self-employed.

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www.sba.gov/content/small-business-facts-and-infographics. These publications include the source citations for all information presented in this section, except that relating to government contracts which is at www.fpds.gov/fpdsng_cms/index.php/en/reports.

[89] This definition is not the same as the "size standards" used to determine eligibility for various government financial and procurement assistance programs. These are established by SBA and vary industry by industry. For more information, see www.sba.gov/size.

- In 2012, veterans owned 2.5 million non-farm businesses. In 2014, 11.0 percent of veterans were self-employed.

Other findings from Advocacy research. In addition to collecting and analyzing data from a variety of government sources, Advocacy's Office of Economic Research conducts a vigorous economic research program of its own, using both in-house resources and contract research as funding permits. Some additional findings from these efforts are of interest here.

- Of high patenting firms (15 or more patents in a four year period), small businesses produced 16 times more patents per employee than large patenting firms.
- About half of all new establishments survive five years or more and about one-third survive ten years or more.
- In 2011, sole proprietorships accounted for 87 percent of non-employers; partnerships, 7 percent; and corporations, 6 percent.
- In 2010, sole proprietorships accounted for 16 percent of employers; partnerships, 11 percent; S corporations, 45 percent; C corporations, 21 percent; and non-profits, 7 percent.

Conclusion. These impressive statistics leave no doubt as to the vital importance of small business to our economy. As we have noted before, small business is a major source of competition, innovation, technological change and productivity growth. It is also the vehicle by which millions enter the economic and social mainstream of American society. The data in this section confirm both the quantitative and qualitative contributions that small business makes every day to our nation.

Chapter 2
The Role of Data and Research

As we have seen in Chapter One, small businesses are a vital component of the American economy. Data from the U.S. Census Bureau show that there were almost 29 million businesses in the United States in 2013, of which 99.9 percent were small, with fewer than 500 employees.[90] Small firms employ half of the private sector workforce[91] and account for half of the private, nonfarm real gross domestic product.[92] Small businesses provided nearly two-thirds of net new jobs over the last two decades.[93] It is for these reasons that there is such interest in the small business sector among policymakers, business leaders, and academics.

Advocacy's Research Mandate

Public Law 94-305 made economic research a core mission of the Office of Advocacy.[94] This mission includes the documentation of the role of entrepreneurship in the economy and the examination of various issues of relevance to small business owners. More specifically, Advocacy is charged to:

- examine the role of small business in the American economy and the contribution which small business can make in improving competition;
- measure the direct costs and other effects of government regulation on small business;
- determine the impact of the tax structure on small businesses;
- study the ability of financial markets and institutions to meet small business credit needs;

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[90] Office of Advocacy, *Frequently Asked Questions,* June 2016. This annually updated resource can be accessed at www.sba.gov/sites/default/files/advocacy/SB-FAQ-2016_WEB.pdf.

[91] Ibid.

[92] Office of Advocacy sponsored research by Katherine Kobe, *The Small Business Share of GDP, 1998-2004*, April 2007, webarchive.loc.gov/all/20100619041812/www.sba.gov/advo/research/rs299.pdf for summary; full report, webarchive.loc.gov/all/20100619022731/www.sba.gov/advo/research/rs299tot.pdf.

[93] Office of Advocacy, *Frequently Asked Questions,* June 2016. This annually updated resource can be accessed at www.sba.gov/sites/default/files/advocacy/SB-FAQ-2016_WEB.pdf.

[94] § 202, Public Law 94-305 (June 4, 1976), 15 U.S.C. § 634b.

- determine the availability of financial resources and alternative means to deliver financial assistance to minority enterprises;
- identify and describe those measures that create an environment in which all businesses will have the opportunity to compete effectively;
- provide information on the status and the potential for development and strengthening of minority and other small business enterprises, including firms owned by veterans and service-disabled veterans; and
- ascertain the common reasons for small business successes and failures.

These elements of Advocacy's mission are the primary responsibility of its Office of Economic Research (OER). In 2016, OER had ten positions, including nine staff economists and an Economic Research Fellow position. The current economics team specializes in the following areas: the small business economy, small firm dynamics, small business finance (traditional and alternative), regulatory policy, women-, veteran-, and minority-owned business, international small business issues, emerging small business markets, and the economics of entrepreneurship. OER economists work with other agencies to acquire and analyze data, conduct in-house research, coordinate extramural contract research projects, and work closely with the legal team in Advocacy's Office of Interagency Affairs to assess the costs of proposed federal rules and associated mitigation strategies. OER also encourages its economists to author papers, to present them at conferences, and whenever possible to publish them in professional peer-reviewed journals. Reports written by Advocacy staff are also posted on Advocacy's website. To facilitate research efforts, all Advocacy economists have access to STATA statistical software,[95] Tableau data visualization software, and full-text journal articles using both JSTOR[96] and the American Economic Association's electronic bibliography, EconLit.[97]

Advocacy – The Source for Small Business Statistics and Research

In the early years of Advocacy, the research mandate of Public Law 94-305 was ambitious. Statistics on small businesses themselves, let alone more derivative topics, were hard to find. The Small Business Economic Policy Act of 1980 and its requirement for an annual report from the President, which was popularly known as *The State of Small Business,* crystallized the need for reliable and periodically updated statistics on small firms.[98] Congress recognized this problem and provided resources for Advocacy to begin to fill this knowledge gap. Since then, a significant portion of the office's operating budget has been dedicated to economic research activities. Since FY 2000, approximately $1 million has been allocated annually for economic research and data products, though final spending totals can fluctuate for various reasons, including the timing of the procurement process for contract research

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[95] For more information, see: www.stata.com/.

[96] For more information, see: www.jstor.org/.

[97] For more information, see: www.econlit.org/. The provider of this service for the Office of Advocacy is EBSCO Publishing.

[98] Title III, Public Law 96-302 (July 2, 1980), 94 Stat. 848, 15 U.S.C. §§ 631a, 631b.

projects and the number of qualified respondents to solicitations for proposals to conduct such research.[99]

Advocacy uses its economic research funds for two primary purposes: 1) to purchase special data tabulations and otherwise support the development of small firm data at various government agencies; and 2) to fund contract research by private-sector vendors such as university researchers on more specialized issues. In each instance, OER strives to produce current and relevant research products that are useful for policymakers and other Advocacy stakeholders.

The federal government collects an enormous amount of data from all businesses for a variety of different purposes. Some of this data is acquired in the course of routine transactions such as filing tax returns, both for the businesses themselves and for their employees as payroll withholding for income, unemployment compensation, and other taxes. Other data come from the filing of documents on business organization, including recognition as partnerships or corporations. Still other administrative data result from firms obtaining various types of permits and licenses, or filing for bankruptcy. More business data come from periodic surveys conducted by the U.S. Bureau of the Census as part of the Economic Census it conducts once every five years. Separate surveys are conducted by other government agencies and by academic and private sector organizations. More recently, market-generated datasets for alternative lending vehicles such as crowdfunding and peer-to-peer lending have emerged.

An important function of Advocacy's economic research program is to take these voluminous and often arcane data sources and to extract from them information that is relevant to small firm interests and useful to its stakeholders. Advocacy attempts to add value to existing government data resources, while minimizing the need for additional information collection from small firms.

OER is an important resource for small firm data and on small business issues generally. In fact, whenever you hear a statistic relating to small business, the chances are good that it either directly or indirectly came from Advocacy. When legislators want to know how legislation will affect small firms, they contact Advocacy; when an agency needs to know how many firms will be affected by a proposed rule, it can confer with Advocacy; when a business organization or trade association needs data on economic trends affecting their small firm members, it can consult with Advocacy's professional staff; when teachers or academic researchers need small business statistics, they often use Advocacy's on-line resources; when the press or any of SBA's many resource partners look for data on firms in their own geographic areas, they often call on Advocacy. All of these stakeholders are Advocacy "customers" and, consistent with its statutory mission, Advocacy always seeks to provide them with the best information and economic research possible.

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[99] Funds for Advocacy's economic research function, excluding salaries and expenses, were prior to FY 2006 set by a specific line item in SBA's annual budget request and appropriations. Since FY 2006, however, Advocacy research has been included within a general amount for Advocacy as a whole.

Advocacy Economic Research Products

From FY 2009 through FY 2016, Advocacy released almost 200 research and data products,[100] which cumulatively continue to document the importance of entrepreneurship to the American economy and provide new insight on various issues of importance to small business owners, policymakers, and researchers.

OER releases at least 20 economic research reports annually.[101] These are produced by the professional OER staff and by contract researchers, subject to the availability of funding. Those released from FY 2011 through FY 2016 are available on Advocacy's website and catalogued annually.[102] Products from FY 2009 and FY 2010 can be accessed at an archive site.[103]

Advocacy publishes issue-specific research as well as periodic reports. OER publications take many forms. In recent years, OER has added new products such as issue briefs, fact sheets, topic-linked research series, and infographics to its traditional publications, which include reports, bulletins, frequently asked questions (FAQs), and state economic profiles. This increased variety of offerings allows the research team to reach a wider audience on small business topics. The following provides an overview of OER publications.

Periodic reports. Advocacy produces a variety of periodic reports that are released annually or semi-annually and enjoy a wide audience. Most of the following are standard releases.[104]

- ***Annual Report.*** This annual publication provides a brief summary of all the research products released by Advocacy in any given year, organized by various categories. It serves as a year-end report on the research accomplishments of the previous year.[105]
- ***Frequently Asked Questions (FAQs)****.* Designed for a general audience, the small business and finance FAQs summarize information and data from many resources. These documents provide a series of quick, easy-to-recite facts that recognize the importance of small business in the economy and small business finance issues. Revised as new data becomes available, the FAQs are an excellent introduction to Advocacy research and data.[106]

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[100] These include: 25 reports in FY 2009, 24 reports in FY 2010, 25 reports in FY 2011, 28 reports in FY 2012, 22 reports in FY 2013, 23 reports in FY 2014, 26 reports in FY 2015, and 25 reports in FY 2016.

[101] For listings see: www.sba.gov/category/advocacy-navigation-structure/research-and-statistics.

[102] www.sba.gov/category/advocacy-navigation-structure/research-and-statistics

[103] webarchive.loc.gov/all/20100617185329/www.sba.gov/advo/research/

[104] www.sba.gov/category/advocacy-navigation-structure/research-and-statistics

[105] For the most recent edition of *Office of Economic Research: Research Publications,* see www.sba.gov/sites/default/files/advocacy/2015_OER_annual.pdf. For past ones, see www.sba.gov/category/advocacy-navigation-structure/research-and-statistics/other-topics .

[106] For the most recent *Frequently Asked Questions,* see www.sba.gov/advocacy/frequently-asked-questions-about-small-business. For the most recent *Frequently Asked Questions about Small Business Finance,* see www.sba.gov/advocacy/frequently-asked-questions-about-small-business-finance-0.

- ***Small Business Bulletins***. These periodic publications gather data from a variety of sources to highlight current economic trends relevant to small businesses as well as current small business capital access trends.[107]
- ***Small Business Data Resources***. This product provides comprehensive information on small business data. It contains a detailed list of data programs provided by both the federal and private sectors and is categorized by topic. Links to databases and data release frequency are also provided. This product is periodically posted to the Advocacy website.[108]
- ***Small Business Lending in the United States***. This is an annual study that analyzes the most recent data available on small and micro business loans and on the lending institutions that provide them. The study uses data reported by lenders to their regulators in their Consolidated Reports of Condition and Income ("call reports") and in reports required by the Community Reinvestment Act (CRA). Because data are available only by size of loan, small business loans are defined as those smaller than $1 million.[109]
- ***Small Business Profiles for States and Territories****.* This report pulls together data from multiple sources to profile the economic conditions of small businesses in the United States, and in each of the 50 states, the District of Columbia, and the U.S. territories. Each profile covers the following from a small business perspective: employment, income and finance, business owner demographics, business turnover, international trade, and industry composition by firm and employment size.[110] The 2016 State Profiles were completely revised to be fully transparent and reproducible by public users. The profiles can now also be updated between releases because they can now access the latest application programming interface (API) data to repopulate data points. Finally, the 2016 profiles included new and improved data visualizations and graphics intended to appeal to a wider audience.

Recent additions. Over the last two years, OER has added a new, diverse range of publications in an effort to expand the reach of small business economic research.

- ***Issue briefs.*** In recent years, OER economists produced a number of issue briefs meant to provide timely and concise information on small business economic issues. These briefs are of use to the small business community, including policymakers, researchers, and other stakeholders involved in small business advocacy and program development. This new product line has proved useful for addressing time-sensitive issues that appeal to an audience beyond academic researchers, or where data limits preclude more in-depth empirical analysis. Issue brief topics have included: crowdfunding, businesses owned equally by men and women, peer-to-peer lending, international trade, and veteran-business owners.[111]

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[107] For recent and past *Small Business Bulletins,* see www.sba.gov/category/advocacy-navigation-structure/research-and-statistics/quarterly-indicators.

[108] See www.sba.gov/sites/default/files/Small%20Business%20Data%20Resources%202013.pdf.

[109] For the most recent and past banking studies, see www.sba.gov/category/advocacy-navigation-structure/research-and-statistics/other-topics.

[110] For the most recent, see www.sba.gov/advocacy/small-business-profiles-states-and-territories-2016. For previous versions, see www.sba.gov/category/advocacy-navigation-structure/research-and-statistics/state-economic-profiles.

[111] www.sba.gov/advocacy/issue-briefs

- ***Small business facts.*** Topics in this recently added series focus on one specific small business issue and provide a quick, digestible summary on relevant, timely, and sometimes data-intensive issues in the small business environment. Past fact sheet topics include: 2012 SBO snapshots for women- and minority-owned businesses, and nonemployers.[112]
- ***Small business infographics.*** These newly added periodic data visualizations provide visual representations of data via a combination of figures, charts, and graphics, allowing for easy translation of the policy relevance found in minutely detailed data. Past infographic topics include: crowdfunding, minority STEM entrepreneurship, and startups and closures.[113]
- **Economic research series.** This new series links multiple products under a broader research topic umbrella. This bundling of research allows stakeholders to track topics that are highly policy relevant and cover a wide scope of issues. Series topics include: entrepreneurship trends, with reports on millennial and encore entrepreneurs; international trade, including a related issue brief; and alternative finance, with an issue brief defining alternative finance.[114]
- ***Research publications.*** Advocacy's OER staff also produce more in depth research reports, such as on small business pension benefits and the small business economy.[115]

Issue-specific external research. Advocacy sponsors issue-specific research on a wide variety of topics of general interest to Advocacy stakeholders. Subject to the availability of resources, Advocacy annually solicits research proposals from small business contractors using normal federal procurement procedures. Ideas for solicitation topics come from many sources, including input from congressional offices, other federal agencies, small business organizations, advocacy groups, the National Economic Council or Council of Economic Advisors, and small businesses themselves. Internal discussions among Advocacy staff and leadership also seek to identify areas where new research is needed. Among the topics selected for proposal solicitation, typically at least one is intended to be flexible enough to encourage interested parties to "think outside the box" and submit proposals on topics not specified in the solicitation.

Almost all of Advocacy's contract research solicitations are in the form of requests for quotations (RFQs) that are posted on FedBizOpps, the federal government's electronic portal for posting contracting opportunities.[116] They are typically small business set-asides (with a small number geared toward academic university or nonprofit think-tank research). The proposals received in response to Advocacy RFQs are evaluated primarily on their technical merit, and awards are usually made prior to the end of the fiscal year.

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[112] For recent Small Business Facts and Infographics, see www.sba.gov/content/small-business-facts-and-infographics.

[113] Ibid.

[114] For more on Advocacy's *Economic Research Series*, see www.sba.gov/advocacy/issue-briefs.

[115] For recent Advocacy reports, see www.sba.gov/category/advocacy-navigation-structure/research-and-statistics/other-topics.

[116] For more information on FedBizOpps, see www.fbo.gov/.

Although most Advocacy contract research is awarded competitively, from time to time the office may award a sole source contract under special circumstances allowed under federal contracting rules (for example, to update a previous study or where a contractor is the holder or originator of a unique and relevant dataset). Rarely, an unsolicited proposal is approved if it is of exceptional interest and it meets the requirements of federal contracting rules.[117] Each Advocacy contract research project is monitored by an Advocacy staff member serving as the contracting officer representative (COR) or technical expert for the project.

All Advocacy issue-specific research reports from FY 2011 through FY 2016 are posted on Advocacy's website and catalogued annually.[118] Products from the mid-1990s through FY 2010 can be accessed at an archive site,[119] along with listings of earlier studies that are available from the National Technical Information Service.[120] Each Advocacy study includes a Research Summary – an easily digestible version of the overall findings, which is typically written by the Advocacy economist who was the COR for the study.

Data Sources

Statistics of U.S. Businesses (SUSB). Given Advocacy's economic research mandate, it is essential to have the most accurate and current data by firm size possible. Advocacy partially funds the U.S. Census Bureau's Statistics of U.S. Businesses (SUSB). This dataset provides static and dynamic firm size data by North American Industrial Classification System (NAICS) codes,[121] by states, and by metropolitan statistical areas (MSAs).[122] This annual data is the source of many Advocacy statistics on the number of small businesses in the United States. Talking points that are regularly referred to in materials as varied as articles in the press and the speeches of elected and other public officials frequently come from this source. In addition, breakouts by industry group in these data facilitate greater knowledge by policymakers of the effects on small firms of particular regulatory or legislative proposals. This dataset is currently available from 1988 to 2013, providing a sufficient time series for analysis.

In 2016, Advocacy completely revamped the SUSB interface to create a user-friendly and searchable tool that allows the public to easily access small business data.[123] Now, the public can enter a simple search keyword or NAICS code and pull data for that group. This new interface is posted to Advocacy's website. The ability to easily search by industry NAICS codes also serves Advocacy's regulatory mission as it

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[117] Unsolicited proposals must meet the conditions of the Federal Acquisition Regulations (FAR) Subpart 15.6. See www.acquisition.gov/far/html/Subpart%2015_6.html.

[118] www.sba.gov/category/advocacy-navigation-structure/research-and-statistics

[119] webarchive.loc.gov/all/20100617185329/www.sba.gov/advo/research/

[120] For more information, see: www.ntis.gov/.

[121] Data before 1998 are available using the prior U.S. Standard Industrial Classification (SIC) system codes.

[122] See www.sba.gov/advocacy/firm-size-data for more information on firm size data.

[123] To access Advocacy's updated SUSB interface, see www.sba.gov/advocacy/firm-size-data.

allows small business stakeholders and policymakers to better access data on small businesses that will be impacted by draft regulations.

The Economic Census. Advocacy makes extensive use of Census Bureau data to describe small business owner demographics. Every five years, Census conducts an Economic Census required by law, in which many types of highly specific data are collected using large scientifically selected survey samples. Advocacy uses one part of the Economic Census, its *Survey of Business Owners (SBO)*[124] as the basis for reports on business ownership by women, individuals belonging to minority groups, and veterans, including service-disabled veterans. The most recent release of the SBO is for data year 2012.

Advocacy also explores and occasionally partially sponsors data generated in the Economic Census, together with associated administrative data from other sources, using specially commissioned tabulations that answer queries not addressed in the standard work products published by Census. These tabulations help Advocacy and its stakeholders learn more about the number of home-based businesses, family-run enterprises, and various other characteristics of small firms and their owners. Most recently, Advocacy is partially sponsoring an effort to join university grant recipient data with Census and administrative data.

Finally, Advocacy is also a member of a federal working group for the Census Bureau's new *Annual Survey of Entrepreneurs (ASE)*, which is an abbreviated annual release of the SBO, providing data on employers only.[125] Each annual module of the SBO includes certain trackable core questions for time series purposes, but also allows for additional topic-specific questions for that year only. In 2016, Advocacy initiated a discussion with Census and the Kauffman Foundation, a co-sponsor of the new ASE, to add new module questions that touch on regulatory burdens and other topics to the ASE.

Internal Revenue Service-based data. Advocacy regularly requests special tabulations from the administrative databases of other agencies. One important example is Advocacy's purchase of sole proprietorship information from the Statistics of Income (SOI) Division of the Internal Revenue Service (IRS).[126] These data allow OER to analyze taxation and income trends. Access to data from the IRS, and from some other agencies as well, is often highly restricted due to appropriate concerns for the privacy of both individuals and firms, restrictions that are often statutory. Advocacy work products never disclose microdata from these sources. Instead, information is aggregated into macrodata that is useful for analytical purposes, but without information at the micro level. Because of these privacy restrictions, special tabulations constructed by agencies authorized to collect and keep such microdata are a more common method of obtaining much of the information used in many of Advocacy's research products.

However, in 2015 and 2016 Advocacy obtained Sworn Special Status for two research economists and is currently working with Census to obtain this status for a third research economist. This special status

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[124] For more information on the Survey of Business Owners, see www.census.gov/programs-surveys/sbo.html.

[125] See www.census.gov/programs-surveys/ase.html.

[126] For more on the IRS Statistics of Income Division, see: www.irs.gov/taxstats/index.html.

allows Advocacy economists to access protected administrative data onsite at the Census Bureau and to conduct research using protected administrative microdata.

The IRS is also actively involved in the approval of microdata research requests using the Census Bureau's Business Information Tracking System (BITS), a database begun with Advocacy support that links data on business establishments from the Census Bureau's *County Business Patterns* from year to year, and includes tax information. Using BITS, researchers are able to create longitudinal tabulations that provide dynamic information on businesses across a span of years, instead of static "snapshots" of firm characteristics at a single point in time. A longitudinal tabulation can measure changes such as establishment births, deaths, expansions, and contractions for an industry and/or enterprise size. The special firm size data tables from the SUSB, mentioned earlier in this section, come from this dataset.

Bureau of Labor Statistics' Business Employment Dynamics series. The Office of Advocacy has also worked very closely with the staff at the Department of Labor's Bureau of Labor Statistics (BLS) to encourage them to produce employment statistics by firm size. Although no funding or special tabulations have been requested to date, the result of this collaboration has been the BLS Business Employment Dynamics (BED) data series, which has looked at establishment job gains and losses on a quarterly basis since 1992.[127] The research significance of this dataset is twofold. First, it allows researchers and policymakers to more precisely ascertain employment dynamics sooner than would be possible with other data sources, as the BED database has a three-quarter lag versus the three-year lag for Census SUSB data. Second, BED data complement the Census data by providing a "check" on each of their measures; for instance, BLS researchers have shown that 63.7 percent of the net new jobs between June 1990 and September 2005 came from small businesses – a figure that is consistent with Advocacy findings using Census data.[128]

Federal Reserve data. Advocacy studies on small business lending utilize a number of datasets and surveys. From 1987 to 2003, the Federal Reserve Board produced its *Survey of Small Business Finances (SSBF),* which was valuable for examining how and from whom small firms used financial services.[129] Another major Federal Reserve data source is its *Survey of Consumer Finances (SCF)*, [130] a triennial survey of the balance sheet, pension, income, and other demographic characteristics of U.S. families. The SCF has been very useful to investigate trends in the income and wealth of business owners. Advocacy also uses the Federal Reserve's quarterly *Senior Loan Officer Opinion Survey on Bank Lending*

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[127] For more information on BED data, see: www.bls.gov/bdm/.

[128] See Jessica Helfand, Akbar Sadeghi, and David Talan; "Employment dynamics: small and large firms over the business cycle," Bureau of Labor Statistics, *Monthly Labor Review*, March 2007, pp. 39-50, www.bls.gov/opub/mlr/2007/03/art3full.pdf.

[129] The Federal Reserve Board discontinued the SSBF after the 2003 survey. For more information on past SSBF surveys, see: www.federalreserve.gov/pubs/oss/oss3/nssbftoc.htm.

[130] For more information, see: www.federalreserve.gov/pubs/oss/oss2/scfindex.html. This data source can also be used to measure pension and IRA coverage of workers in small and large firms.

Practices to track small firm commercial and industrial lending standards and demand.[131] Finally, Advocacy's annual examination of the lending activities of commercial banks and other depository institutions[132] uses data from two types of reports that these institutions make to their regulatory agencies: Community Reinvestment Act (CRA)[133] reports and lenders' Consolidated Reports of Condition and Income, often referred to as "call reports."[134]

Additional data sources. In addition to the government data sources just outlined, OER uses a variety of other data sources. Sometimes, data from both government and non-government sources can be used together in such a way that "the whole is greater than the sum of its parts." Data sources for such studies include the Census/BLS Current Population Survey,[135] the Census Bureau's Survey of Income and Program Participation,[136] the Kauffman Firm Survey[137], the Department of Health and Human Service's Medical Expenditure Panel Survey,[138] and other surveys from the Kaiser Family Foundation[139] and the Employee Benefit Research Institute.[140]

Advocacy also makes use of information developed by key stakeholders in the private sector. For example, the National Federation of Independent Business (NFIB) surveys its members to assess their

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[131] For more information, see: www.federalreserve.gov/boarddocs/SnLoanSurvey/.

[132] Accessible at www.sba.gov/category/advocacy-navigation-structure/research-and-statistics/other-topics. Both call report and CRA data provide loan size data that Advocacy uses as a measure of small firm lending because borrower size is not available.

[133] For more information about the CRA and its associated reports, see: www.ffiec.gov/cra/.

[134] For more information on call reports, see: cdr.ffiec.gov/public/. The Office of Advocacy contracts annually for special tabulations of CRA and call report data.

[135] The *Current Population Survey* (CPS) is a monthly survey of about 60,000 households conducted by the Bureau of the Census for the Bureau of Labor Statistics. The survey has been conducted for more than 60 years, and is the primary source of information on the labor force characteristics of the U.S. population. For more information on the CPS, see: www.census.gov/cps/.

[136] The Census Bureau's *Survey of Income and Program Participation* (SIPP) is a continuing survey with monthly interviewing of national samples of households. SIPP offers detailed information on cash and noncash income and also collects data on taxes, assets, liabilities, and participation in government transfer programs. SIPP data facilitates evaluation of the effectiveness of federal, state, and local programs. For more information on SIPP, see www.census.gov/sipp/.

[137] The Kauffman Firm Survey started with a cohort of nearly 5,000 firms starting up in 2004. This cohort is tracked annually. The survey covers topics such as the background of the founders, the sources and amounts of financing, firm strategies and innovations, and outcomes such as sales, profits, and survival. For more information, see: www.kauffman.org/what-we-do/research/kauffman-firm-survey-series.

[138] The *Medical Expenditure Panel Survey* (MEPS), conducted by the Department of Health and Human Services' Agency for Healthcare Research and Quality, is a set of large-scale surveys of families and individuals, their medical providers, and employers across the United States. MEPS is the most complete source of data on the cost and use of health care and health insurance coverage. For more on MEPS, see: www.meps.ahrq.gov/mepsweb/.

[139] For more information on the Kaiser Family Foundation, see: www.kff.org/.

[140] For more information on the Employee Benefit Research Institute, see: www.ebri.org/.

views on the economy for its monthly *Small Business Economic Trends* publication.[141] Especially useful for evaluating the state of the small business economy are its monthly optimism index numbers together with information on business owners' willingness to expand, hire, purchase capital goods, and obtain financing. NFIB also regularly surveys small firms on other issues of importance, producing information that often is unavailable from other sources. These data are published regularly as NFIB's *National Small Business Poll*.[142]

Another important source of data is the Ewing Marion Kauffman Foundation, which for years has actively supported the development of new data sources for the study of entrepreneurship. Kauffman sponsors the Panel Study of Entrepreneurial Dynamics (PSED), which explores the motivations of individuals just starting their businesses.[143] The University of Michigan and the Office of Advocacy, along with others, have also contributed to the development of PSED and PSED II. Kauffman has also developed several other data sources, including the Kauffman Index of Entrepreneurial Activity[144] and the Kauffman Firm Survey.[145] The Foundation has also contributed to the development of an Integrated Longitudinal Business Database at the U.S. Census Bureau, which is intended to combine administrative records and survey data for both employer and non-employer business units in the U.S.[146]

The Kauffman Foundation and Advocacy share a mission for the study and encouragement of entrepreneurship, and they enjoy a strong collaborative relationship. In addition to their work together on data sources, they have co-sponsored a number of conferences. Advocacy and Kauffman have also collaborated in the past to co-organize sessions at the annual meetings of the American Social Science Association (ASSA). Individuals who have made extraordinary contributions to entrepreneurial research have been honored at such meetings. Other Kauffman achievements have included the creation of a web-based Entrepreneurship Research Portal designed to be a "one-stop-shop" for research in the field, including that from Advocacy.[147] The Kauffman Foundation also directs the Entrepreneurship Research and Policy Network on the Social Science Research Network (SSRN) for working papers and other postings, including papers released by Advocacy.[148]

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[141] *Small Business Economic Trends* is published monthly by the NFIB Research Foundation. For more information, see www.nfib.com/surveys/small-business-economic-trends/.

[142] The *National Small Business Poll* is conducted by the NFIB Research Foundation, and new data are added to its website at www.411sbfacts.com/ eight times annually.

[143] For more information on the PSED, see: www.psed.isr.umich.edu/psed/home.

[144] For more information on the Kauffman Index of Entrepreneurial Activity, see: www.kauffman.org/kauffmanindex/.

[145] For more information on the Kauffman Firm Survey, see: www.kauffman.org/kfs/.

[146] For more information on the Census Bureau's Longitudinal Business Database project, see www.census.gov/ces/dataproducts/datasets/lbd.html.

[147] Kauffman's Entrepreneurship Research Portal can be accessed at: research.kauffman.org/.

[148] For more information on the SSRN Entrepreneurship Research and Policy Network, see www.ssrn.com/en/index.cfm/erpn/.

Finally, in 2016, Advocacy explored sponsoring several possible new information collections related to international trade and supply chains, regulatory burdens to small entities, and veteran entrepreneurial training. In 2017, Advocacy expects to fund a pilot information collection on regulatory burdens to small businesses.

Data Quality and Peer Review

The Office of Advocacy adheres to data quality and peer review guidelines issued by the Office of Management and Budget.[149] All research products are peer-reviewed and data checked internally by at least two members of the economics team. Some reports, which by their nature might be deemed "influential" under data quality guidelines, also undergo an external peer review process. In recent years, Advocacy has formalized the external peer review process and applied it more broadly to external research products. Advocacy peer review is now a double-blind process that is formalized in external research contracts. Likewise, the process for determining which research products should undergo external peer review is now formalized.

Also, Advocacy research products go through an internal clearance process, including a "first draft review" with the Chief Counsel, which produces additional feedback. Comments from the peer review process are provided to the author(s), including contractors. These review measures are intended to strengthen the quality of the final product and to ensure that the analysis is sound.

Should an external reader believe that they have found an error in an Advocacy research or data product, they are encouraged to contact the office. Simple typos or errors might be corrected informally. With larger issues, individuals may file a formal correction request with SBA's Office of the Chief Information Officer (OCIO), and a process has been established to assess such requests in a timely manner.[150] To date, no such request for corrective action has ever been filed with the OCIO on an Office of Advocacy product.

Transparency and Reproducibility in Research

OER's transparency commitment empowers researchers and small business stakeholders to build on OER's research by providing raw statistics, interactive data tools, and completely reproducible analyses.

Interactive tools, such as the SUSB Firm Size Tables 1 and 2, offer convenient search capabilities. Users can easily search a large database based on multiple criteria including NAICS description keywords and size classifications.

In addition, a select number of OER publications now incorporate reproducibility techniques. *Research reproducibility* refers to analyses published alongside data and code so that experts and non-experts

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[149] See www.whitehouse.gov/omb/fedreg/reproducible.html.

[150] See www.sba.gov/about-sba/sba-performance/open-government/information-quality/information-quality-guidelines.

alike can easily reproduce the findings and build upon them. Advocacy's 2016 Small Business Profiles for the States and U.S. Territories demonstrate the efficiencies of a transparent workflow. In lieu of redesigning and editing dozens of reports, one at a time, reproducibility techniques allow OER economists to focus on attaining the highest standards in aesthetics, publication quality, and analysis for just one region. Next, the optimized report is replicated across regions while incorporating adaptive language, layouts, and figures.

Additional reproducible research products involving large datasets and sophisticated computations are in the works. These reproducible analyses allow outside researchers to precisely track each detail of the complex relationships underlying our findings.

Counsel on Economic Issues for Policymakers, Media, and Researchers

The entire economics team and all Advocacy staff make themselves available as a resource to those seeking assistance in areas where the office has expertise. Requests often come from policymakers in both the executive and legislative branches of government for statistical and other economic information.

Each day, there are numerous requests for small business information from the media, congressional offices, academics, small business owners, and professionals throughout SBA's nationwide network of offices, in addition to its various resource partners. Advocacy prides itself on its responsiveness to these inquiries. Most questions can be answered by a referral to an existing research or data product, including those from sources outside of Advocacy. Other requests require more research and are answered as quickly as possible.

Advocacy receives valuable feedback from its stakeholders through the inquiries it receives, and sometimes this can lead to the creation of a new data product. For example, Advocacy is often asked to comment on small business economic trends, and Advocacy economists also speak at a variety of events around the country on these trends.

Outreach

Presentations. In fulfilment of its statutory mission to conduct and share its economic research, Advocacy economists actively seek out opportunities to present at academic conferences, small business stakeholder roundtables, to congressional staff, and to the media. Advocacy economists often work closely with Advocacy's regional advocates, the Office of Information team, and attorneys in Advocacy's Office of Interagency Affairs to coordinate these events. In recent years, Advocacy economists have presented at premier academic conferences such as the Joint Statistical Meetings and the Society of Benefit Cost Analysis. Advocacy economists have presented research at numerous regulatory roundtables; to stakeholders across Advocacy's ten regions, including at NIH's SBIR Annual Conference and the National Small Business Association's Annual Conference; and to congressional committee staff. During FY 2016, Advocacy presented at 52 events, including academic research events, media interviews, and policymaker briefings.

University and academic outreach. Advocacy has an active outreach program to the academic community for many reasons. First, Advocacy wants to encourage more research on entrepreneurship and small business issues. By encouraging professors and graduate students to do research in this area, the office is able to further leverage its limited resources. To encourage more research, academics are regularly encouraged to respond to Advocacy research solicitations or RFQs. Advocacy economists often conduct outreach at academic conferences such as the American Economic Association annual meetings, the annual Joint Statistical Meetings, and National Bureau of Economic Research events. Attendance at such conferences serves multiple purposes: keeping Advocacy current with the latest small business research; providing opportunities to present and receive feedback on Advocacy research; and providing avenues for RFQ outreach.

A second reason for Advocacy's academic outreach is that it acts as a quality control measure for its research and data products. Advocacy wants to know how (or if) these products are being utilized by academics in their curricula or in external research. Many contacts with academic experts made at conferences also later serve as peer reviewers for contracted research.

Finally, future entrepreneurship researchers and leaders are sitting in today's classrooms, and it is important that we educate them on the importance of the small business sector. Outreach with college and university professors is meant to ensure that Advocacy research and data are part of their curricula and become a standard resource for them. It is also meant to encourage those faculty members to mentor new entrepreneurship researchers. To that end, the economic research team has recently added a Fellow position and also reaches out to relevant universities regarding internship opportunities. Finally, in recent years, several Advocacy economists have presented guest lectures and at other sessions for local university students.

Small Business Economic Research Forum. As part of Advocacy's research outreach, the economic team created a new forum for sharing small business research. Typically held on the first Wednesday of every month, the Small Business Economic Research Forum provides an opportunity for academic, government, and private sector researchers to present and share thoughts on current small business research. Past presenters include economists from the Federal Reserve Board, Census, the Consumer Financial Protection Bureau, the Securities and Exchange Commission, Georgetown University, and the World Bank, as well as OER research economists.

The Role of Research in Regulatory Review

The Office of Economic Research includes a team of four regulatory economists that play an integral role in Advocacy's regulatory advocacy, research, and outreach goals. Regulatory economists work to improve the design of regulatory policies for small businesses by emphasizing sound economic analysis, transparency, and data-driven decisions. With expertise across policy areas and industry sectors, they engage with federal agencies during the rulemaking process to evaluate the economic impact of regulations on small businesses, and to develop cost-effective alternatives. They also spend a portion of their time conducting original economic research and engaging with other practitioners and researchers.

More specifically, in collaboration with attorneys from the Office of Interagency Affairs, regulatory economists contribute to Advocacy's regulatory mission by: (1) enhancing Advocacy's public comment letters with economic insight, (2) facilitating economic discussions at Advocacy's roundtables; (3) improving the analytical quality of materials developed for SBREFA panels; and (4) providing hands-on training to federal agency staff on conducting small business impact analyses.

In order to improve agency RFA compliance, Advocacy often consults with rulemaking agencies to modify proposals prior to their publication in the *Federal Register*. Advocacy economists specifically address issues of data quality and completeness, transparency of analysis and assumptions, and the appropriateness of chosen modeling and statistical methodologies. Advocacy frequently requests federal agencies to make specific changes to draft analyses based on deficiencies identified in their economic analyses.

When Advocacy has a substantial disagreement with an agency about the impacts of a rule that cannot be rectified through the interagency comment process, the office often produces a public comment letter citing these concerns and suggesting alternatives. OER economists and Interagency attorneys often work together to produce such comment letters. Regulatory economists contribute alternative data and analyses addressing agency positions with which Advocacy disagrees. These alternative analyses often use data produced by Advocacy, by its contractors, or by other outside sources. The end result of the teamwork between Advocacy's legal and economic teams is better agency RFA compliance, and better results for the small entities impacted by regulation.

In addition to reviewing regulations, regulatory economists also translate their policy knowledge and experience into timely research products that inform policymakers on key small business issues such as startup ecosystems, crowdfunding, and entrepreneurial demographics. Advocacy regulatory economists help inform regulatory decisions with their economic analyses and research by:

- ***Conducting high-level economic analyses for Executive Order 12866 Interagency Reviews.*** Regulatory economists provide analysis-supported improvements to federal agencies and OMB at all stages of the regulatory development process to ensure small business impacts are properly analyzed and addressed. Economists enhance public comment letters with economic insights by providing specific solutions to foster better policy outcomes for small businesses.
- ***Improving the economic rigor of the SBREFA panel process and reports.*** Regulatory economists collaborate with Advocacy and federal agency staff to ensure panel materials adequately inform small entity representatives of the economic impacts of proposed rules. Economists develop specific panel recommendations for SBREFA panel reports that minimize the economic impact to small entities while achieving the regulatory objectives.
- ***Calculating annual cost-savings numbers reported to OMB and the public.*** Regulatory economists help quantify the small business compliance cost savings for the final rules in which Advocacy's efforts, during the rulemaking process, resulted in reduced regulatory burden.
- ***Leading economic analysis elements of RFA training.*** Regulatory economists co-lead RFA training sessions with attorneys in Advocacy's Office of Interagency Affairs. Economists train agencies on how to measure the economic impacts of regulations on small entities, including updating materials on best practices in conducting regulatory flexibility analyses.

Conclusion. To conclude this chapter, Advocacy's economic research team implements one of the two core missions set forth in the office's basic charter, Public Law 94-305. Through internal and external research, data development and support, outreach efforts, and regulatory analysis, Advocacy economists pursue issues of relevance to small business owners and share findings with stakeholders, researchers and policymakers.

We now turn to the other core mission, the regulatory advocacy conducted by Advocacy's legal team and the office's responsibilities under the RFA.

Chapter 3
Advocacy's Role in the Regulatory Process

In this chapter, we will examine one of Advocacy's most important core missions, the representation of small entities before federal agencies and the closely related task of monitoring those agencies' compliance with the federal Regulatory Flexibility Act (RFA).[151] In Chapter 1, we saw how this mission had its beginnings even before the modern Office of Advocacy was established in 1976 by Public Law 94-305, and how it since has been strengthened by the RFA in 1980, the Small Business Regulatory Enforcement Fairness Act (SBREFA) in 1996, Executive Order 13272 in 2002, and the Small Business Jobs Act of 2010.

Advocacy's basic charter enumerates a number of duties that the office performs on a continuing basis. Among them are:

- to serve as a focal point for the receipt of complaints, criticisms, and suggestions concerning the policies and activities of federal agencies that affect small entities and businesses;
- to develop proposals for changes in the policies and activities of any agency of the federal government that will better fulfill the purposes of the Small Business Act (*inter alia,* to aid, counsel, assist and protect the interests of small business concerns) and to communicate such proposals to the appropriate federal agencies; and
- to represent the views and interests of small entities and businesses before other federal agencies whose policies and activities may affect small business.[152]

The RFA, SBREFA, Executive Order 13272, and the 2010 Jobs Act each added additional duties for Advocacy related to this core mission, both in establishing procedures by which agencies must consider the effects of their actions on small entities, and by formalizing Advocacy's role in ensuring that small business concerns are considered in the rulemaking process.

These elements of Advocacy's mission are the primary responsibility of its Office of Interagency Affairs (Interagency). Interagency is Advocacy's largest operational division in terms of staff, with 16 positions in 2016, 15 of whom were attorneys. The legal team monitors federal regulatory and other activity with

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[151] Public Law 96-354 (September 19, 1980), 5 U.S.C. § 601 *et seq.* See Appendix B.

[152] These points are included in 15 U.S.C. § 634c.

potential small entity impacts; and it works with agencies to help them develop better rules, both by soliciting small entity input early in the regulatory process and by crafting rules that mitigate adverse small entity effects where practicable, while still achieving agencies' regulatory goals.

Since 2009, Interagency has reviewed annually from 1200 to 1500 regulatory proposals, notices of regulatory activity or final rules, as published in the *Federal Register.* Through its electronic e-notify system and pursuant to Executive Order 13272, Advocacy also annually receives from agencies about 600 notifications of regulatory activity. More than 500 regulatory proposals are annually reviewed in confidential interagency consultations prior to their publication, whether in the context of SBREFA panels, requests from promulgating agencies for technical assistance, Advocacy participation in interagency policy groups, or internal clearance of SBA rules. From FY 2009 through FY 2016, Advocacy hosted 201 regulatory roundtables on a wide variety of issues at which public stakeholders and agency officials could share information in an informal setting. During the same period, Advocacy also submitted 256 formal public comment letters to 59 agencies throughout government at an average rate of 32 per year. Breakdowns of these letters by year, agency, and key RFA compliance issue are presented later in this chapter.[153]

Advocacy clearly spends a lot of effort looking at rules and working with the agencies that propose them. One major reason that Advocacy undertakes this effort is that regulations impose significant costs on the economy and on small businesses in particular. As we will discuss later in this chapter, Advocacy conservatively estimates that its regulatory advocacy from FY 2009 through FY 2016 resulted in a minimum of $45.8 billion in one-time regulatory cost savings for small businesses, including $24.9 billion in annually recurring cost savings.

The Cost of Regulation

Since Advocacy's inception, one of the most important recurring themes in its work has been the cost of regulation to small businesses. The office released its first study on the cost of regulation in 1980, and since then has sponsored a significant body of research on this issue, an effort that continues today. As recently as June 2016 at Advocacy's 40th Anniversary Symposium, a special panel entitled *Accounting for Small Business: The Challenge of Measuring the Cost of Regulation* featured a discussion on the difficulty of quantifying the cost of regulation by distinguished government and academic experts.[154] A variety of methodologies and assumptions have been employed to study this question through the years. Although it is impossible to calculate such costs with precision, certain conclusions have emerged over and over again. A central finding has consistently been that small businesses bear a disproportionate share of the cost of regulation. The most recent contract study sponsored by Advocacy on this subject offered a rationale for the regulatory cost differential between small and large businesses:

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[153] Some rules come to Advocacy through multiple channels, and some rules come more than once (e.g., for pre-proposal consultation, as a proposed rule, as a final rule, etc.).

[154] See www.sba.gov/advocacy/office-advocacys-anniversary-symposium.

> The underlying force driving this differential cost burden is easy to understand. Many of the costs associated with regulatory compliance are "fixed costs," that is, a firm with five employees incurs roughly the same expense as a firm with 500 employees. In large firms, these fixed costs of compliance are spread over a large revenue, output, and employee base, which results in lower costs per unit of output as firm size increases. This is the familiar empirical phenomenon known as economies of scale, and its impact is to provide a comparative cost advantage to large firms over small firms.[155]

As noted above, though precision in regulatory cost estimates is impossible, and methodologies and assumptions can be challenged, a variety of studies through the years agree with the basic finding articulated here – that economies of scale make regulations more expensive for smaller firms than their larger counterparts.

The Regulatory Flexibility Act

The cost of regulation is enormous, and unfortunately it often falls disproportionately on small firms and other small entities such as local governments and nonprofits. Often, agencies can achieve their statutory or other public policy objectives with a more focused and informed regulatory approach, rather than the imposition of top-down, one-size-fits-all rules that result in overly burdensome regulations, usually at the expense of smaller entities. After years of frustration with a lack of sensitivity to this problem on the part of many federal rulemaking agencies, Congress recognized that legislation would be needed to address this impediment to small business formation, health, and growth.

The RFA, in general. Enacted in 1980, the RFA established in law the principle that government agencies must analyze the effects of their regulatory actions on small entities and consider alternatives that would be equally effective in achieving their regulatory objectives without unduly burdening these small entities. The RFA's section titled "Congressional Findings and Declaration of Purpose" included the following:

> (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

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[155] Nicole V. Crain and W. Mark Crain, *The Impact of Regulatory Costs on Small Firms* (September 2010). See www.sba.gov/advocacy/impact-regulatory-costs-small-firms.

> 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.[156]

The same section of the RFA went on to explain the new legislation's purpose:

> It is the purpose of this Act 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.[157]

The RFA directs agencies to analyze the impact of their regulatory proposals and to review existing rules, planned regulatory actions, and actual proposed rules for their anticipated effects on small entities. The RFA requires agencies to prepare an initial regulatory flexibility analysis (IRFA) unless they can certify

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[156] 5 U.S.C. § 601 note.

[157] Ibid.

that there will not be a significant economic impact on a substantial number of small entities. A final regulatory flexibility analysis (FRFA) is also required for final rules with significant impacts.[158]

Scope of RFA. Not all rules are subject to the RFA. The RFA applies to any rule of general applicability that is subject to notice and comment rulemaking under the Administrative Procedure Act (APA)[159] or any other law.[160] Generally exempt from the APA, and thus from the RFA, are 1) rules involving a military or foreign affairs function of the United States; and 2) rules relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.[161] Also, except where notice or hearing is required by statute, the APA does not apply 1) to interpretive rules, general statements of policy, or rules of agency organization, procedure or practice; or 2) when an agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.[162]

Although interpretive rules are generally exempt from APA requirements, and thus from the RFA as well, SBREFA amended the RFA to bring certain interpretative rulemakings of the Internal Revenue Service (IRS) within the RFA's scope, namely those IRS rules published in the *Federal Register* that would impose a "collection of information" requirement on small entities.[163]

Regulatory agendas. The RFA requires agencies to publish semiannual regulatory flexibility agendas that include a brief description of the subject area of any rule that the agency expects to propose that is likely to have a significant economic impact on a substantial number of small entities; a summary of the nature of any such rule under consideration for each subject area listed in the agenda; the objectives and legal basis for the issuance of the rule; an approximate schedule for completing action on any rule for which the agency has issued a general notice of proposed rulemaking; and the name and telephone number of an agency official knowledgeable concerning these matters.[164]

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[158] For a detailed discussion of the RFA, agency responsibilities under it, and guidance on RFA compliance procedures and issues, see Advocacy's *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act* (May 2012), www.sba.gov/sites/default/files/rfaguide_0512_0.pdf.

[159] 5 U.S.C. § 553(b).

[160] 5 U.S.C. § 601(2).

[161] 5 U.S.C. § 553(a). Because there are separate statutes governing federal procurement, which themselves require notice-and-comment rulemaking, such procurement regulations of general applicability are generally subject to the RFA.

[162] 5 U.S.C. § 553(b).

[163] Public Law 104-121 (March 29, 1996), § 241, 110 Stat. 864, 5 U.S.C. § 603(a). Congress made it clear that the term "collection of information" has the same meaning as that employed in the Paperwork Reduction Act (5 U.S.C. § 3501 *et seq.*), generally the gathering of facts or opinions by the use of identical questions posed to, or recordkeeping requirements imposed on, ten or more persons, regardless of the form or format used in such a collection (5 U.S.C. § 601(7)).

[164] 5 U.S.C. § 602.

Initial RFA analyses. Unless an agency promulgating a proposed rule within the scope of the RFA certifies that the rule will not have a significant economic impact on a substantial number of small entities,[165] the RFA requires that it prepare and make available for public comment an IRFA for that rule that includes:

> (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 that 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 that may duplicate, overlap, or conflict with the proposed rule.[166]

Each IRFA should also include a description of any significant alternatives to the proposed rule that accomplish the stated objectives of applicable statutes and that minimize any significant economic impact of the proposed rule on small entities. Consistent with the stated objectives of applicable statutes, the analysis should 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.[167]

The RFA also includes a provision requiring the Consumer Financial Protection Bureau to include in its IRFAs a description of any projected increase in the cost of credit for small entities, as well as a description of significant alternatives that, while accomplishing the rule's stated objectives, minimize any such increase, and the advice and recommendations of small entities with respect to these cost-of-credit issues.[168] The CFPB is also required to identify small entity representatives in consultation with Advocacy and obtain advice and recommendations about these cost-of-credit issues in addition to the issues raised by the proposed regulation.[169]

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[165] 5 U.S.C. § 605.

[166] 5 U.S.C. § 603(a).

[167] 5 U.S.C. § 603(b).

[168] 5 U.S.C. § 603(d). These provisions were added to the RFA by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Public Law 111–203 (July 21, 2010), title X, § 1100G(b), 124 Stat. 2112, 2113.

[169] Ibid.

Initial regulatory flexibility analyses are an extremely important part of the regulatory development process and assist agencies in determining whether they have properly considered the potential effects of their actions on small entities, and whether there are better ways to accomplish their regulatory and public policy objectives. IRFAs also help those regulated to better understand the basis for rules, and they facilitate a more meaningful exchange of pertinent information in the public notice and comment phase of rulemaking. Both the process of developing a good IRFA and the analysis itself should help agencies draft better proposed rules, while at the same time reducing the likelihood of problems in finalizing such rules.

Final RFA analyses. Unless an agency certifies that a final rule within the scope of the RFA will not have a significant economic impact on a substantial number of small entities,[170] the RFA requires that it prepare and make available to the public a FRFA for that rule that includes:

> (1) a statement of the need for, and objectives of, the rule;
>
> (2) a statement of the significant issues raised by public comments in response to the rule's IRFA, a summary 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 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;[171]
>
> (4) a description and 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 that 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 that affect the impact on small entities was rejected; and
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> (7) for the Consumer Financial Protection Bureau, a description of the steps the agency has taken to minimize any additional cost of credit for small entities.[172]

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[170] 5 U.S.C. § 605.

[171] This provision was added to the RFA by the Small Business Jobs Act of 2010, Public Law 111–240 (September 27, 2010), title I, § 1601(a), 124 Stat. 2551, 5 U.S.C. § 604(a).

[172] 5 U.S.C. § 604.

Final regulatory flexibility analyses require agencies to document their RFA-related actions on significant rules and to make this information available to the public, including publication of the FRFA or a summary thereof in the *Federal Register.*

Periodic review of existing rules. Section 610 of the RFA requires agencies to review all regulations that have a significant economic impact on a substantial number of small entities within 10 years of their adoption as final rules.[173] The purpose of the review is to assess the impact of existing rules on small entities and to determine whether the rules should be continued without change, amended, or rescinded to minimize impacts on small entities in a manner consistent with the stated objectives of applicable statutes. In its review of such rules, agencies are directed to consider the following factors:

> (1) the continued need for the rule, consistent with the objectives of applicable statutes;
>
> (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.[174]

Each year, agencies must publish in the *Federal Register* and solicit public comments on a list of rules that the agency will review under section 610 over the next 12 months. The list must briefly describe each rule, including the need and legal basis for it. Public comment is also to be solicited on each such rule.[175] We will return later to section 610 compliance issues.

Judicial review. It is very important that agencies make every good faith effort to meet their RFA obligations. Not only is it a matter of law and good public policy, but failure to comply with the RFA can result in judicial review of the rule in question. Although the original 1980 RFA did not provide for judicial review of agency compliance with its provisions, we have seen in Chapter 1 how the need for this enforcement mechanism became apparent and how judicial review of RFA compliance issues was provided in 1996 by SBREFA.[176] Since then, a growing body of case law has informed agency RFA compliance efforts.

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[173] 5 U.S.C. § 610.

[174] 5 U.S.C. § 610(b).

[175] 5 U.S.C. § 610(c).

[176] Public Law 104-121 (March 29, 1996), § 242, 110 Stat. 865, 5 U.S.C. § 611.

RFA Compliance and Advocacy's Role

From the initial enactment of the RFA in 1980, the Office of Advocacy was closely involved with its regulatory review process. Agencies are required to transmit to the Chief Counsel their regulatory agendas,[177] their initial regulatory flexibility analyses,[178] and their certifications of rules without significant effects.[179] They must respond to any comments from the Chief Counsel on rules with FRFAs.[180] In addition, the Chief Counsel was tasked to report annually to the President and the Congress on agency compliance with the RFA,[181] and was authorized to appear as *amicus curiae* or "friend of the court" in any action brought in a court of the United States to review a rule.[182] In this section we will review in greater detail some of the many ways in which Advocacy works with agencies to achieve better RFA compliance, and in so doing pursues its own statutory mission of representing small entity and business interests within the federal government.

SBREFA, judicial review, and amicus authority. As we have seen, in 1996 SBREFA provided for judicial review of RFA compliance issues. Before this important enforcement mechanism was enacted, Advocacy's annual RFA reports and testimony before congressional committees regularly noted that RFA compliance was spotty. Some agencies made good faith efforts to comply with the RFA; they considered the effects of their proposals on small entities, and worked with them to craft better rules. Other agencies used elastic interpretations of the law's application to exempt most of their rules from RFA coverage or they made cursory, boilerplate certifications and analyses. Still others completely ignored the RFA.

It was difficult to change longstanding regulatory cultures at some agencies; and in the absence of judicial review, efforts to achieve RFA compliance met with limited success. After SBREFA, the development of case law based on RFA compliance issues has, as expected, helped focus many agencies' attention on the need to consider small entity impacts early in their rulemakings. Small entities have used judicial review to seek RFA compliance, and a number of court decisions have remanded rules and analyses to agencies for failure to comply with the RFA.[183] It is important to note that most challenges to agency rules based on RFA compliance issues are made without Advocacy involvement. However, in certain cases, the Chief Counsel has elected to join such actions as *amicus curiae* under the authority granted by section 612 of the RFA.[184]

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[177] 5 U.S.C. § 602.

[178] 5 U.S.C. § 603.

[179] 5 U.S.C. § 605.

[180] 5 U.S.C. § 604.

[181] 5 U.S.C. § 612(a).

[182] 5 U.S.C. §§ 612(b), 612(c).

[183] E.g., see *Northwest Mining v. Babbitt*, 5 F. Supp. 2d 9 (D.D.C. 1998) in which Advocacy filed an amicus brief.

[184] 5 U.S.C. § 612(b).

Although RFA compliance issues were not directly reviewable by the courts under the original RFA, Congress did authorize the Chief Counsel to file 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 views with respect to the effect of the rule on small entities."[185] In 1986, the Chief Counsel filed the first such *amicus curiae* brief in *Lehigh Valley Farmers v. Block*,[186] but later withdrew it after it was challenged by the Department of Justice (DOJ). The DOJ maintained that the Chief Counsel's *amicus curiae* authority was unconstitutional on the grounds that it would impair the ability of the executive branch to fulfill its constitutional functions. DOJ cited § 1-402 of Executive Order 12146,[187] which states that legal disputes between two agencies are to be resolved by the Attorney General. The Chief Counsel argued that an executive order could not override a statute, namely the RFA, but nevertheless withdrew the brief.

In September 1994, the Chief Counsel decided to file as *amicus curiae* in *Time Warner Entertainment Co., L.P., et. al., v. Federal Communications Commission*.[188] The brief was prepared, but the issue was resolved with the Commission (FCC) before the filing deadline. During discussions with the FCC, DOJ attempted to object to the filing, arguing that the Chief Counsel's authority was narrow and could not address the merits of the rule. The issue was mooted by the out-of-court resolution of the dispute.

Advocacy's pre-SBREFA *amicus* filings were generally limited to arguing that failure to comply with the RFA was arbitrary and capricious under the APA. With the enactment of SBREFA in 1996, the Chief Counsel was specifically authorized to present his or her views as *amicus curiae* on: 1) agency compliance with the RFA; 2) the adequacy of an agency's rulemaking with respect to small entities; and 3) the effect of a rule on small entities.[189] This important clarification complemented the new authority to allow judicial review of RFA compliance issues and gave the Chief Counsel an important new tool to encourage agencies to take their RFA responsibilities seriously.

In 1997, Advocacy filed a motion to intervene as *amicus curiae* in *Southern Offshore Fishing Association v. Daley*.[190] Advocacy withdrew its motion when DOJ stipulated that the standard of review for RFA cases should be whether the regulation was "arbitrary and capricious." Before Advocacy withdrew, the court noted that Advocacy is the "watchdog of the RFA," and quoted from Advocacy's comment on the regulation during the proposed rule stage. Ultimately, the court held that the National Marine Fisheries Service had not complied with the RFA and remanded the regulation to the agency with instructions to undertake a new RFA analysis.

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[185] Public Law 96-354, 94 Stat. 1170. This language in § 612 of the RFA was subsequently amended by SBREFA.

[186] 829 F.2d 409 (3rd Cir. 1987).

[187] Executive Order 12146 (July 18, 1979), 44 Fed. Reg. 42657.

[188] 56 F.3d 151 (D.C. Cir. 1995).

[189] Public Law 104-121 (March 29, 1996), § 243(b), 110 Stat. 866, 5 U.S.C. § 612.

[190] 55 F. Supp. 2d 1336 (M.D. Fla. 1999).

In 1998, Advocacy's first post-SBREFA *amicus* brief was filed in *Northwest Mining Assoc. v. Babbitt.*[191] The court agreed with the issues raised by Advocacy and remanded the rule to the Department of the Interior for further analysis. The Department of Justice did not file formal objections to the filing of Advocacy's brief with the court.

Also in 1998, Advocacy filed a Notice of Intent to file an *amicus curiae* brief in *Grand Canyon Air Tour Coalition v. FAA.*[192] During the notice and comment stage, Advocacy had pointed out flaws in the Federal Aviation Administration's (FAA) regulatory flexibility analysis. Advocacy withdrew its Notice of Intent when the Department of Transportation agreed to notify the court that it was in error when it certified the final rule as having no significant economic impact on a substantial number of small entities. FAA also agreed to detail for the court data on the impact of the regulation.

In 2004, Advocacy again filed a Notice of Intent to file a brief in *United States Telecom Association, et al., v. Federal Communications Commission*,[193] challenging an FCC order imposing new rules regarding local number portability. The FCC had stated that its order "clarified" an earlier final rule and did not require notice and comment or an analysis under the RFA. Advocacy withdrew its notice when the FCC agreed to more fully consider impacts on small businesses and to urge state regulators to consider the concerns of small rural telecom providers that would be seeking waivers of the new rule. Ultimately, the petitioners prevailed in this lawsuit.

While infrequently invoked, the Office of Advocacy's *amicus* authority is an important tool to prod agencies into better compliance with the RFA when more collaborative efforts have failed. It has produced important agreements with agencies reluctant to perform appropriate RFA analyses. The Chief Counsel's willingness to use the *amicus* authority remains a "big stick" that can be wielded in support of small business when agencies ultimately are called to account for their actions by the courts. Of course, Advocacy does everything possible to help agencies avoid litigation over RFA compliance problems, and the key to this effort is early intervention.[194]

The SBREFA Panel Process. Even before the enactment of the RFA, it was recognized that early participation in the rulemaking process by small entities was essential if their interests were to be properly considered. Towards this end, SBREFA established for the first time a formal procedure for the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA) to solicit direct input from small entities on the effects of their proposals *prior* to the beginning of the normal notice-and-comment periods for these rules in what are called SBREFA panels. The Dodd-Frank

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[191] 5 F. Supp. 2d 9 (D.D.C. 1998).

[192] 154 F.3d 455 (D.C. Cir. 1998).

[193] 400 F.3d 29 (D.C. Cir. 2005).

[194] For additional information on the referenced cases, see the 2005 edition of Advocacy's annual RFA report at www.sba.gov/sites/default/files/files/05regflx.pdf, pp. 10-11.

Wall Street Reform and Consumer Protection Act of 2010 later extended the SBREFA panel provisions to the new Consumer Financial Protection Bureau.[195]

SBREFA provided that these agencies must notify Advocacy prior to the publication of an IRFA and provide information on the potential impacts of the proposed rule. In most cases, a SBREFA review panel is then convened, on which sit representatives of the Chief Counsel for Advocacy, the Administrator of OMB's Office of Information and Regulatory Affairs (OIRA), and the agency proposing the rule.[196] The panel reviews materials related to the proposal and, importantly, the advice and recommendations of small entity representatives (SERs) on the rule's potential effects and possible mitigation strategies. The panel then issues a report on the comments of the SERs and on its own findings related to RFA issues. SBREFA requires the rulemaking agency to consider the panel report findings and, where appropriate, modify the proposed rule or its IRFA.[197]

Since SBREFA established the review panel process in 1996, Advocacy has participated in 48 EPA panels, 12 OSHA panels, and 7 CFPB panels.[198] Each of these panels closely examined a regulatory proposal expected to have significant economic impacts on a substantial number of small entities. The findings of their respective panel reports helped rulemakers improve their draft proposals *before* they entered the normal notice-and-comment process. In some cases, a proposal was actually withdrawn after its impacts, costs, and benefits were better understood as a result of the panel process. In other cases, revisions were made to a draft rule that mitigated its potentially adverse effects on small entities, but did not compromise the rule's public policy objective.

The panel process does not replace, but enhances, the regular notice-and-comment process. By using the additional and often highly specific information generated during the panel process, an agency can improve its proposal early in the rule development process. Further, the panel's report and associated economic analyses are made part of the proposed rule's record, where they then help inform the public's response to the proposal. The panel process seeks to provide relevant information to all concerned parties.

Good policy requires good information, and the value of sound economic data and robust regulatory flexibility analyses has been demonstrated time and again in the SBREFA review panel process. The panel experience has confirmed that credible economic and scientific data, as well as sound analytical methods, are crucial to rational decision-making in regulatory matters, and that information provided by

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[195] Public Law 111–203 (July 21, 2010), title X, § 1100G(a), 124 Stat. 2112.

[196] The Chief Counsel may in certain limited circumstances waive the requirement for a SBREFA panel.

[197] Public Law 104-121 (March 29, 1996), § 244; 110 Stat. 867, 5 U.S.C. § 609.

[198] Through FY 2016. EPA panels and the disposition of their rules are posted at www.sba.gov/category/advocacy-navigation-structure/regulatory-affairs/small-business-statutes/sbrefa/epa-sbrefa-panels. OSHA panels and the disposition of their rules are posted at www.sba.gov/category/advocacy-navigation-structure/regulatory-affairs/small-business-statutes/sbrefa/osha-sbrefa-panels. CFPB panels and the disposition of their rules are posted at www.sba.gov/category/advocacy-navigation-structure/cfpb-sbrefa-panels.

small entities themselves on real-world impacts is invaluable in identifying equally effective regulatory alternatives.

The SBREFA panel process has institutionalized in specific circumstances what Advocacy seeks to accomplish more broadly with all agencies whose proposals have significant small entity effects – early intervention in the regulatory process. Early intervention and constructive engagement with regulatory agencies are far more productive for those regulated than coming to the table late when a rule is about to be finalized. This approach was underscored with Executive Order 13272.

Executive Order 13272. Since the enactment of the RFA in 1980, Advocacy has sought to help agencies develop a regulatory culture that internalizes the act's purposes. Advocacy takes every opportunity to show rulemakers how consideration of the potential small entity effects of their proposals and the adoption of mitigation strategies can actually improve their regulations, both by reducing costs to small entities and the economy as a whole, and by improving compliance with those rules by those regulated.

Recognizing the importance of Advocacy's participation *early* in the regulatory process and the need for improved RFA compliance by the agencies, President George W. Bush in 2002 signed Executive Order 13272, *Proper Consideration of Small Entities in Agency Rulemaking*.[199] The order provides that:

> Each agency shall establish procedures and policies to promote compliance with the Regulatory Flexibility Act, as amended…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. The Chief Counsel for Advocacy …shall remain available to advise agencies in performing that review.[200]

Executive Order 13272 further mandates that agencies:

- Issue written procedures and policies, consistent with the Regulatory Flexibility 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. These procedures and policies are to be submitted to Advocacy for comment prior to adoption, and made public when finalized.[201]
- Notify Advocacy of any draft rules that may have a significant economic impact on a substantial number of small entities under the Act.[202]
- Give every appropriate consideration to any comments provided by Advocacy regarding a draft rule. In most cases, an agency must provide in its explanation or discussion accompanying

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[199] Executive Order 13272 (August 13, 2002), 67 Fed. Reg. 53461. See Appendix C.

[200] Ibid., § 1.

[201] Ibid., § 3(a).

[202] Ibid., § 3(b).

publication of a final rule its response to any written comments from Advocacy on the proposed rule that preceded it.[203]

Advocacy is also mandated to provide RFA compliance training to agencies,[204] and to report annually to OIRA on agencies' compliance with the executive order.[205] The order specifically provides that Advocacy may provide comments on draft rules to both the agency that has proposed or intends to propose the rules and to OMB's Office of Information and Regulatory Affairs, with which Advocacy works closely.[206]

The language of Executive Order 13272 is clear. Advocacy has a central role in helping agencies comply with the RFA and in monitoring that compliance. The Chief Counsel issued a series of memoranda to agency general counsels and regulatory staff in 2002 and 2003 concerning their responsibilities under Executive Order 13272, and in 2003 Advocacy made its first annual report under the order.[207] In subsequent years, Advocacy has consolidated its annual report under Executive Order 13272 with its annual Regulatory Flexibility Act report.[208]

Executive Order 12866. One important way in which Advocacy works with OMB's Office of Information and Regulatory Affairs (OIRA) is through the regulatory review process established by Executive Order 12866, *Regulatory Planning and Review*,[209] which is coordinated by OIRA. The order sets forth principles of regulation for executive branch agencies and establishes a centralized review process for "significant" rules and guidance documents, as defined in the order.[210] This process is separate from that required by the RFA, but both share a number of objectives, and they often occur in tandem.

Executive Order 12866 principles include the justification of needs; cost-benefit analyses of regulatory alternatives based on sound scientific, technical, economic, and other information; consideration of effects on state, local, and tribal governments; avoidance of regulations that are inconsistent, incompatible, or duplicative with other federal regulations; and drafting of rules and guidance documents in simple and easy-to-understand language with the goal of minimizing uncertainty and litigation arising from such uncertainty.

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[203] Ibid., § 3(c). As noted above, the Small Business Jobs Act of 2010 included a provision that an agency must include in a final rule's FRFA its response to any comments filed by the Chief Counsel for Advocacy in response to its proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of the comments. Public Law 111–240 (September 27, 2010), title I, § 1601(a), 124 Stat. 2551, 5 U.S.C. §604(a).

[204] Ibid., § 2(b).

[205] Ibid., § 6.

[206] Ibid., § 2(c).

[207] Both the memoranda and the 2003 report can be accessed at webarchive.loc.gov/all/20100617185809/www.sba.gov/advo/laws/law_lib.html.

[208] These reports are available at www.sba.gov/advocacy/regulatory-flexibility-act-annual-reports.

[209] Executive Order 12866 (September 30, 1993), 58 Fed. Reg. 51735. See Appendix D.

[210] Ibid., § 3(f).

Importantly, Executive Order 12866 provides that "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." [211] Advocacy staff members frequently participate in 12866 reviews and assist OIRA in soliciting input from small entities. Executive Order 13272 specifically states that its mandates are consistent with those of Executive Order 12866.[212]

Executive Order 13563. In January 2011, President Barack Obama issued Executive Order 13563, *Improving Regulation and Regulatory Review*, which is supplemental to and reaffirms the principles, structures, and definitions established in Executive Order 12866.[213] The order provides that each agency must:

- 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);
- 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;
- 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);
- to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and
- 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.[214]

Executive Order 13563 further directs federal regulatory agencies to promote the coordination, simplification and harmonization of regulations that are redundant, inconsistent, or overlapping across agencies. It also directs agencies to consider regulatory flexibility whenever possible, to ensure scientific and technological objectivity in regulatory development, and to identify means to achieve regulatory goals that are designed to promote innovation. The order and related guidance documents also direct agencies to review existing significant regulations and 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. Public participation in this process is encouraged and an accountability framework through agency reporting to OMB was established.

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[211] Ibid., § 1(b)(11).

[212] Executive Order 13272, § 2.

[213] Executive Order 13563 (January 18, 2011), 76 Fed. Reg. 3821. See Appendix E.

[214] Ibid. § 1.

This important regulatory initiative is very much in keeping with Advocacy's mission, the RFA, and the prior Executive Order 13272. In fact, both Advocacy and the RFA are mentioned by name in a memorandum from the President to the heads of executive branch departments and agencies, *Regulatory Flexibility, Small Business, and Job Creation*,[215] which was issued at the same time as the order, together with another memorandum, *Regulatory Compliance*.[216] In the former memorandum, the President emphasized the importance of agency compliance with the RFA and its purposes; in the latter, the emphasis is on greater public disclosure of regulatory compliance and enforcement activities.

Executive Order 13579. In July 2011, President Barack Obama issued Executive Order 13579,[217] *Regulation and Independent Regulatory Agencies*, which encouraged independent regulatory agencies to comply with the goals of the prior Executive Order 13563.[218] The order reiterates provisions of Executive Order 13563 concerning public participation, integration and innovation, flexible approaches, and science. It provides that regulatory decisions should be made only after consideration of their costs and benefits, and that "To the extent permitted by law, independent regulatory agencies should comply with these provisions as well." [219]

Executive Order 13579 also provided that "…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." [220]

Executive Order 13610. In May 2012, President Barack Obama issued Executive Order 13610,[221] *Identifying and Reducing Regulatory Burdens,* which further developed provisions in both Executive Orders 12866 and 13563 relating to the retrospective review of regulations, also a directive included in

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[215] See Appendix F.

[216] See Appendix G.

[217] Executive Order 13579 (July 11, 2011), 76 Fed. Reg. 41587. See Appendix H.

[218] Executive Order 13563 applies to agencies as defined in §3(b) of Executive Order 12866, which itself refers to the definition of an agency in 44 U.S.C. § 3502(1) that explicitly excludes independent regulatory agencies. Executive Order 13579 provides that the term "independent regulatory agency" shall have the meaning set forth in 44 U.S.C. §3502(5) which provides that ``the term `independent regulatory agency means the Board of Governors of the Federal Reserve System, the Commodity Futures Trading Commission, the Consumer Product Safety Commission, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Energy Regulatory Commission, the Federal Housing Finance Board, the Federal Maritime Commission, the Federal Trade Commission, the Interstate Commerce Commission, the Mine Enforcement Safety and Health Review Commission, the National Labor Relations Board, the Nuclear Regulatory Commission, the Occupational Safety and Health Review Commission, the Postal Rate Commission, the Securities and Exchange Commission, and any other similar agency designated by statute as a Federal independent regulatory agency or commission…"

[219] Executive Order 13579, § 1(c).

[220] Ibid. § 2(a).

[221] Executive Order 13610 (May 10, 2012), 77 Fed. Reg. 28469. See Appendix J.

Executive Order 13579. The new order recognized progress that had been made under the prior orders, but noted that "…further steps should be taken…to promote public participation in retrospective review, to modernize our regulatory system, and to institutionalize regular assessment of significant regulations."[222]

A key provision of the RFA is its Section 610 "look-back" provision mandating the periodic review of existing regulations. Accordingly, Executive Order 13610 directs agencies to give priority in their reviews "…to those initiatives that will produce significant quantifiable monetary savings or significant quantifiable reductions in paperwork burdens…" and, importantly, it provides that "…agencies shall also give special consideration to initiatives that would reduce unjustified regulatory burdens or simplify or harmonize regulatory requirements imposed on small businesses."[223]

RFA compliance training program. A major provision of Executive Order 13272 is its requirement that Advocacy provide RFA compliance training to federal regulatory agencies.[224] When this task was given to Advocacy in 2002, Advocacy established training teams including attorneys in the Office of Interagency Affairs and regulatory economists from Advocacy's Office of Economic Research. From FY 2009 through FY 2016, Advocacy has provided RFA compliance training to over 1,100 rule development and policy professionals. Since the training program's inception, most federal agencies have received RFA training, including 18 cabinet level departments, 67 separate component agencies and offices within these departments, and 22 independent agencies. Various special groups, including congressional staff, business organizations, and trade associations, have also received training.

Federal officials – including attorneys, economists, policymakers, and other professionals involved in the regulatory development process – have come to the training sessions with varying levels of familiarity with the RFA. The 3½ hour session gives participants hands-on training on how to comply with the RFA and associated requirements. There are activities throughout the course to refresh and challenge attendees' existing RFA knowledge, as well as numerous opportunities to tackle some of the lesser-known complexities of the RFA.

One of the most important themes throughout Advocacy's RFA training course is that agencies should bring Advocacy into the rule development process early. The course encourages agencies to work closely with Advocacy to help them determine whether a potential rule will have a significant economic impact on a substantial number of small entities. This determination is often where agencies make their initial mistakes under the RFA. RFA training explains the steps needed to make this decision accurately. By considering the impact of their regulations on small entities from the beginning, agencies are more likely to propose a rule that is less burdensome while at the same time encouraging better compliance. By "doing it right on the front end," agencies avoid the legal complications and delays that can result from RFA noncompliance.

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[222] Ibid. § 1.

[223] Ibid. § 3.

[224] Executive Order 13272, § 2(b).

Advocacy's success over the years in providing RFA compliance training to regulatory and policy officials throughout the federal government is having an impact on the way agencies approach rule development. It has led to a greater willingness by many agencies to share draft documents with Advocacy, an important measure of the trust essential to a constructive interagency relationship. Agencies whose staff members have been through the classroom training call Advocacy earlier in the rule development process, share draft documents, and recognize that if they do not have the information they need, Advocacy can often assist them in obtaining small business data. In addition, Advocacy's training program has improved agencies' analyses of the federal regulatory impact that their rules have on small entities and has enhanced the factual basis for agency certifications that rules will not have significant impacts. Although changing the regulatory culture at some agencies continues to be a challenge, and not all agencies adequately consider the small business effects of their proposals, Advocacy's RFA compliance training sessions have indeed made a difference in the rule development process at many agencies, and therefore ultimately they have made a difference to small businesses.

Advocacy continues to train agencies as requests are made for additional and more detailed assistance on RFA compliance. Advocacy is able to focus on those agencies needing additional training in the economic analysis of small business impacts, as well as offering basic training. This continued emphasis on the basics of the RFA—including the importance of detailed economic analysis as an integral part of the public comment period, the requirement of a factual basis for a threshold analysis of a rule's impact, and contemplating a rule's impact prior to a first draft—will continue to be important issues for Advocacy's training teams in the years to come.

RFA compliance guide. Following enactment of SBREFA in 1996, Advocacy published an 18-page document titled *A Guide to the Regulatory Flexibility Act,* which provided a general overview of the RFA and its amendments. In 1998 that document was updated with more detailed information informed by Advocacy's experience with the RFA as amended by SBREFA, resulting in a much expanded resource that has been periodically revised to reflect the most current legislation, executive orders, case law, and Advocacy experience.

Advocacy's current RFA compliance guide, *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act*, was updated in 2012 and reprinted in 2016. This guide also implements a provision of Executive Order 13272 which mandates that Advocacy should notify agencies of the requirements of the RFA.[225] In preparing this guide, Advocacy received input from regulatory agencies, the Office of Management and Budget, congressional committees, and small business and trade associations. It reflects Advocacy's 35 years of experience with the RFA and is written in a spirit of interagency cooperation and recognition of small businesses' vital importance to the economy. This 200-page guide provides a step-by-step, detailed procedural outline of what the RFA requires agencies to do when promulgating regulations. It also details relevant case law, provides Advocacy policy decisions on some of the finer points of the law, and includes examples of actual regulations where an agency did a

[225] Ibid., § 2(a).

good job on their RFA analysis. The RFA itself, applicable executive orders, and memoranda relating to regulatory review are also reprinted.

Advocacy's RFA compliance guide has been provided to regulatory agencies and other interested parties. It is also available on Advocacy's website.[226] The guide is an important part of Advocacy's RFA training process. Copies of the guide are sent to an agency prior to a training session, along with pre-classroom activities, enabling students to familiarize themselves with RFA issues in preparation for the training session. One of the goals of RFA training is to show agency regulatory staff that many of their RFA questions can be answered easily by referring to the guide, which is designed to be a valuable resource for this purpose. There will always be questions, however, that require consultation with Advocacy staff members. Advocacy staff are always available to confer with regulatory development staff at other agencies on questions relating to RFA compliance, small business impacts and statistics, and related matters.

Confidential interagency communications. One of the most important duties of Advocacy is to "represent the views and interests of small businesses before other Federal agencies whose policies and activities may affect small business."[227] The fact is that a considerable amount of preparation goes into rule development before regulatory agencies formally promulgate rules and their public notice-and-comment process begins. It is Advocacy's goal to participate in this regulatory development process as early as possible, both to counsel agencies on potential effects of their actions on small business and to provide RFA compliance expertise as needed.

Inherent in this constructive engagement is the understanding that both Advocacy and a regulatory agency with which it confers are partners within the executive branch, and that both should work together to advance their respective public policy objectives. These are often not the same, but they usually can be accomplished together. For example, EPA may have a regulatory objective to reduce a source of pollution, while Advocacy's objective is to mitigate the resulting rule's adverse effects on small entities that are not the primary source of the pollution problem. If 5 percent of an industry's firms are creating 95 percent of the problem, there is little reason to impose one-size-fits-all regulations that create unwarranted burdens for smaller firms that are not the cause of the problem the regulation seeks to control. In this case, an EPA rule focused on 5 percent of the firms in an industry could deal with 95 percent of the pollution problem, while not affecting the other 95 percent of firms in that industry. This illustration is by no means fanciful, and Advocacy seeks to promote such flexible regulatory approaches every day.

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[226] See www.sba.gov/advocacy/guide-government-agencies-how-comply-regulatory-flexibility-act.

[227] 15 U.S.C. § 634c(4). We have seen in Chapter 1 how small business association representatives testifying before Congress as Advocacy's charter legislation was being considered made the point that, no matter how effective they were in representing their own members, "advocacy within Government and by Government would still be essential to do the infighting for small business." Hearing before the Senate Select Committee on Small Business, "Oversight of the Small Business Administration: The Office of the Chief Counsel for Advocacy and How it Can be Strengthened" (March 29, 1976), p. 82.

Advocacy and regulatory agencies must work as partners for the objectives of the RFA to be accomplished, and more agencies are learning that this partnership helps them accomplish their own regulatory objectives as well. The fact that both are headed by senior-level presidential appointees confirmed by the Senate helps in this process – in an important sense, the leadership of both agencies are on the same team. But it is also essential that other agency policymakers and regulatory development staff have confidence that they can share pre-proposal information with Advocacy staff without fear of premature disclosure. Such disclosure could have a variety of adverse consequences and, depending on what is disclosed to whom, could in some cases violate law. Perhaps the worst outcome for Advocacy would be that an agency would no longer share pre-proposal information or seek Advocacy's help in crafting RFA-compliant rules.

Fortunately, Advocacy's track record in this regard has been exemplary, and the trust that its legal team has built with regulatory agencies is evident as these agencies are increasingly asking for Advocacy guidance early in the pre-proposal phase of the rule development process. These requests can take many forms, and Advocacy staff members are always ready to handle the most routine or complex inquiry. A question could relate to how to conduct an RFA threshold analysis when considering a certification. Or it may be about how many firms are in a given industry sector and how do they break down by size. Perhaps an opinion on a technical point in the RFA and related case law is needed, or a preliminary review of a draft IRFA. Advocacy's legal team and its regulatory economists are experts in these matters; its attorneys have highly specialized experience in their issue areas and in administrative law in general.

While Advocacy is extremely proud of its expert pre-proposal technical assistance to regulatory agencies, and of the significant improvements in regulations that result, it is frustrating that because of the confidential nature of most such communications, Advocacy is unable to document the cost savings that flow from this important work. However, there is another category of interagency communications that Advocacy is careful to document and post on its website - formal Advocacy communications to agencies, including but not limited to comments on rules during their formal notice-and-comment process.

Formal Advocacy comments. While Advocacy attempts to work with regulatory agencies as early in the rule development process as possible, many regulations still reach the public proposal stage with RFA compliance issues or potential adverse consequences for small entities that could be better addressed. This can happen even when the promulgating agency has made a good-faith effort to do all required of it by the RFA. As knowledge of a new proposed regulation circulates to those who could be affected (whether through trade associations, outreach efforts by the issuing agency or Advocacy, listservs, press coverage, etc.), new issues can come to light, or the importance of something previously considered may be better understood. This, after all, is a primary purpose of the notice-and-comment period—to solicit public input on what is still at this stage a proposal, with the hope that it can be improved.

Advocacy has since its inception made extensive use of the public notice-and-comment process to make known the concerns of small businesses to agencies promulgating rules with potentially adverse effects

or RFA compliance problems. Before RFA judicial review, SBREFA panels, and Executive Order 13272, Advocacy's opportunities for pre-proposal technical assistance to regulatory agencies were often limited. But Advocacy was able to make small business concerns known, together with appropriate legal and RFA compliance analyses, by filing public comments. A breakdown of 256 public filings by year and agency follow in Chart 1.

Chart 1.
Number of Advocacy Formal Regulatory Comments by Year, FY 2009–FY 2016

Year	Number	Year	Number
FY 2009	41	**FY 2013**	28
FY 2010	39	**FY 2014**	22
FY 2011	50	**FY 2015**	28
FY 2012	28	**FY 2016**	20

Also of interest is a breakdown of Advocacy comments by key RFA compliance issues. Chart 2 illustrates major concerns raised in comment letters, as reported in Advocacy's annual RFA reports. Over the time period, fewer comments have related to inadequate or missing IRFAs and to small business outreach, while inadequate economic analyses of small business impacts and improper certifications remain persistent problems.

Chart 2.
Advocacy Comments by Key RFA Compliance Issues, FY 2009–FY 2015

Percent of all Issues Noted in Advocacy Regulatory Comment Letters							
Issues	**FY 2009**	**FY 2010**	**FY 2011**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**
Inadequate economic analysis of SB impacts	7%	18%	15%	22%	24%	24%	23%
Small business outreach needed	17%	3%	9%	13%	3%	6%	3%
Inadequate or missing IRFA	31%	12%	18%	16%	9%	6%	
Improper certification	7%	9%	11%	5%	15%	9%	10%
Significant alternatives not considered	17%	26%	12%	7%	12%	18%	3%
Comment period should be lengthened			5%	5%	9%	12%	3%
Other*	22%	32%	29%	30%	29%	27%	54%

***These included incorrect size or class of entities considered in analyses, failure to follow SBREFA panel recommendations, and failure to consider small business input. Also, Advocacy suggested specific regulatory alternatives in some instances.**

As the agency distribution table, Chart 3, shows, formal Advocacy regulatory comments have gone to 59 different agencies with remarkably diverse missions. The number of communications to any given agency should not be taken as a measure of its sensitivity to small business or RFA concerns. Some agencies' activities by their nature affect more small entities than others. The establishment of the SBREFA review panel process for EPA, OSHA, and CFPB rules reflects this, contributing to the relatively larger number of comments to these agencies. Also, major issues can generate multiple communications on the same proposals. Designations of critical habitat for endangered species generate numerous comments to the Fish and Wildlife Service, and IRS rules and paperwork are always near the top of any list of small business concerns. All Advocacy comment letters have been posted on Advocacy's website since 2002.[228]

[228] For a detailed listing, see www.sba.gov/category/advocacy-navigation-structure/legislative-actions/regulatory-comment-letters.

Chart 3.
Regulatory Comment Letters, FY 2009–FY 2016

Agency	Number of Letters	Agency	Number of Letters
Environmental Protection Agency	51	General Services Administration	2
Department of Labor	20	National Marine Fisheries Service	2
Federal Communications Commission	20	Office of the Comptroller of the Currency	2
Fish and Wildlife Service	18	Animal and Plant Health Inspection Service	1
Department of Health and Human Services	13	Bureau of Land Management	1
Federal Reserve Board	10	Comptroller of the Currency	1
Department of Energy	8	Department of Commerce	1
Food and Drug Administration	8	Department of Education	1
Internal Revenue Service	7	Department of the Treasury	1
Consumer Financial Protection Bureau	6	Department of Housing and Urban Development	1
Federal Aviation Administration	5	Department of Veterans Affairs	1
National Oceanic and Atmospheric Admin.	5	Employee Benefits Security Admin.	1
Occupational Safety and Health Administration	5	Equal Employment Opportunity Commission	1
Department of the Interior	4	Executive Office of the President	1
Small Business Administration	4	Farm Credit Administration	1
Consumer Product Safety Commission	3	Food and Nutrition Service	1
Department of Agriculture	3	Food and Safety Inspection Services	1
Department of Defense	3	International Accounting Standards Board	1
Department of Homeland Security	3	National Archives and Records Administration	1
Department of Justice	3	National Credit Union Administration	1
Department of Transportation	3	National Institute of Standards and Technology	1
Financial Accounting Standards Board	3	National Toxicology Program	1
Office of Management and Budget	3	Office of Surface Mining Reclamation and Enforcement	1
Patent and Trademark Office	3	Office of Thrift Supervision	1
Securities and Exchange Commission	3	Presidential Economic Recovery Advisory Board	1
Administrative Conference of the United States	2	Social Security Administration	1
Department of State	2	Transportation Security Admin.	1
Federal Acquisition Regulation Council	2	U.S. Army Corps of Engineers	1
Federal Deposit Insurance Corporation	2	U.S. Citizen and Immigration Services	1
Federal Motor Carrier Safety Admin.	2		

Source: Data derived from RFA Annual Reports thru FY 2015 and Advocacy website postings through FY 2016. A total of 256 letters were sent to 59 agencies. Average number of letters per full year: 32. One FY 2011 letter not counted was sent to all agencies.

Periodic review and reform – the RFA's Section 610. Section 610 of the RFA requires agencies to periodically review their existing rules that have or will have a significant economic impact upon a substantial number of small entities.[229] The purpose of the review is to determine whether such rules should be continued without change, or should be amended or rescinded, consistent with the stated objectives of applicable statutes, to minimize any significant economic impact of the rules upon a substantial number of such small entities. Section 610 reviews are to take place within ten years of the publication of such rules as final. During a 610 review agencies are to 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.

A report issued by the Government Accountability Office (GAO) in July 2007 examined agency reviews to evaluate the effectiveness of their existing regulations, including the periodic reviews required by Section 610.[230] GAO found that agencies often did a poor job of involving the public in the review process and explaining what they look at when they evaluate their rules. As a result, GAO concluded that agencies' reviews of their current rules, including reviews required under Section 610, were not as effective as they could be. In a follow-up report prepared in connection with congressional testimony in March 2014, GAO found that, while the administration's issuance of Executive Orders 13563, 13579, and 13610 were helpful, problems remained for many agencies in the effectiveness of their efforts at regulatory review.[231]

Advocacy refocused its retrospective review efforts with the issuance of Executive Orders 13563, 13579, and 13610, and accompanying guidance to agencies from OMB. These orders formalized procedures to

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[229] 5 U.S.C. § 610.

[230] U.S. Government Accountability Office, *Reexamining Regulations: Opportunities Exist to Improve Effectiveness and Transparency of Retrospective Reviews* (July 2007), GAO-07-791, www.gao.gov/products/GAO-07-791.

[231] U.S. Government Accountability Office, *Federal Rulemaking: Regulatory Review Processes Could Be Enhanced* (March 2014), GAO-14-423T, www.gao.gov/assets/670/661540.pdf.

institutionalize the goals of an earlier Advocacy's retrospective review effort, the so-called "r3" initiative, and those of a similar effort by OMB's Office of Information and Regulatory Affairs.[232]

This concludes our review of the various ways in which Advocacy, and especially its legal team, advances the purposes of the Regulatory Flexibility Act. We have looked at judicial review and the Chief Counsel's *amicus curiae* authority; the SBREFA review panel process; Executive Orders 13272, 12866, 13563, 13579, and 13610; Advocacy's RFA compliance training program and its RFA compliance guide; confidential interagency communications; Advocacy formal comments; and periodic regulatory review under the RFA's Section 610. The effects of all these efforts are often difficult to measure, but where possible Advocacy does try to quantify the results of its activities. One important such measure is that of cost savings flowing from Advocacy interventions in the rulemaking process.

Cost Savings from Advocacy Interventions in the Rulemaking Process

As the Office of Advocacy works with federal agencies during the rulemaking process, it seeks to measure the savings of its actions in terms of the compliance costs that small firms would have had to bear if changes to regulations had not been made. Cost savings are not claimed unless the methodologies and sources for their calculation can be documented, and Advocacy is conservative in these calculations.

Advocacy generally bases its cost savings on agency estimates, though additional research and sources may be used and documented as needed. Cost savings for a given rule are reported in the fiscal year in which the agency agrees to changes in a rule as a result of Advocacy's intervention. Where possible, cost savings are limited to those attributable to small businesses.

Advocacy generally reports two types of cost savings: first-year savings, and recurring annual savings. First-year cost savings consist of either capital or annual costs that would be incurred in the rule's first year of implementation. Some rules will have one-time, but not recurring annual savings. As Chart 4 shows, there can be considerable variation from year to year in cost savings estimates. This arises from a number of factors beyond Advocacy's control, including the timing of agency proposals, occasional "outliers" with unusually large savings, and the willingness of agencies to agree to Advocacy suggestions.

[232] Partially in response to the 2007 GAO report, and recognizing a need for improvements in Section 610 compliance, Advocacy launched its Small Business Regulatory Review and Reform (or r3) initiative in that year. For more information, see webarchive.loc.gov/all/20100619022216/www.sba.gov/advo/r3/. Advocacy also published a best practices document to help federal agencies know when and how they should conduct a Section 610 review of an existing rule. See: *Section 610 of the Regulatory Flexibility Act: Best Practices for Federal Agencies* (October 2007), webarchive.loc.gov/all/20100730124403/www.sba.gov/advo/r3/r3_section610.pdf.

Chart 4.
Regulatory Cost Savings from Advocacy Interventions, FY 2009 – FY 2016

Fiscal Year	First Year Savings ($)	Recurring Annual Savings ($)
FY 2009	6.995 billion	.745 billion
FY 2010	14.995 billion	5.495 billion
FY 2011	11.695 billion	10.693 billion
FY 2012	2.450 billion	1.237 billion
FY 2013	1.533 billion	.866 billion
FY 2014	4.811 billion	4.606 billion
FY 2015	1.610 billion	.926 billion
FY 2016	1.725 billion	.346 million
Total	**45.814 billion**	**24.914 billion**

Note: More detailed information on cost savings and the specific rules from which they result is available in Advocacy's annual RFA reports at www.sba.gov/advocacy/regulatory-flexibility-act-annual-reports.

Historically, Advocacy has measured its achievements under the RFA through a calculation of regulatory cost savings. However, the cost savings figure does not begin to capture the totality of Advocacy's involvement in the rulemaking process. Advocacy's efforts pursuant to Executive Order 13272 have proven increasingly successful, and more agencies are doing a better job in their analyses of a rule's impact on small entities before the regulation is made public in the *Federal Register*. Many of Advocacy's greatest successes cannot be explained or quantified publicly because of the importance of maintaining the confidentiality of interagency communications. Pre-proposal oral and written communications between Advocacy and agencies are kept confidential, and that encourages the pre-publication exchange of information between them. Often, pre-proposal communications are where the greatest benefits are achieved in agency compliance with the RFA and in the choice of alternatives that lessen a rule's impact on small businesses. Advocacy continues to measure its accomplishments through cost savings that can be claimed publicly, but the fact is that the real savings are much higher.

The success of Advocacy's early intervention in the rulemaking process and its agency training program under Executive Order 13272 has presented Advocacy with an interesting conundrum. Theoretically, as Advocacy achieves its goals in utilizing these tools, and agencies become more proficient in complying with the RFA and institutionalizing consideration of small entities in the rulemaking process, cost savings between the first public proposal of a rule and its finalization should diminish, and this may be a major reason why annual cost savings publicly claimed do not appear to be as high as they were a decade ago.

Further, as agencies begin to see for themselves the importance of implementing the RFA early in the rulemaking process, cost savings will be more difficult to calculate, and other measures of the law's effectiveness may be needed. As a result, Advocacy continues to analyze various alternative methods of quantifying the effectiveness of its regulatory advocacy. Advocacy is also now publishing in its annual

RFA reports examples of instances in which the office's efforts resulted in a regulatory outcome that was beneficial to small concerns, but which could not be quantified in terms of cost savings.

Advocacy Roundtables

The preceding sections have dealt largely with Advocacy's interaction with other federal agencies on regulatory issues, and on the RFA in particular. To be effective in its interagency communications, it is important that Advocacy understands the concerns of small entities about these issues, especially new proposed regulations, and the office actively solicits input from stakeholders in a variety of ways. One of the most important sources of information are "roundtables" that Advocacy sponsors on specific topics, at which representatives of small businesses and government agencies can meet and informally discuss matters of current interest.

A typical regulatory roundtable would be attended by 10 to 50 small business owners, representatives of small business trade associations, and agency representatives. Although some roundtables are scheduled regularly, such as those on environmental regulations and on labor safety and health issues, roundtables can be held at any time that there is sufficient interest in a topic. Attendance is open to the public, and notices of upcoming roundtables are posted on Advocacy's website. Many such sessions are focused on specific rules, and help Advocacy and regulatory agencies solicit small business input in the rule development process. They also frequently introduce individuals with shared interests to each other for the first time, beginning a relationship that may continue after the roundtable without Advocacy's direct involvement. Advocacy roundtables are held to share and exchange information on topics such as:

- Environmental regulations
- Occupational safety and health regulations
- Tax issues
- Homeland security issues, including immigration rules
- Regulations affecting home mortgage brokers
- Patent reform
- Telecommunications issues
- Regulations implementing the Americans with Disabilities Act
- RFA jurisprudence
- Aviation safety issues, including FAA regulations on unmanned aircraft (drones)
- Federal Motor Carrier Safety Administration training and safety requirements
- Veterans business data
- Federal contracting issues and regulations
- Employee benefits
- Fair pay and overtime regulations

All of these sessions contributed directly to Advocacy's and the attendees' working knowledge of topics that were currently the subject of new regulations, legislation, or court decisions. They also helped the regulatory agencies that made presentations at or attended such roundtables better understand the

views of stakeholders about their proposals. As we have said before, Advocacy believes that good policy requires good information, and the goal of Advocacy roundtables is to improve the information that policymakers have about the potential effects of their proposals. From FY 2009 through FY 2016, Advocacy hosted 201 regulatory roundtables as noted in Chart 5.

Chart 5.
Number of Advocacy Roundtables,
FY 2009–FY 2016

Advocacy Roundtables	
FY 2009	22
FY 2010	27
FY 2011	37
FY 2012	32
FY 2013	21
FY 2014	19
FY 2015	21
FY 2016	22

International Trade

In 2012, Advocacy began a special initiative relating to international trade. Advocacy's unique knowledge of how regulations affect small business gives the office the ability to help the small businesses of America have a place at the table during trade negotiations. Advocacy can be their voice encouraging policies that will allow them easier access to the 95 percent of the world's customers outside of our borders.

Since 2012, Advocacy has participated in a number of international regulatory cooperation (IRC) and international trade initiatives that will impact U.S. small businesses. Although IRC is not a new concern, President Obama's Executive Order 13609, *Promoting International Regulatory Cooperation*, has further impressed upon executive agencies the importance of cooperating with their foreign counterparts.[233] IRC has become a subject of negotiations in recent trade agreements, as have the disproportionate burdens that small businesses may face in international trade.

Advocacy has been invited by the Office of the United States Trade Representative (USTR) to participate in high-level meetings of various international working groups on regulatory cooperation, and it has received positive feedback from its involvement in these meetings. The office anticipates continuing

[233] Executive Order 13609, *Promoting International Regulatory Cooperation* (May 1, 2012), 77 Fed. Reg. 26413. See Appendix I.

participation in future IRC efforts, and has dedicated staff for this purpose. Because of the experience and contacts that Advocacy has gained through these activities, the office is now actively involved in international regulatory matters that affect U.S. small businesses, including participation in the official U.S. delegations to trade negotiations.

Advocacy continues to explore how it can represent U.S. small businesses both in dealing with foreign regulations and those U.S. regulations that impede small business involvement in international trade. Lowering such regulatory barriers could open vast new markets to smaller firms.

The Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA) established a new role for Advocacy to facilitate greater consideration of small business issues during international trade negotiations.[234] Under TFTEA, the Chief Counsel for Advocacy must convene an Interagency Working Group (IWG) whenever the President notifies Congress that the Administration intends to enter into trade negotiations with another country. The purpose of the IWG is to conduct small business outreach in manufacturing, services, and agriculture industries, and to receive input from small businesses of the potential economic effects of a trade agreement on these sectors.

From these efforts, the IWG is charged with identifying the most important priorities, opportunities, and challenges affecting these industry sectors in a report to Congress. This report must also provide an analysis of the economic impact on various industries, information on state-owned enterprises, recommendations to create a level playing field for U.S. small businesses, and information on federal regulations that should be modified in compliance with the potential trade agreement.

TFTEA requires that an IWG convened by Advocacy must include a representative from the U.S. Department of Commerce, the Office of U.S. Trade Representative, and the U.S. Department of Agriculture. Each individual will represent their agency during the IWG's discussions and outreach to small business and other small entities. On August 1, 2016, the Chief Counsel sent letters to the heads of Commerce, USTR, and USDA requesting that they designate a representative for the IWG.

Advocacy looks forward to this new avenue through which it can use its resources and regulatory experience to help small businesses participate in international trade, and to have a more level playing field with competition in an increasingly global economy.

Memoranda of Understanding – OIRA and the Office of the National Ombudsman

From time to time, agencies with a commonality of interests choose to formalize certain aspects of their relationships with a memorandum of understanding (MOU). Such an agreement sets forth responsibilities within its scope to which the leadership of each party to the agreement commits their agencies or offices. It also makes clear to both the staff of those offices and to the public the nature of

[234] Public Law 114-125 (February 24, 2016), § 502, 130 Stat. 172-173. The act provided that its Title V may be cited as the ''Small Business Trade Enhancement Act of 2015'' or the ''State Trade Coordination Act."

the cooperation contemplated between the offices. In recent years, Advocacy has entered into two MOUs of special interest, one with OMB's Office of Information and Regulatory Affairs (OIRA), and one with SBA's Office of the National Ombudsman.

MOU with OIRA. In March 2002, Advocacy and OIRA signed an MOU that prefigured important elements of Executive Order 13272, which was to follow in August of that year.[235] The agreement noted that both offices recognized "that small entities…often face a disproportionate share of the Federal regulatory burden compared with their larger counterparts. Advocacy and OIRA further recognize that the best way to prevent unnecessary regulatory burden is to participate in the rulemaking process at the earliest stage possible and to coordinate both offices to identify draft regulations that likely will impact small entities." The MOU continued that "Inasmuch as Advocacy and OIRA share similar goals, the two agencies intend to enhance their working relationship by establishing protocols for sharing information and providing training for regulatory agencies on compliance with the Regulatory Flexibility Act (RFA) and various other statutes and Executive orders that require an economic analysis of proposed regulations."[236]

Under the MOU, Advocacy agreed to be available to assist OIRA on RFA compliance questions in any Executive Order 12866 review; to monitor agency RFA compliance and keep OIRA advised of concerns on noncompliance; to share with OIRA any correspondence or formal comments that Advocacy files with an agency concerning RFA compliance; to develop guidance for agencies on RFA compliance; and to provide training to agencies on RFA compliance.

For its part, OIRA agreed to consider during its Executive Order 12866 pre-proposal review of a rule whether the agency should have provided a regulatory flexibility analysis and to provide Advocacy with a copy of the draft rule if it has such a concern; to consider during the 12866 process the resolution of any RFA deficiencies identified by Advocacy or to consider other options; to consider Advocacy concerns about information collection requirements under review by OIRA pursuant to the Paperwork Reduction Act; and to provide assistance to Advocacy in the development of guidance for agencies in RFA compliance and analyses.

The Advocacy/OIRA MOU laid the groundwork for a more coordinated RFA compliance enforcement effort on the part of both offices, and most of its provisions were subsequently embodied in Executive Order 13272. Because this order has a wider and direct application to agencies across government, the earlier MOU was allowed to lapse at the end of its three-year term in 2005. However, the close working relationship between Advocacy and OIRA has not changed since then, and virtually all of the provisions of the MOU remain in practice today.

MOU with the Office of the National Ombudsman. Among its many other provisions, SBREFA established within the SBA the position of Small Business and Agriculture Regulatory Enforcement

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[235] For the MOU between Advocacy and OIRA, see www.sba.gov/advocacy/mou-office-information-and-regulatory-affairs-oira. The MOU is also reprinted in Appendix P.

[236] Ibid., § 1.

Ombudsman (Ombudsman).[237] The Ombudsman's duties include: 1) monitoring the regulatory enforcement activities of federal agencies; 2) working with agencies to establish means of communication for small businesses affected by such activities to comment on their experiences, both to the agencies themselves and to the Ombudsman; 3) coordination of the activities of regional Small Business Regulatory Fairness Boards comprised of private-sector representatives who through hearings and other means collect information on the government agency enforcement activities in their own areas; 4) and the preparation of an annual report to Congress and affected agencies concerning these enforcement activities, comments from affected small firms and regional boards, and the results of resolution efforts by the Ombudsman on behalf of small firms with substantiated problems with excessive enforcement efforts.[238]

Advocacy works primarily with rules in the development and issuance process, while the Ombudsman's office is primarily concerned with potentially unfair agency enforcement of existing regulations. Because of the similarity of their respective missions, both Advocacy and the Ombudsman sometimes receive communications or complaints that would be better handled by the other. In other cases, the two offices work together to advance both their missions at the same time, especially at the regional level. To help formalize this relationship, Chief Counsel Tom Sullivan and National Ombudsman Nicholas Owens signed a MOU in November 2006.[239]

The objectives of the Advocacy/Ombudsman MOU are: 1) the establishment of an information-sharing process to ensure that small business complaints, comments, or concerns are heard by the appropriate office, and 2) the dissemination of information to small businesses and federal agencies on the respective statutory responsibilities of both offices. Advocacy and the Office of the Ombudsman enjoy an excellent working relationship. Of special importance in this relationship is the mutual assistance provided between Advocacy's regional advocates and the ten regional fairness boards established by SBREFA, comprised of private sector members and supported by the Ombudsman. The information that these "RegFair Boards" gather in their hearings and other activities can be of use to Advocacy, and Advocacy's ten regional advocates (whose geographic responsibilities coincide exactly with those of the fairness boards) can assist in the public outreach efforts of the fairness boards, particularly with business associations and governments at the regional, state and local levels. And it is to chapters on Advocacy's outreach, public information, and regional advocacy activities that we now turn.

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[237] § 222, Public Law 104-121 (March 29, 1996), 110 Stat. 860, 15 U.S.C. § 657.

[238] For additional information on SBA's Office of the National Ombudsman and its activities, see www.sba.gov/ombudsman.

[239] For the MOU between Advocacy and the Ombudsman, see www.sba.gov/advocacy/mou-office-national-ombudsman. The MOU is also reprinted in Appendix Q.

Chapter 4
The Public Face of Advocacy: Outreach to Stakeholders

In the last chapter we examined how Advocacy represents the interests of small businesses before government agencies, a core mission mandated by Public Law 94-305. In this chapter, we will look at a variety of activities that together respond to other important duties specified in that law that Advocacy is to implement on a continuing basis, notably:

- to serve as a focal point for the receipt of complaints, criticisms, and suggestions concerning the policies and activities of federal agencies that affect small businesses; and
- to enlist the cooperation and assistance of public and private agencies, businesses, and other organizations in disseminating information about the programs and services provided by the federal government that are of benefit to small businesses, and information on how small businesses can participate in or make use of such programs and services.[240]

For example, Public Law 94-305 authorizes the Chief Counsel to prepare and publish such reports as deemed appropriate,[241] and we have seen how a variety of additional duties involving periodic reports have accrued to Advocacy, including major annual reports on the RFA, Executive Order 13272, and the *Small Business Profiles.* Although all of Advocacy's operational divisions are very much involved in these activities, it is the special duty of its Office of Information to facilitate the exchange of information between Advocacy and its stakeholders, an exchange that is essential for the successful accomplishment of Advocacy's varied duties.

The Office of Information had seven positions in 2016. The role of the Office of Information staff continues to evolve with the ever-changing avenues of communication through the Internet, social media, and computer graphics. The independence of Advocacy, the highly technical nature of much of its economic research and legal work products, the high-level communications of the office, both in and out of government, and the sensitivity of many of these communications, all require a professional staff of uncommon ability.

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[240] These points are adapted from 15 U.S.C. § 634c.

[241] 15 U.S.C. § 634f.

Information is responsible for Advocacy's congressional relations; liaison with small business organizations and trade associations; press communications; preparation of all Advocacy publications, including *Small Business Profiles* and the monthly newsletter, *The Small Business Advocate;* management of content on the office's extensive website; organization of conferences and symposia; and general coordination of the flow of Advocacy work products to stakeholders.

Congressional Outreach: Testimony and Other Assistance

One of the primary responsibilities of the Office of Advocacy is listening to small businesses and ensuring that their views and concerns are heard by Congress, both formally and informally. Advocacy is frequently asked by members and committees of Congress for its views on legislation and policy issues of importance to small business. These issues are amazingly diverse, ranging from agency compliance with the Regulatory Flexibility Act to intellectual property legislation, from a predictable and reliable tax structure to overtime pay exemption rules. Formal responses may be delivered either as legislative comment letters or as testimony before a congressional committee by the Chief Counsel or another designated Advocacy staff member. Following are examples of testimony delivered by Chief Counsels Sargeant and DePriest on subjects of major importance to small business:

- *Next Steps for Main Street: Reducing the Regulatory and Administrative Burdens on America's Small Businesses.* In November 2010 testimony before the Senate Committee on Small Business and Entrepreneurship, Chief Counsel Sargeant described the current regulatory landscape, and specifically touched on both the work of the Environmental Protection Agency and the Internal Revenue Service. Most importantly, Chief Counsel Sargeant discussed a previous Advocacy-sponsored roundtable and small business concerns with the controversial IRS Form 1099 rule. He recalled how roundtable participants said that the expanded Form 1099 reporting requirement would increase burdens on small businesses. Chief Counsel Sargeant expressed his support for the repeal of the expanded Form 1099 reporting requirement, and less than six months later, President Barack Oba ma signed into law the repeal of the expanded 1099 form.
- *Drowning in Regulations: The Waters of the U.S. Rule and the Case for Reforming the RFA.* In April 2016 testimony before the Senate Committee on Small Business and Entrepreneurship, Chief Counsel DePriest outlined Advocacy's legislative priorities for 2016. The topic areas that the legislative priorities included were: indirect effects and the scope of the Regulatory Flexibility Act, quality of RFA analyses, quality of RFA certifications, SBREFA panels, and retrospective review of regulations. During his questioning, Chief Counsel DePriest expressed his opinion that he would recommend that only the U.S. Fish and Wildlife Service be added to the SBREFA panel process.

Advocacy also answers many informal inquiries by Members of Congress and their staffs, and provides technical assistance in areas in which the office has expertise. This can range from helping craft legislation in furtherance of small business interests to interpreting information generated in Advocacy's economic research products. Advocacy economists are frequently asked for data relating to small firms in states or localities, and Advocacy has actually initiated several regular reports based on such popular demand. Advocacy's legal team is often asked how a bill or regulation will affect small business, or perhaps an industrial sector.

Chart 6 depicts Advocacy's congressional hearing testimony and legislative comment letters from October 1, 2008 through September 30, 2016.[242]

Chart 6.
Advocacy Congressional Testimony and Legislative Comments,
FY 2009–FY 2016

Fiscal Year	Congressional Testimony	Legislative Comments
FY 2009	1	2
FY 2010	2	0
FY 2011	4	1
FY 2012	1	0
FY 2013	1	0
FY 2014	2	2
FY 2015	1	0
FY 2016	2	1
Total	**14**	**6**

Although the Office of Information coordinates Advocacy's congressional communications, all professional staff are always available to respond to congressional requests as the need arises. An important element of Advocacy's independence is that Advocacy responses to such requests are not reviewed or cleared through any other office at SBA or elsewhere. Congress wanted Advocacy to provide it with independent counsel, and that is exactly what happens.

Advocacy establishes legislative priorities after consultation with congressional committees, business organizations, trade associations, and other stakeholders.[243] Such outreach to private-sector stakeholders is another important mission for the Office of Information.

Small Business Trade Association Liaison and the Chief Counsel's Leadership Group

Advocacy believes that, to be successful in its statutory duties, the office must listen to and learn from small businesses themselves, and from the organizations that represent them. They are the best primary source from which to learn directly about the problems and concerns of the small business community, and Advocacy proactively seeks their insights and assistance.

[242] See www.sba.gov/category/advocacy-navigation-structure/regulatory-policy_0.

[243] For Advocacy's legislative priorities document, see Appendix K. We will return to this subject in Chapter 7.

Advocacy works closely with small businesses and the business and trade organizations that represent them. The Chief Counsel meets quarterly with representatives from the largest small business organizations where current issues are discussed and new opportunities and strategies are explored. Contacts with hundreds of other associations are made during Advocacy's regulatory, economic research, and outreach activities. The Chief Counsel and Advocacy staff are frequently invited to attend and speak before trade conventions and meetings in their capacity as policy experts, and the office welcomes such opportunities to share information.

Advocacy's communications and legislative affairs staff keep an updated contact list of small business organizations, trade associations, and other stakeholder organizations (e.g., congressional committees, SBA resource partners, etc.) to provide outreach information. Advocacy uses this list for several purposes in order to leverage its own resources and reach a larger audience of small business opinion leaders.

Advocacy's Presence on the Web

Prior to 2001, the Office of Advocacy provided its work products and other information to its many stakeholders and the public at large through traditional outreach tools: face-to-face contact, telephone, mail, email, conferences, and print media – including hard copies of letters, newsletters, brochures, conference notebooks, and publications printed through the Government Printing Office or SBA's own internal print shop. Over the 2001-2008 period, Advocacy accomplished a major modernization of its outreach operations through extensive use of electronic media, and especially through the development of its presence on the Internet at www.sba.gov/advocacy. Advocacy's extensive website and associated listservs continue to be an indispensable part of Advocacy's communications efforts. From 2009-2016, Advocacy began to expand its outreach campaign by using new online platforms, including the Advocacy blog and through social media vehicles such as Facebook and Twitter.

With the exception of confidential interagency documents, all of Advocacy's research reports, comment letters, news releases, and other documents from 1996 forward are posted to its website and initially highlighted in the homepage "What's New" section. Here are some of the items to be found on Advocacy's website.

Publications. The web is currently Advocacy's primary daily outreach tool, with all new publications posted upon their release and publicized through listservs to all who subscribe. The website includes all Advocacy publications. Newsletters can be found in the newsroom section. Contract research reports, issue briefs, *Frequently Asked Questions*, and *Small Business Bulletins* can be found in the Research and Statistics section of the website. Advocacy's annual data product, *Small Business Profiles,* is a web "bestseller" and is also available there, along with hundreds of other research studies and publications.

Some of the most visited Advocacy webpages are

- Research and Statistics page: www.sba.gov/category/advocacy-navigation-structure/research-and-statistics.

- Regulatory Policy and Mission: www.sba.gov/category/advocacy-navigation-structure/regulatory-policy_0.
- Annual Report on Federal Agency Compliance with the RFA: www.sba.gov/advocacy/regulatory-flexibility-act-annual-reports.

Communications. Advocacy prides itself on transparency, and whenever possible the office tries to make its communications and work products available to the widest possible audience. The web has made this both practical and inexpensive.

- Advocacy posts all of its formal comment letters to regulatory agencies and related correspondence. Since 2002, these have been posted chronologically and by subject matter. Additional comments from 1996-2001 are available by subject area. Comment letters are online at www.sba.gov/category/advocacy-navigation-structure/legislative-actions/regulatory-comment-letters.
- Legislative comments from 2002 forward are posted at www.sba.gov/category/advocacy-navigation-structure/legislative-actions/legislative-comment-letters.
- Advocacy's congressional testimony from 2008 forward is posted at www.sba.gov/category/advocacy-navigation-structure/legislative-actions/congressional-testimony.

Advocacy also communicates through several social media platforms.

- Advocacy's blog includes posts from every department within Advocacy and is located at advocacysba.sites.usa.gov.
- The information team also uses Advocacy's Facebook page to disseminate information to stakeholders. It is located at www.facebook.com/AdvocacySBA.
- The office is also present on Twitter. Small business stakeholders can tweet back to @AdvocacySBA.

Regulatory Alerts. Advocacy has developed a useful site for small businesses interested in current regulatory developments. The Regulatory Alerts webpage lists regulatory notices published in the *Federal Register* that may significantly affect small businesses and that are open for comment. Advocacy encourages small firms to provide the issuing federal agency with comments on the proposed action and on the agency's analysis of potential impacts on small business. Firms are also encouraged to share their comments with Advocacy on these and other regulatory proposals of importance to them. The page is located at www.sba.gov/category/advocacy-navigation-structure/legislative-actions/regulatory-alerts.

Each Regulatory Alerts entry contains a link to www.regulations.gov, the federal government's one-stop site at for commenting on regulations published in the *Federal Register*. Advocacy's Regulatory Alerts page is updated frequently with the assistance of its Office of Interagency Affairs.

Listservs. Advocacy maintains three major listservs for distribution of its monthly newsletter: news releases, research reports, and regulatory comments, respectively. At the end of FY 2016, the news release listserv included nearly 35,000 subscribers; the data, statistics, and reports listserv had more than 27,000 subscribers; and the regulatory alert and comment letter listserv included nearly 25,000 subscribers. The use of these listservs ensures targeted delivery of information to tens of thousands of

recipients across the world at an extremely low cost. Advocacy actively encourages the use of its listservs as a convenient way for its stakeholders to keep abreast of the office's activities and to alert them of regulatory developments of interest. Users can sign on to one or more of these email listservs at public.govdelivery.com/accounts/USSBA/subscriber/new?topic_id=USSBA_184.

Small Business Alerts Newsletter. To ensure that Advocacy's publications, research, and regulatory affairs efforts reach a broad audience, Advocacy's information team put together a Small Business Alerts Newsletter. It is a bimonthly newsletter that is sent to the small business congressional staff, small business trade organizations, and is distributed across the nation to small business stakeholders through Advocacy's ten regional advocates. The newsletter recaps recently released research, Advocacy comment letters, open regulatory comment periods, SBREFA panels, Advocacy events, and Advocacy roundtables. It also links to *The Small Business Advocate,* Advocacy's monthly newsletter.

The Small Business Advocate Newsletter. *The Small Business Advocate,* Advocacy's monthly newsletter, chronicles the office's important achievements and provides ongoing news about Advocacy research, important regulatory topics, and regional activities. The newsletter is currently in its 35th year of publication. Its production and distribution have continuously evolved to take advantage of current technologies. At the end of FY 2016, *The Small Business Advocate* was reaching about 37,000 subscribers. The newsletter appears monthly except for an occasional double issue.

Occasionally, a special issue of *The Small Business Advocate* will be dedicated to a single topic. For example, Advocacy's July-August 2016 edition was dedicated to Advocacy's 40th Anniversary.[244] Past issues of *The Small Business Advocate* from January 2001 forward are available online at www.sba.gov/category/advocacy-navigation-structure/newsroom/advocacy-newsletter.

Conferences and Symposia

The Office of Advocacy has a long tradition of outreach to various constituencies through conferences and symposia. In the 1980s and 1990s, Advocacy sponsored a number of conferences on state legislative and regulatory initiatives to improve the environment for small firms. Between 2004 and 2007, Advocacy cosponsored six conferences offering research and regulatory information to a range of small business stakeholders across the country. From 2009 to 2016, Advocacy symposia focused on the small business innovation economy with additional symposia on the availability of capital for small businesses and celebrating the many anniversaries for the office and small business statutes during this period. Those conferences relating to innovation will be covered in the next chapter because of their connection to regional advocacy. A brief description of other symposia follows:

RFA @30 Anniversary Symposium. In honor of the anniversary of the signing of the Regulatory Flexibility Act in September 1980, Advocacy held a daylong symposium on September 21, 2010. The event featured speakers and panels on key aspects of the law and its implementation, as well as measuring the impact of regulation on small business. Symposium panels reviewed important landmarks

[244] The special edition is reprinted in its entirety in Appendix U.

in the law's history and application, and examined current issues. Distinguished speakers participated, including The Honorable Mary Landrieu, Chair of the U.S. Senate Committee on Small Business and Entrepreneurship; the Honorable Karen Mills, Administrator of the U.S. Small Business Administration; and the Honorable Cass Sunstein, Administrator of the White House Office of Information and Regulatory Affairs.

Small Business Capital Crunch: Debt and Equity. On September 15, 2011, the Office of Advocacy held a symposium that focused on small business credit market conditions and policy initiatives addressing small business access to capital. Joining Chief Counsel Winslow Sargeant was CNN journalist Roland S. Martin, along with members of the small business community, policymakers, economists, and financial experts. Panelists explored new financing options in response to ongoing small business needs for capital.

Advocacy Anniversary Symposium. Held on June 22, 2016, Advocacy hosted an event in Washington, D.C., to mark a number of important milestones for the office: 40 years since Advocacy's founding, 35 years since the Regulatory Flexibility Act was enacted, 20 years since the passage of the Small Business Regulatory Enforcement Fairness Act, and 15 years of carrying out the duties of Executive Order 13272. The symposium brought together participants from Congress, the White House, federal agencies, and small business stakeholders. The day's events included a congressional panel that focused on the regulatory process while another panel included former Chief Counsels discussing their past experience in shaping regulations and policy. In addition, other panel topics included perspectives of government and private sector economists on analyzing the cost of regulations to small business, and ideas for reducing the regulatory impact on small business.

Media Presence

Advocacy maintains a robust program of public outreach. Aside from the fact that such outreach has always been a core statutory mission for the office, Advocacy believes that its economic research and regulatory advocacy missions cannot be accomplished if policymakers and other stakeholders are not aware of them. Accordingly, a major goal of Advocacy has been to publicly promote its work whenever appropriate.

Advocacy issues news releases on most of its research studies and statistical data postings, which are followed up by twitter and Facebook posts. Advocacy can also issue news releases on comment letters and other events, depending on the timing and the issues involved. News releases go to: 1) the entire Advocacy staff via internal agency email distribution; 2) stakeholder organizations through Advocacy's small business outreach list; 3) all small business committee members' small business legislative assistants in the Senate and the House of Representatives; 4) a targeted list of key small business reporters and writers; and 5) the thousands of "opt-in" email addresses in Advocacy's press and other email listservs.

Advocacy also relies on its regional advocates to distribute news releases to their own regional lists. Advocacy's regional advocates are a vital component of its media, stakeholder, and public outreach

strategies. They are responsible for local and regional media relations and maintaining extensive media lists, stakeholder outreach, and participation in public events. In the next chapter, we will look more closely at regional advocacy.

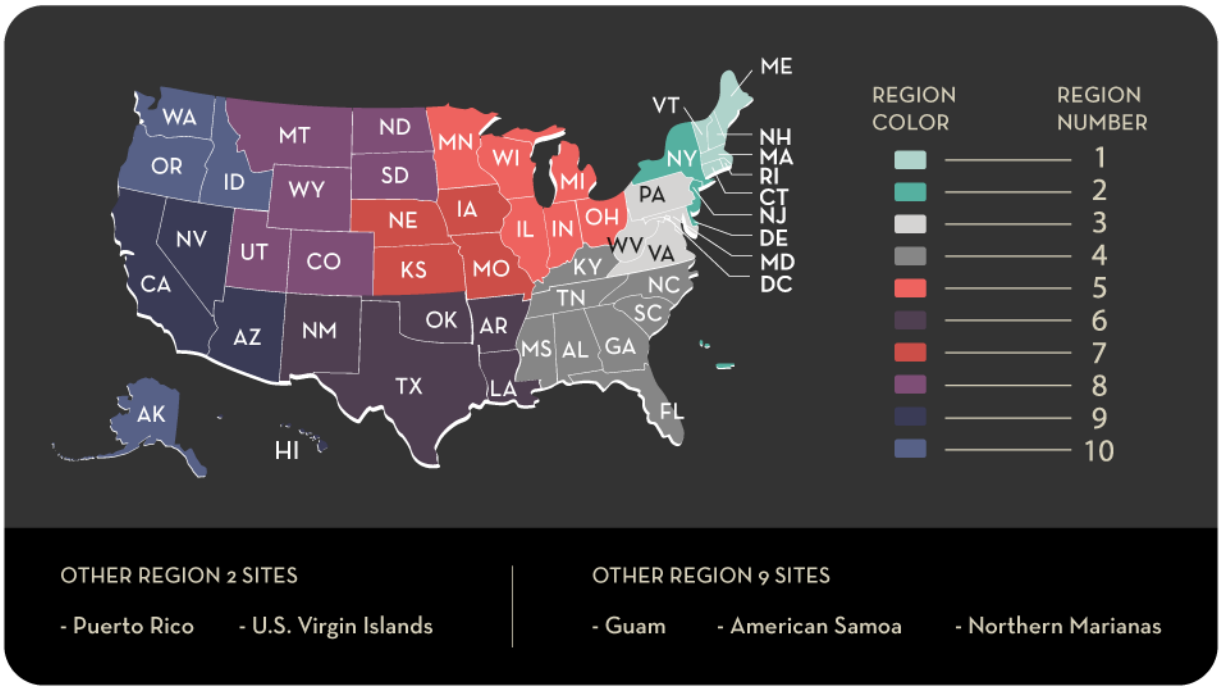
Chapter 5
Regional Advocacy

In the last chapter we examined how Advocacy conducts extensive outreach activities to facilitate an exchange of information with small businesses and stakeholders. The focus of many of Advocacy's activities is necessarily in Washington, D.C., where the federal agencies and policymakers with whom the office works daily are concentrated. But the vast majority of small businesses are not inside the beltway. They are located everywhere across America and are as diverse as the country itself. To properly understand the problems and concerns of such a varied constituency, from its earliest years Advocacy has recognized the value of posting one regional advocate in each of SBA's ten geographic regions. In this chapter, we shall look at the role of regional advocacy in furtherance of Advocacy's mission, starting with a map of the regions in Chart 7.

The Office of Regional Affairs, the operational division within Advocacy that carries out the office's mission at the regional, state, and local levels, includes its Director and ten regional advocates who are located in the ten SBA regions around the country. Advocacy's regional advocates are the office's eyes and ears outside Washington and are on the front line in carrying out Advocacy's mission. Although Advocacy is well known in D.C., this is not necessarily the case outside the beltway. For many small businesses and stakeholders, meeting their regional advocate is their first introduction to the mission of the office and how Advocacy's work can help them address their concerns regarding federal government actions that affect them.

Regional advocates interact directly on a daily basis with small business stakeholders, alerting businesses in their respective regions about regulatory proposals that could impact them. Regional advocates conduct outreach to locate participants for SBREFA panels that require small entity representatives, and they work with Advocacy's Washington staff to conduct roundtables on regulatory issues in the field. They also convene events to share and discuss Advocacy's economic research.

Chart 7.
The Office of Advocacy's Ten Regions



Regional advocates have been critical in the office's Innovation Initiative described below, reaching out to innovative small businesses and organizing regional symposia to learn more about the barriers that small businesses face in innovation and to explore new approaches to address these problems. Regional advocates are vital for the two-way communication that Advocacy needs from the vast majority of small entities that operate outside of the Washington area.

Regional advocates are not political appointees. However, historically the expectation is that regional advocates that serve during a particular presidential administration will leave at the end of that administration. The current group of ten regional advocates all joined Advocacy at the end of 2010 and the beginning of 2011 after the President's appointment of Chief Counsel Winslow Sargeant, and have continued in their positions into 2016.

The Role of Regional Advocates

The regional advocates are Advocacy's "eyes and ears on Main Street." Each promotes and champions the interests of small business in their area, working cooperatively with regional, state, and local business organizations and trade associations; legislative bodies; universities and other academic institutions; the press; and other stakeholders. The regional advocates:

- represent the Chief Counsel in their regions and facilitate opportunities for the Chief Counsel to interact directly with small businesses and stakeholders in the regions;
- conduct extensive outreach programs in their areas to enable the two-way exchange of information between Advocacy and its stakeholders;
- work closely with Washington-based Advocacy staff to ensure that small businesses and regional stakeholders are engaged on regulatory issues and other federal actions that affect them;
- create opportunities for small business stakeholders to interact directly with Advocacy economists and to become fully aware of the statistics and research available to them;
- maintain close working relationships with their area's SBA regional administrator, district directors, and their staff to keep current with regional business trends and to ensure that SBA's program staff members are aware of Advocacy products and actions; and
- engage with their respective regional Regulatory Fairness Boards and the Office of the National Ombudsman in carrying out their mission, including the identification of excessive or unfair regulatory enforcement actions of federal agencies in their regions.

This is only a partial list of the activities of the regional advocates. Given the unique nature of each region, and to some extent each state within the regions, it is important to note that regional advocates often focus on different priorities that track closely with what they are hearing from stakeholders in their area. The Office of Advocacy has always taken its direction from the concerns of small business, and this is very clear in the workload of each regional advocate, resulting in a wide range of activities on a variety of issues that affect local, state and regional business communities. Specific examples will be provided in this chapter, though these are merely illustrative and represent only a small fraction of the overall accomplishments of the regional advocates during this administration.

Regional Approach to Outreach

The regional advocates have taken a two-pronged approach to outreach in the field. The first goal is always to fully understand the concerns of small business owners. This is, of course, one of the main purposes behind the overall mission of the Office of Advocacy. Through their extensive networks and frequent travel, regional advocates have been able to greatly increase the number and diversity of small business voices that reach Advocacy. While every business, sector and industry has its unique issues and concerns, the regional advocates generally seek input from stakeholders in three broad categories that are referred to as the 3 Bs – Barriers, Best Practices and Big Ideas. Barriers are the government actions that make it more challenging for a business to operate. Best Practices are examples of actions either in the public or private sector that assist small businesses and could be implemented or emulated on a wider scale. And finally, the regional advocates ask for the Big Ideas - outside-the-box thinking that has the potential to change the landscape for small businesses.

The other general approach to regional outreach revolves around the idea that there is power to networks and that a cluster approach helps small businesses amplify their voices, resulting in better information for Advocacy and the federal government as a whole. To this end, the regional advocates focus on creating and fostering locally-based entrepreneurial ecosystems and in strengthening communication with key economic sectors, such as technology.

By facilitating such connections, the regional advocates help create opportunities for various stakeholders to engage more effectively with the government and forge stronger public-private relationships. Although many of these networks are local, the regional advocates have also worked on cross-regional initiatives that bring together stakeholders across the country to engage in a broader dialogue. One of the major regional accomplishments has been the fostering of such functional sector-specific networks. One of the powerful results of this approach to outreach is that the local networks, in many cases, continue to sustain themselves independently beyond their interactions with Advocacy.

The regional advocates have one performance objective in furtherance of Advocacy's Strategic Goal #2 relating to outreach, which is included as part of the office's annual performance report that appears together with the President's annual congressional budget justification. Advocacy's goal is that the regional advocates each year participate in at least 360 outreach events with at least five small business stakeholders where Advocacy research or data products or regulatory and policy issues are discussed. This objective has been significantly exceeded in every year since it was added to Advocacy's performance metrics in FY 2013. Although the objective has only been in place for part of this Administration, Advocacy has tracked this number since the current group of regional advocates started. During their tenure, as shown in Chart 8, they have collectively convened or participated in nearly 3,000 events that meet the objective's criteria. The regional advocates have also participated in many more meetings that did not meet the criteria of the objective, but have been equally important in supporting their small business constituencies.

Chart 8.
Regional Advocate Outreach Events

FY 2013	FY 2014	FY 2015	FY 2016
607	536	550	509

In addition to meeting regularly with stakeholders, regional advocates create opportunities for the Chief Counsel to hear directly from small businesses. It is critical that the Chief Counsel visit the regions and understand the concerns of stakeholders first hand. To this end, the regional advocates facilitated and participated in 56 trips to 41 states with the Chief Counsel from FY 2009 through FY 2016.

Advocacy makes every effort to ensure that its research and data products provide information that is both timely and actionable. It is also important that stakeholders are aware of the availability of Advocacy's work and how to access it. In addition, it is critical that regional stakeholders are connected to Advocacy's Washington-based staff to provide input on regulatory issues and other federal actions. To this end, the Office of Regional Affairs has encouraged staff in other Advocacy branches to develop a closer working relationship with the regional advocates than had been the case in the past. This effort has encouraged all divisions of the office to develop better connections to small business stakeholders outside of Washington.

Regional Regulatory Engagement

As has already been extensively discussed in previous chapters, Advocacy's role in the regulatory process is extremely important to small business stakeholders. While much of this work is done in Washington by Advocacy's team of attorneys and economists, regional advocates also play a role in ensuring that small business voices are heard throughout the regulatory process. For the most part, this occurs during the daily interactions with small business owners and their representatives. Regional advocates are constantly forwarding concerns and comments on federal regulatory actions to Advocacy's Washington-based staff.

Regional advocates also connect local stakeholders directly to staff in Advocacy's Washington office on specific issues. In some cases, the regional contact is the first indication that there is a small business concern with a regulation. Regional advocates help Washington staff by seeking answers to directed questions on key regulations and by helping to find small entity representatives to serve on SBREFA panels. Regional advocates also work with Washington staff to convene roundtables and other events in their regions to obtain targeted comments on regulations.

Examples of regional advocate activities on regulatory issues include the following:

- As the first round of regulations were being proposed by the newly created Consumer Financial Protection Bureau, the Region 1 regional advocate was introduced to local mortgage brokers that advised Advocacy about their concerns. Those initial contacts resulted in a regional coalition of mortgage brokers who engaged in providing input on the regulations and who ultimately served as small entity representatives on CFPB SBREFA panels.
- On June 30, 2015, the Department of Labor released a proposed rule revising overtime regulations under the Fair Labor Standards Act. The proposal modified the "white collar exemption" for overtime pay for executive, administrative, and professional employees. Due to the potential small business impact, the Region 4 regional advocate worked with the Advocacy assistant chief counsel handling this issue to convene a small business roundtable in Louisville, KY, which was attended by more than 50 small business stakeholders. A second roundtable on this issue was held in Region 6 in New Orleans.
- On July 2, 2015, the Region 7 regional advocate worked with one of Advocacy's assistant chief counsels to organize a roundtable in West Des Moines, IA, regarding the Department of Labor's proposed guidance document pertaining to Executive Order 13673, "Fair Pay and Safe Workplaces," which regulated labor practices by federal contractors and subcontractors. Small business owners had the opportunity to directly discuss concerns and make suggestions on the guidance document.
- In August 2016, the Region 8 regional advocate organized a series of four roundtables in Colorado for the Chief Counsel, two assistant chief counsels and two Advocacy economists. The roundtables, which were held in Denver and Boulder, covered a wide range of labor and tax issues.

Regional Research Engagement

Advocacy's economic research, as has been discussed in previous chapters, provides policymakers and small business stakeholders with the critical analyses and accessible statistics to allow them to

understand the state of the small business economy. Access to and awareness of this information is important for policymakers and stakeholders inside and outside the Washington beltway. Because of this, regional advocates help Advocacy's Office of Economic Research disseminate and discuss Advocacy data and research products. Regional advocates are primarily responsible for ensuring that SBA field personnel understand the resources available to them from Advocacy and for encouraging SBA and other regional government staff to use them. In addition, regional advocates assist Advocacy economists in reaching their objective of making research presentations by creating opportunities for them to meet with regional stakeholders. Regional advocates routinely distribute Advocacy products, such as the *State Profiles*, *Frequently Asked Questions,* and a variety of specific reports at events with small business stakeholders.[245]

For some reports, the regional advocates work closely with Advocacy economists as part of a broader strategy to provide context on key findings. One such effort revolved around the Advocacy report, *Understanding the Gender Gap in STEM Fields Entrepreneurship*,[246] which was released in October 2014. The report provided a detailed analysis of the gender disparities in STEM fields, and it attracted a great deal of attention, particularly in localities with strong technology sectors. Some of the events that coincided with this report included the following:

- The Region 1 regional advocate participated in the WE-Boston (women entrepreneurship-Boston) event with the Office of the Mayor of Boston and Simmons College School of Entrepreneurship. With Advocacy research as a starting point, this led to the convening of a group of Boston women CEOs and venture and angel investors who were interested in the policy aspects of access to capital for women entrepreneurs.
- In Region 9, particularly in Arizona, California and Hawaii, academics and STEM sector leaders have worked with Advocacy on ways for the federal government to accelerate gender and race diversity in the workforce. Advocacy has participated in three roundtable discussions on these issues.
- A two-day series of events in Seattle, WA, which was initiated by the Region 10 regional advocate, shared the report with hundreds of stakeholders. Advocacy's Chief Economist and other Washington-based economists attended to discuss the findings with a wide range of stakeholders, including small business owners, angel investors, academics and state government officials.

Innovation Initiative

The President's budget for FY 2013 included a new initiative for the Office of Advocacy. The budget request described the new Innovation Initiative:

> In FY 2013, Advocacy plans a new initiative to focus on the specific needs and concerns faced by high growth companies and entrepreneurs. These innovative businesses face different challenges in starting, maintaining and growing their

[245] See www.sba.gov/category/advocacy-navigation-structure/research-and-statistics.

[246] See www.sba.gov/advocacy/understanding-gender-gap-stem-fields-entrepreneurship.

operations than do other types of small businesses. They often pioneer technologies, business models, and practices that are not yet addressed by the federal government's existing regulations and processes. Using both its Washington staff and its ten regional advocates, Advocacy will engage innovators through meetings with entrepreneurs, financiers, research universities, and industry representatives to hear first-hand what impediments exist for innovative small businesses in high-growth sectors.

The Innovation Initiative has allowed the office to undertake a greater focus on innovators and entrepreneurs who might not naturally reach out to Advocacy. The goal is to help reduce barriers for these small businesses. The initiative has included many aspects of Advocacy's regulatory and research efforts that focus on innovation and innovative small businesses. The regional component of the innovation initiative has also been extensive, combining outreach to a wide range of stakeholders with major symposia focusing on the concerns and characteristics of these entrepreneurs, including the following:

- Advocacy hosted its first innovation symposium on September 19, 2012 in Seattle, WA, to coincide with the celebration of the 50th anniversary of the Seattle World's Fair. Entitled *Small Business and Government: Maximizing Entrepreneurship, Driving Innovation*, the event was a daylong, participant-driven conversation about the role of innovation and entrepreneurship in our economy. Panels throughout the day focused on such important small business topics as optimizing the relationship between small business innovators and government, maximizing the impact of entrepreneurial accelerators, and utilizing emerging capital strategies.
- The second day-long innovation symposium was held on May 6, 2014, in New Orleans, LA. Also entitled *Small Business and Government: Maximizing Entrepreneurship, Driving Innovation*, this symposium explored ways in which Advocacy could better understand the many perspectives of the small business community. During the symposium, small business stakeholders and business owners shared insights into the impact of federal regulations on small businesses, and helped Advocacy learn where research can inform small businesses and policymakers about current and future issues. Panel topics included fostering regional innovative accelerators, incentivizing growth in innovative sectors, understanding immigration and international development trends, and innovations in entrepreneurial assistance.
- *Building a Foundation for Innovation and Global Growth*, the third Advocacy innovation symposium, was held on September 16, 2015 in La Jolla, CA. The event brought together participants from the private sector, public research and educational institutions, and the federal government to discuss the foundations of SBA Region 9's strong innovation economy and the public policies necessary to ensure its continued success. Panel topics included strategies for funding research and development, access to the global marketplace, and fulfilling the future potential of the region's diverse pool of entrepreneurial talent.

In addition to the office-wide regional symposia that focused on innovation, there were three other events in Region 2 and 3 held under the Maximizing Entrepreneurship, Driving Innovation banner:

- On March 12 and 13, 2013, Advocacy sponsored a regional innovation event in Pittsburgh, PA. Over the two-day period, more than 600 people attended the events, including participants from West Virginia, Philadelphia and Ohio.

- Regional advocates from Regions 2 and 3 collaborated to host events in Wilmington, DE, Philadelphia, PA, and Camden, NJ. More than 280 people attended the events, which were held during a four-day period. A total of fourteen sessions were held in key sectors such as green technology/chemistry, cybersecurity, women and minority entrepreneurship, and life sciences.
- On February 28, 2014, the Region 3 regional advocate organized an event in Baltimore, MD, to hear from seven sectors. More than 120 people representing small businesses attended the sessions and provided Advocacy important feedback.

The regional advocates also worked closely with Advocacy's Entrepreneur-in-Residence, who was hosted for a year at Advocacy as part of the Innovation Initiative. This collaboration entailed reaching out specifically to small businesses and other stakeholders in the emerging field of additive manufacturing, which was used as a case study to highlight and illuminate trends in innovative technologies. The end result of this work was the Advocacy report, *Small Innovative Company Growth: Lessons from the 3D Printing Industry*,[247] which was released in January 2015.

Regional Initiatives with Other Agencies and Regional Stakeholders

Regional advocates also work closely with other federal agencies in their regions and other stakeholders on key issues that affect their local constituencies. These initiatives sometimes have a nexus with regulatory actions, but often they go beyond the specifics of the regulation to address broader concerns that have tremendous impact on regional small business ecosystems.

Examples include the following:

- The Region 2 regional advocate worked closely with her General Services Administration (GSA) counterparts to help bring more awareness to the concerns of small businesses regarding contracting opportunities in Puerto Rico and the U.S. Virgin Islands. In New York, the Region 2 regional advocate also coordinated with GSA, the City of New York and the State of New York to streamline contracting processes and reduce paperwork for small businesses seeking SBA 8(a) certification.
- In 2012, NOAA issued a proposed regulation requiring Turtle Excluder Devices (TEDs) in smaller skimmers due to a high level of sea turtle strandings in the northern Gulf of Mexico. Local small businesses in Region 6 expressed concern that regulating agencies ignored the economic impact TED regulations would have on the fishing industry. Small businesses stressed the desire to have NOAA work with the fishing community to develop the best available technology for the industry before initiating regulations. In response to these concerns, the Region 6 regional advocate initiated a unique public-private partnership to address complicated regulatory and technological challenges that eventually led to the production of a better TED technology, reduced regulatory impacts and created stronger ties between the fisheries and traditional regulating agencies.
- Immigration reform for both non-professional and high skilled workers has been a major issue for Region 9 stakeholders. Agriculture is a major small business industry in Arizona and

[247] See www.sba.gov/advocacy/small-innovative-company-growth-barriers-best-practices-and-big-ideas-lessons-3d-printing.

California. Farmers, ranchers, wineries, and food manufacturing and processing businesses rely on seasonal immigrant workers to operate their businesses. The Region 9 regional advocate has worked to connect stakeholders to Advocacy's Washington-based staff on immigration related rules and programs, such as the H2A seasonal worker visa program. Immigration policy and visa programs for the highly skilled are also top concerns for Region 9's high tech, biotech and life science sectors, and research universities. Advocacy participated in no fewer than 10 roundtable discussions hosted by various groups in Region 9 regarding these issues.

Regional Interaction with the Office of the National Ombudsman

We have seen in Chapter 3 how SBA's Office of the National Ombudsman assists small businesses with unfair and excessive federal regulatory enforcement, such as repetitive audits or investigations, excessive fines and penalties, retaliation, or other unfair regulatory enforcement actions by a federal agency. Advocacy's Director of Regional Affairs serves as liaison to the Office of the National Ombudsman (ONO) headquarters staff to receive and make individual small business case referrals as provided for in the Memorandum of Understanding between the ONO and the Office of Advocacy.[248]

The regional advocates work with the ONO in advance of hearings conducted by the regional Regulatory Fairness Boards in their respective regions. They work with the ONO and the private-sector Fairness Board members, both to ensure that small business owners are aware of these hearings and to keep Advocacy's leadership in Washington informed of issues that are raised.

Both Advocacy and the ONO refer information, regulatory complaints, and other issues to each other or other appropriate offices to ensure that small business owners are receiving helpful and timely responses to their inquiries. Additional information on the ONO can be accessed at www.sba.gov/ombudsman/. Ombudsman referrals by Regional Advocates are tabulated in Chart 9.

Chart 9.
Ombudsman Referrals by Regional Advocates

FY 2011	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016
71	112	97	110	163	99

An example of how Advocacy works with the ONO on specific issues that involve both offices' responsibilities was the Region 7 regional advocate's engagement on the negative impact the Center for Medicare & Medicaid Services' Recovery Audit Contractor and competitive bidding practices have on small and rural suppliers of durable medical equipment, prosthetics, and orthotics. This longstanding concern was raised with the regional advocate by stakeholders in Iowa. The regional advocate and the

[248] See Appendix Q.

ONO worked together to coordinate a National Ombudsman hearing on June 21, 2013 in Davenport, IA. More than 20 business owners from across the country provided testimony. Advocacy and the ONO have since continued to bring this issue to the attention of policymakers in DC.

Chapter 6
The Office of Advocacy's Authority, Organization, and Budget

In the preceding chapters, we have described the evolution of Advocacy's mission and its activities today, including economic research, regulatory advocacy, outreach to stakeholders, and regional advocacy. These activity categories were organized broadly by the office's major operational division, although too sharp a division should not be made. Advocacy prides itself on how the work of each division contributes to that of the others and to the office as a whole, and we have seen how the missions of the several divisions often overlap. Economists are indispensable to the regulatory advocacy of Interagency; the Office of Information's outreach efforts bring all of Advocacy's work products to its stakeholders; Advocacy's regional advocates are a vital link to state and local governments and the small business community at large.

In this chapter we will move back to an office-wide perspective and look at Advocacy's legislative authority, its relationship with the rest of SBA, its organization and staffing, and its budget history. The material in this chapter, together with information in the appendices, can be viewed as reference materials. It is offered here to provide an overview of Advocacy's infrastructure. Some of this information is readily accessible elsewhere; some is not. It is our goal to provide stakeholders with the greatest transparency possible on Advocacy operational matters.

Advocacy's Statutory Authority

In this section, we will outline provisions of Advocacy's basic statutory authority, Title II of Public Law 94-305, and those provisions of Public Law 96-354, the Regulatory Flexibility Act, which confer additional responsibilities and authorities on Advocacy. Both of these laws are standing, non-expiring legislation, and both have been amended over the years. This section will refer to both laws as amended, i.e., as they are in 2016. In the next section on legislative history, we will look back on amendments to the original laws.

Advocacy program levels have not been set in authorizing legislation since 1984, but later in this chapter we will review those levels and the legislation that set them from 1978 to 1984.

From time to time, the Congress enacts legislation directing that Advocacy conduct a specific project or study. Legislation for such one-time projects is not covered here.

Public Law 94-305, as amended. Advocacy's basic statutory charter is Title II of Public Law 94-305, approved on June 4, 1976.[249] We have seen in Chapter 1 how this legislation superseded Public Law 93-386, which had established the first statutory Chief Counsel for Advocacy.[250] The prior Chief Counsel's activities were authorized under the Small Business Act,[251] and he or she operated under the supervision of the SBA Administrator. Title II of Public Law 94-305 repealed the Small Business Act references to the Chief Counsel,[252] and re-established the position with a new, freestanding charter *outside* of the Small Business Act. The new charter upgraded the position of Chief Counsel, expanded Advocacy's duties, and provided important new tools to allow the Chief Counsel to carry out these duties with flexibility and independence.

Section 201. Establishment of Chief Counsel. Section 201 establishes the position of Chief Counsel for Advocacy "who shall be appointed from civilian life by the President, by and with the advice and consent of the Senate."[253] Direct appointment by the President, together with a separate statutory charter (i.e., outside of the Small Business Act), are important elements of the Chief Counsel's independence.

Section 202. Duties related to economic research. Section 202 sets forth "primary functions" relating to economic research.[254] Among these, Advocacy is to perform the following:

- examine the role of small business in the American economy and the contribution that small business can make in improving competition;
- measure the direct costs and other effects of government regulation on small business, and make legislative and non-legislative proposals for eliminating excessive or unnecessary regulations of small businesses;
- determine the impact of the tax structure on small businesses;
- study the ability of financial markets and institutions to meet small business credit needs;
- determine the availability of financial resources and alternative means to deliver financial assistance to minority enterprises;
- identify and describe those measures that create an environment in which all businesses will have the opportunity to compete effectively;
- provide information on the status and the potential for development and strengthening of minority and other small business enterprises, including firms owned by veterans and service-disabled veterans; and

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[249] Public Law 94-305 (June 4, 1976), Title II, 15 § U.S.C. 634a *et seq.* See Appendix A for full text as amended.

[250] Public Law 93-386 (August 23, 1974), Small Business Amendments of 1974, 88 Stat. 742. Section 10 established the position of Chief Counsel for Advocacy and enumerated his or her duties.

[251] Public Law 85-536 (July 18, 1958), 72 Stat. 384, 15 U.S.C. § 631 *et seq.*

[252] § 208, Public Law 94-305, 90 Stat. 671.

[253] Ibid., § 201, 15 U.S.C. § 634a.

[254] Ibid., § 202, 15 U.S.C. § 634b.

- ascertain the common reasons for small business successes and failures.

Section 203. Additional duties. Section 203 sets forth additional duties for Advocacy that are the same duties of the earlier P.L. 93-386 Chief Counsel, as enumerated in the prior § 5(e) of the Small Business Act (repealed by § 208 of Public Law 94-305).[255] Advocacy is to:

- serve as a focal point for the receipt of complaints, criticisms, and suggestions concerning the policies and activities of federal agencies that affect small businesses;
- counsel small businesses on how to resolve questions and problems concerning their relationship to the federal government;
- develop proposals for changes in the policies and activities of any agency of the federal government that will better fulfill the purposes of the Small Business Act (*inter alia,* to aid, counsel, assist and protect the interests of small business concerns) and to communicate such proposals to the appropriate federal agencies;
- represent the views and interests of small businesses before other federal agencies whose policies and activities may affect small business; and
- enlist the cooperation and assistance of public and private agencies, businesses, and other organizations in disseminating information about the programs and services provided by the federal government that are of benefit to small businesses, and information on how small businesses can participate in or make use of such programs and services.

Section 204. Staff and powers of the Office of Advocacy. This section gives the Chief Counsel one of the most important tools to ensure that Advocacy has the flexibility to respond to rapidly changing needs in its regulatory, legislative, research, and policy work. The Chief Counsel may "employ and fix the compensation" of such personnel as he or she deems necessary without regard to civil service competitive requirements or standard classification and pay schedules.[256] The statute sets Advocacy's highest allowable pay level under this authority to the equivalent of the highest level in the federal "General Schedule." A limit is also established for the number of positions at that level. Most Advocacy professionals serve at the pleasure of the Chief Counsel under this "public law hiring authority," typically for one-year renewable appointments. Advocacy's public law appointments are generally subject to the same screening and security requirements as those for all federal employees. They are not political appointments such as those made under Schedule C or non-career SES authorities.

Section 204 also permits the Chief Counsel to procure temporary and intermittent services,[257] to consult with experts and other authorities,[258] to utilize the services of SBA's National Advisory Council or to

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[255] Ibid., § 203, 15 U.S.C. § 634c.

[256] Ibid., § 204(1), 15 U.S.C. § 634d(1).

[257] Ibid., § 204(2), 15 U.S.C. § 634d(2).

[258] Ibid., § 204(3), 15 U.S.C. § 634d(3).

appoint other advisory boards or committees,[259] and to "hold hearings and sit and act at such times and places as he may deem advisable."[260]

All of these authorities are exercised independently of SBA or the SBA Administrator.

Section 205. Assistance of other government agencies. This section simply provides that "Each department, agency, and instrumentality of the Federal Government is authorized and directed to furnish to the Chief Counsel for Advocacy such reports and other information as he deems necessary to carry out his functions…"[261]

Section 206. Reports. The Chief Counsel is authorized to prepare and publish such reports as deemed appropriate. Importantly for Advocacy's independence, this section provides that such "reports shall not be submitted to the Office of Management and Budget or to any other Federal agency or executive department for any purpose prior to transmittal to the Congress and the President."[262] Accordingly, the Office of Advocacy does not circulate its work products for clearance with the SBA Administrator, OMB, or any other federal agency prior to publication. These work products include testimony, reports to Congress, economic research, comments on regulatory proposals, comments on legislation, publications, press releases, and website content.

Section 207. Authorization of appropriations. Advocacy has its own statutory line-item account in the Treasury, separate from other SBA accounts, a subject to which we will return later in this chapter.[263] This section also provides that:

> The Administrator of the Small Business Administration shall provide the Office of Advocacy with appropriate and adequate office space at central and field office locations, together with such equipment, operating budget, and communications facilities and services as may be necessary, and shall provide necessary maintenance services for such offices and the equipment and facilities located in such offices.[264]

The costs for the support that SBA provides to Advocacy pursuant to this provision are not charged to Advocacy's own appropriation, but appear elsewhere in SBA's budget, along with an overhead charge for certain centralized indirect expenses shared with other SBA offices.

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[259] Ibid., § 204(4), 15 U.S.C. § 634d(4).

[260] Ibid., § 204(5), 15 U.S.C. § 634d(5).

[261] Ibid., § 205, 15 U.S.C. § 634e.

[262] Ibid., § 206, 15 U.S.C. § 634f.

[263] Ibid., § 207(a), 15 U.S.C. § 634g(a).

[264] Ibid., § 207(b), 15 U.S.C. § 634g(b).

Such sums as are necessary to carry out Advocacy's functions are permanently authorized, and these sums are to remain available until expended, without fiscal year limitation.[265]

Public Law 96-354, as amended - the Regulatory Flexibility Act. In Chapter 3, we saw the important role that Public Law 96-354, the Regulatory Flexibility Act (RFA), plays in Advocacy's activities.[266] Section 3(a) of the RFA added a new Chapter 6 to Title 5 of the United States Code, titled "The Analysis of Regulatory Functions."[267] Those sections of the new title with references to Advocacy are here summarized.

Section 601. Definitions. This section provides that, for the purposes of the RFA, a small business shall be defined in the same way SBA defines small business concerns under 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."[268] From time to time, with appropriate justification, Advocacy may concur with a rulemaking agency's request to adopt a different definition of "small business" for RFA purposes than that provided in SBA's published size standards.

Section 602. Regulatory agenda. Each October and April, federal agencies must publish in the Federal Register a regulatory flexibility agenda that includes: 1) a brief description of the subject area of any rule that the agency expects to propose or promulgate that 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, 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 rule. Each regulatory flexibility agenda must be transmitted to the Chief Counsel for Advocacy for comment.[269]

Section 603. Initial regulatory flexibility analysis. This section provides that whenever an agency is required to publish an initial regulatory flexibility analysis (IRFA) for a proposed rule describing the impact of that rule on small entities, the IRFA shall be transmitted to the Chief Counsel for Advocacy.[270] This requirement is one important method by which Advocacy is alerted to new regulatory proposals that merit additional scrutiny for potential revisions to reduce small business impacts.

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[265] Ibid., § 207(c), 15 U.S.C. § 634g(c).

[266] Public Law 96-354 (September 19, 1980), 5 U.S.C. § 601 *et seq.* See Appendix B for full text as amended.

[267] § 3, Public Law 96-354, 94 Stat. 1165.

[268] 5 U.S.C. § 601(3).

[269] 5 U.S.C. § 602(b).

[270] 5 U.S.C. § 603(a).

Section 604. Final regulatory flexibility analysis. This section provides that whenever an agency is required to publish a final regulatory flexibility analysis (FRFA), that FRFA shall include the response of the agency to any comments filed by the Chief Counsel for Advocacy 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.[271] This provision helps both Advocacy and the general public better understand to what extent Advocacy's comments affected the agency's decision making.

Section 605. Avoidance of duplicative or unnecessary analyses. The RFA's requirement for an IRFA or FRFA can be waived if the agency head certifies that a proposed rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. Such a certification must be published in the *Federal Register*, along with a statement providing the factual basis for such certification. This section of the RFA also provides that the agency must provide such a certification and statement to the Chief Counsel for Advocacy.[272] This notification requirement serves as an important flag for Advocacy to review such rule certifications to ensure that they are justifiable.

Section 609. Procedures for gathering comments - SBREFA panels. This section sets forth procedures for gathering comments on proposed rules expected to have a significant economic impact on a substantial number of small entities. The Small Business Regulatory Enforcement Fairness Act (SBREFA) amended the original RFA to create a new "panel process" through which two agencies, the Environmental Protection Agency and the Occupational Safety and Health Administration, must solicit *prior to the beginning of the normal notice and comment periods* direct input from small entities on the effects of those proposals that require IRFAs.[273] Although SBREFA's review panel process originally applied specifically to proposals of EPA and OSHA, its coverage was extended by the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010 to the new Consumer Finance Protection Bureau.[274]

For most such rules, a SBREFA review panel is convened, on which sit representatives of the Chief Counsel, OMB's Office of Information and Regulatory Affairs, and the agency proposing the rule.[275] The panel reviews materials related to the proposal and, importantly, the advice and recommendations of small entity representatives (SERs) on the rule's potential effects and possible mitigation strategies. The panel then issues a report on the comments of the SERs and on its own findings related to RFA issues. The rulemaking agency is required to consider the panel report findings and, where appropriate, modify the proposed rule or its IRFA.

Section 612. Reports and intervention rights. This section of the RFA has three important provisions relating to Advocacy. The first is self-explanatory: "The Chief Counsel for Advocacy of the Small Business

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[271] 5 U.S.C. § 604(a)(3).

[272] 5 U.S.C. § 605(b).

[273] 5 U.S.C, § 609(b).

[274] Public Law 111–203, title X, § 1100G(a) (July 21, 2010), 124 Stat. 2112.

[275] The Chief Counsel may in certain limited circumstances waive the requirement for a SBREFA panel.

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."[276] Advocacy's annual RFA reports are posted at www.sba.gov/advocacy/regulatory-flexibility-act-annual-reports.

A second provision in § 612 is the clarification of the Chief Counsel's authority to appear as *amicus curiae* in cases involving RFA compliance: "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."[277] A third provision in § 612 directs the courts to allow the Chief Counsel to appear in such actions.[278]

Together, these RFA provisions make clear the intent of Congress that the Chief Counsel for Advocacy serves as the "watchdog" for agency compliance with the RFA.

Legislative History

This section includes a brief legislative history of Public Law 94-305, Advocacy's basic statutory charter, and those provisions of Public Law 96-354, the Regulatory Flexibility Act, that confer additional responsibilities and authorities on Advocacy. History is provided only on the original legislation and subsequent legislation with amendments that modified Advocacy-related provisions in these two basic statutes. As noted above, from time to time, the Congress enacts legislation directing that Advocacy conduct a specific project or study. Legislation for such one-time projects is not covered here.

Public Law 94-305 (June 4, 1976). Title II of Public Law 94-305 (90 Stat. 668) is the original act authorizing today's Office of Advocacy.

HOUSE REPORTS:

House Report 94-519 to accompany H.R. 9056; September 26, 1975 (Committee on Small Business)

House Conference Report 94-1115 to accompany S. 2498; May 10, 1976 (Conference Committee)

SENATE REPORTS:

Senate Report 94-420 to accompany S. 2498; October 8, 1975

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[276] 5 U.S.C. § 612(a).

[277] 5 U.S.C. § 612(b).

[278] 5 U.S.C. § 612(c).

(Committee on Banking, Housing and Urban Affairs)

Senate Report 94-501 to accompany S. 2498; November 26, 1975

(Committee on Commerce)

CONGRESSIONAL RECORD:

Volume 121 (1975):	October 6, H.R. 9056 considered and passed in House
	December 12, considered and passed in Senate
	December 17, S. 2498 considered and passed in House, amended in lieu of H.R. 9056
Volume 122 (1976):	May 13, House agreed to conference report
	May 20, Senate agreed to conference report

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS:

Volume 12, No. 23 (1976): June 4, Presidential statement

Public Law 96-302 (July 2, 1980). Public Law 96-302 was multi-title SBA reauthorization legislation that included in its Title IV two provisions relating to Advocacy.[279] Also, its Title III, known as the Small Business Economic Policy Act of 1980,[280] though not an amendment to either Advocacy's charter or the Small Business Act, did require the President to prepare an annual "Report on Small Business and Competition," a responsibility that was delegated to Advocacy by the White House from the first edition in 1982 until the statutory requirement was terminated in 2000. Additional information on this report was presented in Chapter 1.

Section 402 of Public Law 96-302 amended 15 § U.S.C. 634d(1) to provide that not more than ten Advocacy staff members at any one time could be compensated at a rate not in excess of GS-15, step 10, of the federal government's "General Schedule." Prior to this amendment, the highest allowable pay rate for Advocacy employees hired under its own public law hiring authority had been the lowest rate at the GS-15 level.

Section 403 of Public Law 96-302 placed the position of Chief Counsel for Advocacy at Level IV of the Executive Schedule, confirming his or her rank at a very high level, generally equivalent to assistant secretaries and general counsels at cabinet-level departments.[281] This rank was conferred as a measure

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[279] 94 Stat. 850.

[280] 94 Stat. 848.

[281] The position of Chief Counsel for Advocacy was added to the list of ES-4 positions set forth at 5 U.S.C. § 5315.

of the importance with which the Congress holds the position, and to facilitate interaction between Advocacy and high-level policymakers in other executive branch agencies.

HOUSE REPORTS:

House Report 96-998 to accompany H.R. 7297; May 16, 1980

(Committee on Small Business)

House Conference Report 96-1087 to accompany S. 2698; June 12, 1980

(Conference Committee)

SENATE REPORT:

Senate Report 96-703 to accompany S. 2698; May 14, 1980

(Committee on Small Business)

CONGRESSIONAL RECORD:

Volume 126 (1980): May 28, S. 2698 considered and passed in Senate

June 3, H.R. 7297 considered and passed in House; passage vacated & S. 2698, amended, passed in lieu

June 17, Senate agreed to conference report

June 19, House agreed to conference report

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS:

Volume 16, No. 27 (1980): July 2, Presidential statement

Public Law 96-481 (October 21, 1980). Public Law 96-481 was multi-title legislation including various SBA authorizations and a Title II also known as the Equal Access to Justice Act.[282] This act included two provisions relating to Advocacy. Section 203(a) added a new 5 U.S.C. § 504 that included a provision requiring the Chairman of the Administrative Conference of the United States to submit, after consultation with the Chief Counsel for Advocacy, an annual report to Congress on various matters

[282] 94 Stat. 2325. The Equal Access to Justice Act, as amended, is codified at 5 U.S.C. § 504.

relating to the implementation of the Equal Access to Justice Act.[283] This function ended for Advocacy when the requirement for this report was terminated in 2000.[284]

Section 203(b) of Public Law 96-481 also added a related duty to Advocacy's ongoing functions, as iterated in its permanent charter at 5 U.S.C. § 634b. Advocacy was to "advise, cooperate with, and consult with, the Chairman of the Administrative Conference of the United States" with respect to the Equal Access to Justice Act.[285] Advocacy maintains a strong working relationship with the Administrative Conference.

HOUSE REPORTS:

House Report 96-1004 to accompany H.R. 5612; May 16, 1980

(Committee on Small Business)

House Conference Report 96-1434 to accompany H.R. 5612; September 30, 1980

(Conference Committee)

SENATE REPORT:

Senate Report 96-974 to accompany H.R. 5612; September 19, 1980

(Committee on Small Business)

CONGRESSIONAL RECORD:

Volume 126 (1980): June 9-10, H.R. 5612 considered and passed in House

September 26, considered and passed in Senate, amended

September 30, Senate agreed to conference report

October 1, House receded and concurred in Senate amendment; Senate concurred in House amendment

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS:

Volume 16, No. 43 (1980): October 21, Presidential statement

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[283] 5 U.S.C. § 504(e), as added by § 203(a) of Public Law 96-481.

[284] § 3003, Public Law 104-66 (December 21, 1995), 109 Stat. 734, 31 U.S.C. § 1113 note. *See also*, House Document 103-7, A List of Reports Pursuant to Clause 2, Rule III of the Rules of the House of Representatives (January 5, 1993).

[285] This duty remains codified at 5 U.S.C. § 634b(11).

Public Law 103-403 (October 22, 1994). Public Law 103-403 was again multi-title legislation including various SBA authorizations. It also included four provisions relating to Advocacy. One was a requirement for a one-time study that we will not discuss here; another was a minor technical correction; but the other two provisions were substantive.

Section 610(1) of Public Law 103-403 deleted a requirement in prior law that the Chief Counsel consult with and obtain the approval of the SBA Administrator before exercising the special authorities in Section 204 of Public Law 94-305.[286] These included the Chief Counsel's important public law hiring authority,[287] and authorities to procure temporary and intermittent services,[288] to consult with experts and other authorities,[289] to utilize the services of SBA's National Advisory Council or to appoint other advisory boards or committees,[290] and to hold hearings and sit and act at such times and places as deemed advisable.[291] The conference report to accompany this legislation was clear and explicit in stating the intent of Congress: the legislation modified "the authority of the Chief Counsel for Advocacy to hire the employees provided for under 15 U.S.C. § 634d by eliminating the requirement that the Chief Counsel obtain the approval of the SBA Administrator."[292]

Section 610(2) increased from 10 to 14 the number of Advocacy staff members who at any one time could be compensated at Advocacy's highest allowable pay level, a rate not in excess of GS-15, step 10, of the federal government's General Schedule.[293]

HOUSE REPORTS:

House Report 103-616 to accompany H.R. 4801; July 21, 1994

(Committee on Small Business)

House Conference Report 103-824 to accompany S. 2060; October 3, 1994

(Conference Committee)

SENATE REPORT:

Senate Report 103-332 to accompany S. 2060; August 10, 1994

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[286] 108 Stat. 4204.

[287] Public Law 94-305, § 204(1), 15 U.S.C. § 634d(1).

[288] Ibid., § 204(2), 15 U.S.C. § 634d(2).

[289] Ibid., § 204(3), 15 U.S.C. § 634d(3).

[290] Ibid., § 204(4), 15 U.S.C. § 634d(4).

[291] Ibid., § 204(5), 15 U.S.C. § 634d(5).

[292] House Conference Report 103-824 to accompany S. 2060 (October 3, 1994), p. 54.

[293] 108 Stat. 4204.

(Committee on Small Business)

CONGRESSIONAL RECORD:

Volume 140 (1994): August 18, S. 2060 considered and passed in Senate

September 21, H.R. 4801 considered and passed in House, S. 2060 amended and then passed in lieu

October 4, House agreed to conference report

October 5, Senate agreed to conference report

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS:

Volume 30, No. 43 (1994): October 31, Presidential statement

Public Law 106-50 (August 17, 1999). Section 702 of Public Law 106-50, also known as the Veterans Entrepreneurship and Small Business Development Act of 1999, added a new paragraph (12) to the listing of Advocacy's ongoing functions, as iterated in its permanent charter at 5 U.S.C. § 634b.[294] The new provision relating to veterans authorized Advocacy to "evaluate the efforts of each department and agency of the United States, and of private industry, to assist small business concerns owned and controlled by veterans…and service-disabled veterans…, and to provide statistical information on the utilization of such programs by such small business concerns and to make recommendations to the Administrator of the Small Business Administration and to the Congress in order to promote the establishment and growth of those small business concerns."[295]

HOUSE REPORT:

House Report 106-206 to accompany H.R. 1568; June 29, 1999

(Committee on Small Business)

SENATE REPORT:

Senate Report 106-136 to accompany H.R. 1568; August 4, 1999

(Committee on Small Business)

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[294] 113 Stat. 250.

[295] 15 U.S.C. 634b(12).

CONGRESSIONAL RECORD:

Volume 145 (1999): June 29, H.R. 1568 considered and passed in House

August 5, considered and passed in Senate with amendment

August 5, House concurred in Senate amendment

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS:

Volume 35, No. 33 (1999): August 17, Presidential statement

Public Law 111-240 (September 27, 2010). The Small Business Jobs Act of 2010 included an extremely important provision concerning Advocacy's budgetary independence. Since the enactment of its charter in 1980, Advocacy operated with a great degree of independence from the Small Business Administration in which it was housed. However, Advocacy was still very much attached to SBA with respect to the budget process. Prior to the Jobs Act, the Office of Advocacy was treated for budgetary purposes in much the same way as any SBA program office, in fact with less independence than certain other functions that had their own statutory budget accounts.[296] Advocacy participated in every step of the budget process in the same way as most other SBA offices and programs. This meant the preparation of annual budget requests and justifications that "competed" with those of other SBA offices and programs for a share of the agency's annual request to Congress.

The Jobs Act amended Advocacy's statutory authority to require that each budget submitted by the President shall include a separate statement of the amount of appropriations requested for Advocacy, and that these funds be designated in a separate Treasury account. The Act also requires SBA to provide Advocacy with office space, equipment, an operating budget, and communications support, including the maintenance of such equipment and facilities.[297]

The Jobs Act budgetary amendment to Advocacy's charter also provided that funds appropriated to Advocacy would remain available until expended. This has proven an extremely valuable feature of the legislation due to uncertainties that can arise in the obligation of funds for economic research contracts due to contracting procedures and other reasons.

In addition to the Jobs Act budgetary provisions, the legislation also included a codification of a provision of the 2002 Executive Order 13272 that requires agencies to include in their final regulatory flexibility analyses the response of the agency to any comments filed by the Chief Counsel for Advocacy

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[296] Notably, the Office of the Office of the Inspector General and disaster operations.

[297] Public Law 111–240, title I, § 1601(b) (Sept. 27, 2010), 124 Stat. 2551, 15 U.S.C. § 634g. See Appendix L for a history of prior congressional efforts to provide budgetary independence for Advocacy.

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 those comments.[298]

HOUSE REPORT:

House Report 111–499 to accompany H.R. 5297; May 27, 2010

(Committee on Financial Services)

CONGRESSIONAL RECORD:

Volume 156 (2010): June 16, 17, considered and passed House

June 29, July 19, 21, 22, 27–29; August 5, September 14–16, considered and passed Senate, amended

September 23, House concurred in Senate amendment

DAILY COMPILATION OF PRESIDENTIAL DOCUMENTS:

DCPD-201000804: September 27, Presidential remarks

This concludes the legislative history of statutes amending Advocacy's basic charter, Public Law 94-305. The fact that it has been amended so infrequently is testament to the durability and flexibility of the underlying statute. We will turn now to a similar treatment to the Regulatory Flexibility Act and amendments to it affecting Advocacy.

Public Law 96-354 (September 19, 1980). This is the original Regulatory Flexibility Act (RFA) that we have already seen in Chapters 1, 3, and earlier in this chapter.[299] The Office of Advocacy has been closely involved with the RFA regulatory review process from its inception. Under the original act, agencies were required to transmit to the Chief Counsel their regulatory agendas,[300] their initial regulatory flexibility analyses,[301] and their certifications of rules without significant effects.[302] In addition, the Chief Counsel reports annually to the President and the Congress on agency compliance with the RFA,[303] and is authorized to appear as *amicus curiae* in any action brought in a court of the United States to review a rule.[304]

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[298] Ibid., $ 1601(a)

[299] 94 Stat. 1164.

[300] 5 U.S.C. § 602.

[301] 5 U.S.C. § 603.

[302] 5 U.S.C. § 605.

[303] 5 U.S.C. § 612(a).

[304] 5 U.S.C. §§ 612(b), 612(c).

SENATE REPORT:

Senate Report 96-878 to accompany S. 299; July 30, 1980

(Committee on the Judiciary)

HOUSE REPORT:

House Report 96-519 to accompany H.R. 4660; October 17, 1980

(Committee on Small Business)

CONGRESSIONAL RECORD:

Volume 126 (1980): August 6, S. 299 considered and passed in Senate

September 9, considered and passed in House

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS:

Volume 16, No. 38 (1980): September 19, Presidential statement

Public Law 104-121 (March 29, 1996). Public Law 104-121, the Contract with America Advancement Act of 1996, included a Title II that is known separately as the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).[305] As we have seen, among its many other provisions, SBREFA significantly strengthened the RFA, especially by providing judicial review of RFA compliance issues,[306] by establishing a special regulatory panel review process to gather early comments on proposals from EPA and OSHA,[307] and by clarifying the Chief Counsel's authority to appear as *amicus curiae* in cases involving RFA compliance.[308]

No Senate or House report was filed in connection with Public Law 104-121, although subject matter related to its SBREFA title was considered in earlier legislation that was reported in the House, H.R. 994. Accordingly, the House reports associated with this bill are referenced here, even though H.R. 994 was not considered by the full House before enactment of SBREFA.

HOUSE REPORTS:

House Report 104-284 (Part 1) to accompany H.R. 994; October 19, 1995

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[305] 110 Stat. 857.

[306] 5 U.S.C. § 611.

[307] 5 U.S.C. § 609(b). The process was subsequently extended to the Consumer Financial Protection Bureau.

[308] 5 U.S.C. § 612(b).

(Committee on Government Reform and Oversight)

House Report 104-284 (Part 2) to accompany H.R. 994; November 7, 1995

(Committee on the Judiciary)

SENATE REPORTS:

No Senate reports.

CONGRESSIONAL RECORD:

Volume 142 (1996): March 19, S. 942 considered and passed in Senate

March 28, H.R. 3136 considered and agreed to in both House and Senate

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS:

Volume 32, No. 14 (1996): March 29, Presidential statement

Public Law 111-203 (July 21, 2010). Public Law 111-203, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, included a provision to extend the SBREFA regulatory review panel process to the new Consumer Financial Protection Bureau (CFPB).[309] The legislation also amended the RFA to require that that agency's initial regulatory flexibility analyses include a description of any increased cost of credit for small entities, significant alternatives that minimize any such increase, and the advice of small entity representatives on these subjects.[310] Final regulatory flexibility analyses must also include a description of the steps that the CFPB has taken to minimize any additional cost of credit for small entities.[311]

HOUSE REPORTS:

House Report 111–517, conference report to accompany H.R. 4173

(Conference Committee)

SENATE REPORT:

Senate Report 111–176 to accompany S. 3217

Committee on Banking, Housing, and Urban Affairs

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[309] Public Law 111–203 (July 21, 2010), title X, § 1100G(a), 124 Stat. 2112.

[310] Ibid., § 1100G(b), 124 Stat. 2112.

[311] Ibid., § 1100G(c), 124 Stat. 2113.

CONGRESSIONAL RECORD:

Vol. 155 (2009): December 9–11, considered and passed House

Vol. 156 (2010): May 20, considered and passed Senate, amended, in lieu of S. 3217

June 30, House agreed to conference report.

July 13, 15, Senate considered and agreed to conference report

DAILY COMPILATION OF PRESIDENTIAL DOCUMENTS:

DCPD-201000617: July 21, Presidential remarks

Independence and Relationship with SBA

Independence and flexibility are the "bedrock principles that underlie the Office of Advocacy's ability to represent small businesses effectively."[312] We have seen in Chapter 1 how Advocacy and its mission came to be, and an important theme that ran through the steps leading to Public Law 94-305 was the need for an *independent* voice within government to represent the interests of small business.

How independence began. Although Public Law 93-386 amended the Small Business Act in 1974 to establish a Chief Counsel for Advocacy within SBA, it did not explicitly provide for staffing or administrative powers for this function. Advocacy was clearly under the direction of the SBA Administrator, and the office was viewed as one of many other agency program offices, certainly not independent from it. While SBA Administrators had been supportive and did provide some staffing for Advocacy, there were questions about where the new office should fit in SBA's organizational structure, and the effectiveness of the new position remained limited.[313]

Small business organizations and the small business community at large that they represent have always been among the most vocal supporters of a strong Office of Advocacy. They had been closely involved with the creation of the original office and were disappointed that in 1976 it had not yet reached the potential that they had envisioned for it. It was apparent that the role of the Chief Counsel should be

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[312] Testimony of former Chief Counsel Tom Sullivan before a hearing of the House Committee on Small Business, "Strengthening the Office of Advocacy;" March 20, 2002.

[313] In 1976, the Office of Advocacy employed twelve, including the Chief Counsel. SBA's advisory councils were under Advocacy, and a plan was under consideration to place Advocacy under an Assistant Administrator who would also be responsible for public affairs and communications. Source: Testimony of SBA Administrator Mitchell P. Kobelinski, Hearing before the Senate Select Committee on Small Business, "Oversight of the Small Business Administration: The Office of the Chief Counsel for Advocacy and How it Can be Strengthened;" March 29, 1976; pp. 10 and 27.

clarified and strengthened, and Congress was again encouraged by private sector small business organizations to consider new legislation. At a 1976 hearing conducted by the Senate Select Committee on Small Business, John Lewis, executive vice president of the National Small Business Association, had the following exchange with Sen. Thomas McIntyre (D-N.H.):

> MR. LEWIS. It is unfortunately true that advocacy for small business in Government has mostly come from Congress…and not from the SBA.
>
> SEN. MCINTYRE. What are some of the reasons you have that feeling on SBA? … If he [the SBA Administrator] gets too strong, talks too big, does that not get him into difficulty with Commerce?
>
> MR. LEWIS. No, not with Commerce but with the White House. Inherently, he must be a team player. His agency is not independent, does not have the independence of a Federal Reserve Board that can tell the Administration to go fly a kite.[314]

At the same 1976 Senate hearing, James D. "Mike" McKevitt, Washington counsel for the National Federation of Independent Business (NFIB), also expressed disappointment with the status quo and strong support for a strengthened Office of Advocacy:

> Mr. Chairman, …you indicated that you were interested in determining the role and effectiveness of the Agency's Advocacy Office. NFIB feels that this effort is simply too little, too late and that there is a pressing need to revamp the program before the small business community is turned off by its ineffectiveness. NFIB believes that Advocacy will be the watchword of the future and that the Small Business Administration has no program that will be more important to the small business community…Advocacy should be one of the primary functions of the Agency and it should be expanded and given the power necessary to represent the small business community within the Federal Government and before Congress…To accomplish this we would recommend that the Advocacy program and the person who runs it be significantly upgraded … and while we still believe that the head of the advocacy program should be highly placed within the Small Business Administration, we are also convinced that he or she must have the freedom to speak out on issues of importance and to represent the interests of small business within the Administration and before Congress…Without this freedom, we would not have an advocate, but just another spokesman for the Administration.[315]

These and other witnesses were persuasive, and the Congress responded positively to their call for an upgraded Chief Counsel with the ability to speak independently on behalf of small businesses. As we

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[314] Ibid., pp. 82-83.

[315] Ibid., pp. 121-122.

have seen, a new charter for Advocacy followed only two months after this hearing, and it reflected many of the witnesses' recommendations.[316]

Advocacy's new charter, Title II of Public Law 94-305, was a major step forward in establishing the independent office envisioned by its authors and the small business community itself. Although the term "independent" does not actually appear in the statute, a number of indicia of independence are apparent.

Separate statutory charter. The first thing to note about Advocacy's new charter is that it was not in the form of amendments to the Small Business Act, the generic legislation creating SBA and its Administrator, as well as authorizing the agency's various programs. Instead, Advocacy's legislation is freestanding, and it is codified separately at 15 U.S.C. §§ 634a – 634g. The prior Chief Counsel for Advocacy, who had worked under the direction of the Administrator, was authorized by provisions in the Small Business Act that were repealed by Public Law 94-305.[317]

Senate-confirmed status. Although Public Law 94-305 established the new Office of Advocacy "within the Small Business Administration," it also provides that the Chief Counsel is to be appointed by the President with the advice and consent of the Senate. In 1976, the only other Senate-confirmed appointee at SBA was the Administrator.[318] The Congress conferred this special status on the Chief Counsel both to make clear the importance with which it held the position and its duties, and to facilitate interaction between Advocacy and high-level policymakers in other executive branch agencies. Concerning this provision, former Chief Counsel Frank Swain testified:

> The fact of the matter is that when somebody from the SBA is negotiating with the IRS or with the EPA on a proposed regulation, they can get to a lot higher and more influential level of the office at EPA or IRS or Treasury because the Chief Counsel is appointed by the same President that appointed them and confirmed by the Senate, and is in one sense, on the President's team, trying to do better by that administration for small business.[319]

Appointment from civilian life. Public Law 94-305 provided that the Chief Counsel "shall be appointed from civilian life," a distinction also characterizing the SBA Administrator's appointment, but not those of his or her subordinates. Concerning this provision, former Chief Counsel Jere Glover testified:

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[316] Title II, Public Law 94-305 (June 4, 1976), 15 § U.S.C. 634a *et seq.* See Appendix A.

[317] Prior § 5(e) of the Small Business Act, which was repealed by § 208 of Public Law 94-305.

[318] Ibid., § 201, 15 U.S.C. 634a. Subsequently, the SBA Inspector General was given Senate-confirmed status in 1978 (Public Law 95-452, Inspector General Act of 1978 (October 12, 1978), 92 Stat. 1101, 5 U.S.C. App.), and the SBA Deputy Administrator was given Senate-confirmed status in 1990 (§ 222, Public Law 101-574, Small Business Administration Reauthorization and Amendments Act of 1990 (November 15, 1990), 104 Stat. 2823, 15 U.S.C. § 633(b)(1)).

[319] Hearing before the House Committee on Small Business, "SBA Office of Advocacy;" April 4, 1995; p. 7.

> That becomes very important because the ability to communicate and understand what small business is saying can only be learned through that experience of having been on the outside and having been involved in business. I think that's one of the important things that Congress did when they set up this office.[320]

No clearance for Advocacy work products. Yet another clear indication of the Chief Counsel's independence was Public Law 94-305's provision that the Chief Counsel is authorized to prepare and publish such reports as deemed appropriate. Importantly for Advocacy's independence, this section provides that such "reports shall not be submitted to the Office of Management and Budget or to any other Federal agency or executive department for any purpose prior to transmittal to the Congress and the President."[321] Accordingly, the Office of Advocacy does not circulate its work products for clearance with the SBA Administrator, OMB, or any other federal agency prior to publication. These work products include testimony, reports to Congress, economic research, comments on regulatory proposals, comments on legislation, publications, press releases, and website content. Concerning this provision, former Chief Counsel Frank Swain observed:

> …the Congress, I think, wisely designed the Chief Counsel's job to have a significant aspect of independence that other Federal appointed officials don't have. That is, to testify in front of this and other congressional committees without clearing one's testimony with OMB and to attempt…to make its voice heard in judicial proceedings as well as in *amicus*.[322]

1980 statement of congressional intent. In 1980, Public Law 96-302 placed the position of Chief Counsel for Advocacy at Level IV of the Executive Schedule, confirming his or her rank at a very high level, generally equivalent to assistant secretaries and general counsels at cabinet-level departments.[323] The Senate report to accompany this legislation included remarks illuminating congressional intent with respect to the Chief Counsel's relationship with other SBA officials and the independence of his mission generally.

> In establishing the Chief Counsel for Advocacy at executive level IV, the committee notes that the administration expressed concern because this level is the same as SBA's Deputy Administrator and above that of the Associate Administrators. The Committee does not see that this should create any internal problems at SBA.
>
> By agreeing to this provision, the committee does not intend to alter or interfere with the internal line of authority of either the Administrator or Deputy Administrator of the Small Business Administration. The change is intended simply to give the Chief Counsel for Advocacy

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[320] Ibid., p. 3.

[321] § 206, Public Law 94-305, 15 U.S.C. § 634f.

[322] Hearing before the House Committee on Small Business, "SBA Office of Advocacy;" April 4, 1995; p. 7.

[323] § 403, Public Law 96-302 (July 2, 1980), 94 Stat. 850. The position of Chief Counsel for Advocacy was added to the list of ES-4 positions that is set forth at 5 U.S.C. § 5315.

proper standing within the executive branch and thereby enable him to better carry out the responsibilities imposed upon him by Congress in Public Law 94-305.

The Chief Counsel for Advocacy is not in the SBA chain of command: he is a Presidentially appointed official with Senate confirmation. His mandate is to represent the views of small business. In carrying out this mission, he is expected to present and fight for the views of the small business sector of the economy; the views will not always be the same as those expressed by the SBA on behalf of the administration. He is much like an attorney representing a client and just as the attorney presents his client's position, the Chief Counsel for Advocacy presents his client's position which is that of the small business community.

Viewed in this role, the position of the advocate cannot be equated with that of the Deputy Administrator or the Associate Administrators. He has a different mission than that assigned to the rest of SBA and since he is a separate part of the SBA team, there should not be any comparison of positions between him and other officials in the SBA hierarchy. The advocate may not necessarily represent the administration's position or that of SBA; however, the SBA and other Federal departments and agencies are required to cooperate fully with him.[324]

1994 statutory confirmation of independent authorities. Public Law 103-403 deleted a requirement in prior law that the Chief Counsel consult with and obtain the approval of the SBA Administrator before exercising a variety of special authorities in Public Law 94-305,[325] including the Chief Counsel's public law hiring authority,[326] and authorities to procure temporary and intermittent services,[327] to consult with experts and other authorities,[328] to utilize the services of SBA's National Advisory Council or to appoint other advisory boards or committees,[329] and to "hold hearings and sit and act at such times and places as he may deem advisable."[330]

The conference report to accompany this legislation was clear in stating the intent of Congress: the legislation modified "the authority of the Chief Counsel for Advocacy to hire the employees provided for under 15 U.S.C. 634d by eliminating the requirement that the Chief Counsel obtain the approval of the SBA Administrator."[331] By removing the Administrator's ability to intervene in the use of these § 204

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[324] Senate Report 96-703 to accompany S. 2698 (subsequently enacted as Public Law 96-302), Senate Committee on Small Business; May 14, 1980; pp. 15-16.

[325] § 610(1), Public Law 103-403 (October 22, 1994), 108 Stat. 4204.

[326] Public Law 94-305, § 204(1), 15 U.S.C. § 634d(1).

[327] Ibid., § 204(2), 15 U.S.C. § 634d(2).

[328] Ibid., § 204(3), 15 U.S.C. § 634d(3).

[329] Ibid., § 204(4), 15 U.S.C. § 634d(4).

[330] Ibid., § 204(5), 15 U.S.C. § 634d(5).

[331] House Conference Report 103-824 to accompany S. 2060; October 3, 1994; p. 54.

authorities, the action by Congress to give the Chief Counsel sole discretion over their use should be viewed as enhancing the office's independence.

The Regulatory Flexibility Act. Another indication of Advocacy's independence is the fact that the RFA as amended has conferred additional authorities and duties on the Chief Counsel apart from those specified in Public Law 94-305. These do not run to the SBA Administrator, but solely to the Chief Counsel. We have reviewed these in earlier chapters in more detail, but to summarize here, agencies are required to transmit to the Chief Counsel their regulatory agendas,[332] their initial regulatory flexibility analyses,[333] in their final regulatory flexibility analyses their responses to Advocacy comments and any actions taken as a result of such comments,[334] and their certifications of rules without significant effects.[335] In addition, the Chief Counsel participates in SBREFA regulatory review panels for certain EPA, OSHA, and CFPB rules,[336] is tasked to report annually to the President and the Congress on agency compliance with the RFA,[337] and is authorized to appear as *amicus curiae* in any action brought in a court of the United States to review a rule, including those based on RFA compliance issues.[338]

Separate appropriations account. As discussed earlier in this chapter, the Small Business Jobs Act of 2010 provided that Advocacy would henceforth have its own separate line-item in the President's budget request and a separate account for its appropriations in the Treasury. Also, these funds are to remain available until expended.[339] These provisions became operational with Advocacy's budget request for Fiscal Year 2012, and beginning with the Fiscal Year 2013 request, Advocacy's annual Congressional Budget Justification and its accompanying Annual Performance Report have appeared in a separate budget appendix following the main SBA budget request, much as the request for the Inspector General's office appears. Since the establishment of Advocacy's separate appropriations account, its funds are no longer comingled with those of the SBA, and the ability to transfer funds between SBA and Advocacy is strictly limited by the reprogramming procedures set forth in appropriations law. Advocacy now submits its own draft budget requests to OMB for review, without approval or editing by SBA. Advocacy also has established its own strategic goals and performance metrics.

Independent, yes; detached, no. We have just reviewed some of the many indications that the Chief Counsel's duties and authorities are implemented independently from SBA and the SBA Administrator, who directs neither the office's activities, personnel, nor budget. The entire evolution of Advocacy has been a journey that began in 1974 under the authority of the Small Business Act and the direction of the

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[332] 5 U.S.C. § 602.

[333] 5 U.S.C. § 603.

[334] 5 U.S.C. § 604.

[335] 5 U.S.C. § 605.

[336] 5 U.S.C. § 609(b)

[337] 5 U.S.C. § 612(a).

[338] 5 U.S.C. §§ 612(b), 612(c).

[339] Public Law 111–240, title I, § 1601(b) (Sept. 27, 2010), 124 Stat. 2551, 15 U.S.C. § 634g.

Administrator, and then progressed through a series of legislative refinements that increasingly enhanced and confirmed the office's independence under its own statutory charter, appropriations account, and administrative authorities.

But in important ways, Advocacy is still very much a part of the agency in which it is housed. Although its mission is different from that of SBA—except in the largest sense of serving the small business community—Advocacy is a relatively small operation. In fact, it is too small to efficiently deal with the myriad administrative chores that beset all federal offices.

Advocacy relies on SBA for a variety of administrative support services, ranging from office space and equipment to IT and communications support; from printing to the purchase of goods and services; from training and travel to payroll, benefit, and other personnel administration services (though not classification and selection). Advocacy's own small administrative support staff are professionals who "plug in" to SBA's systems to keep Advocacy functioning at a high level of productivity. Advocacy could not accomplish what it does without the support of SBA.

There are many other ways in which Advocacy and the rest of SBA interact. Of special importance is the work of Advocacy's economic research team that is widely used by SBA offices throughout the country and by SBA officials at all levels in Washington. Advocacy also works closely with the National Ombudsman and prides itself on the level of cooperation and assistance that its professionals provide to all SBA program and policy staff whenever required.

View from the top. To close this section, it might be useful to recount a few observations made by former Chief Counsels on the sometimes awkward position of being an advocate inside the government representing those on the outside. Asked about his ability to speak independently on behalf of small businesses, the first Chief Counsel, Milt Stewart, recalled:

> I had no problems…I do think it helps if the Administrator and the Chief Counsel are known to the President as a team. If the Chief Counsel is pushed on an issue where he has to depart from the administration in his own right, obviously, he's got to let [the Administrator] know and let him know why…The once or twice that I went off the reservation, I think aside from a couple of catcalls and raised eyebrows, nobody made any trouble for us.[340]

Frank Swain, the second and longest-serving Chief Counsel, observed that:

> …the drafters of the [Advocacy] legislation basically tried to design an office that was both an inside player and an outside player. Each of the four Chief Counsels has attempted to fulfill that mandate in their own way. I think that there is set up an inherent conflict there, but it's a conflict that has been responsible for many of our victories… They ought to be independent when the situation demands. I think that it is a balancing act for every Chief Counsel and for

[340] From "Walking a Fine Line: The Independence of the Office of Advocacy," *The Small Business Advocate,* June 1996, p. A-14. This special edition of Advocacy's monthly newsletter, which commemorated Advocacy's 20th anniversary, is reprinted in its entirety in Appendix R.

> the Office of Advocacy. I think that it's really unique…it's a tribute to our system that it's been done.[341]

Tom Kerester, the third Chief Counsel, recalled:

> Former Administrator Pat Saiki…encouraged me to be independent. She said "that's your role and that's the role you should carry out." I did, as a courtesy matter, try to keep her advised ahead of time so that she wasn't blindsided by some questions – she knew exactly where I was coming from.[342]

Jere Glover, the fourth Chief Counsel, testified that:

> …the Chief Counsel can, and on occasion does, take a position contrary to that of the administration when it comes to a policy affecting small business…Congress wanted a small business advocate who could honestly and directly put forth the small business point of view. By not requiring the Office of Advocacy to deliver the exact same message as the Administration, Congress could obtain information that was free from many political considerations and would have credibility with the small business community outside of Washington.[343]

Tom Sullivan, the fifth Chief Counsel, testified that:

> One of the original ideas behind the Office of Advocacy was that small businesses needed a voice both to articulate their contributions to the economy and to represent their unique needs to policymakers in Washington. To be effective, the office had to have the ability to speak within the Administration in a voice that did not always echo Administration policy, hence the need for independence. At the same time, the wisdom of putting the Chief Counsel in the Executive Branch, where the Chief Counsel could insert the "small business voice" into discussions with policymakers on the same team – before proposed policy became law – has been borne out over the years.[344]

Dr. Winslow Sargeant, the sixth Chief Counsel, testified that:

> Advocacy's independence allows us to take strong positions in our comment letters, publications, testimony and other work, without going through clearance within the executive branch. While such review and coordination is certainly appropriate for most agencies, in our case it is not. That is

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[341] Hearing before the House Committee on Small Business, "SBA Office of Advocacy;" April 4, 1995; pp. 7-8.

[342] From "Walking a Fine Line: The Independence of the Office of Advocacy," *The Small Business Advocate,* June 1996, p. A-15.

[343] Hearing before the House Committee on Small Business, "SBA Office of Advocacy;" April 4, 1995; pp. 50-51.

[344] Hearing before the House Committee on Small Business, "Strengthening the Office of Advocacy;" March 20, 2002.

> because it is the job of each Chief Counsel to transmit directly to policymakers the unfiltered views of our small entity stakeholders…When I speak of independence, I want to emphasize that Advocacy only makes decisions based on what we believe is best for small business… I know from my conversations with past Chief Counsels that Advocacy's independence has been a constant through the years, and it remains the bedrock of Advocacy's ability to be effective.[345]

Darryl DePriest, the seventh and current Chief Counsel, observed that:

> Let's face it. The Office of Advocacy is part of the federal government. Therefore, when Advocacy meets with small business owners and other stakeholders, we are viewed somewhat skeptically when we say we're here to help. Advocacy's independence is critical to our ability to overcome that skepticism. Advocacy's independence allows us to take positions that demonstrate the seriousness with which we take our obligation to advocate within the federal government on behalf of small business.

So we see that all of the seven confirmed Chief Counsels have embraced their independence and welcomed the opportunity to represent the views of small business within the councils of government and to Congress, even if those views were not always the same as those of their administration. Each Chief Counsel serves his or her President and administration best by providing the small business point of view candidly. Agencies throughout government have many and varied missions, but it is the mission of the Chief Counsel alone to make sure that those agencies consider the effects of their actions on small businesses and mitigate them when possible.

This concludes the section on Advocacy's independence and its relationship with SBA.[346] We will now turn to brief sections on the office's organization and budget history.

Organization and Staffing

Chapters 2 through 5 of this report were organized by functionalities that closely parallel Advocacy's main operating divisions: its Office of Economic Research, Office of Interagency Affairs, Office of Information, and Office of Regional Affairs. Because this treatment was based on statutory duties, we have neglected the smallest, yet indispensable, operating division in Advocacy, its Administrative Support Branch (ASB).

The six professionals in ASB provide critical support in everything that Advocacy does. Their duties include the coordination of the many ways in which Advocacy "plugs in" to SBA's administrative support functions such as payroll and benefits, purchasing, training, travel, IT, and other communications. ASB staff also assists in organizing many of Advocacy's outreach events, answers the phones, directs public

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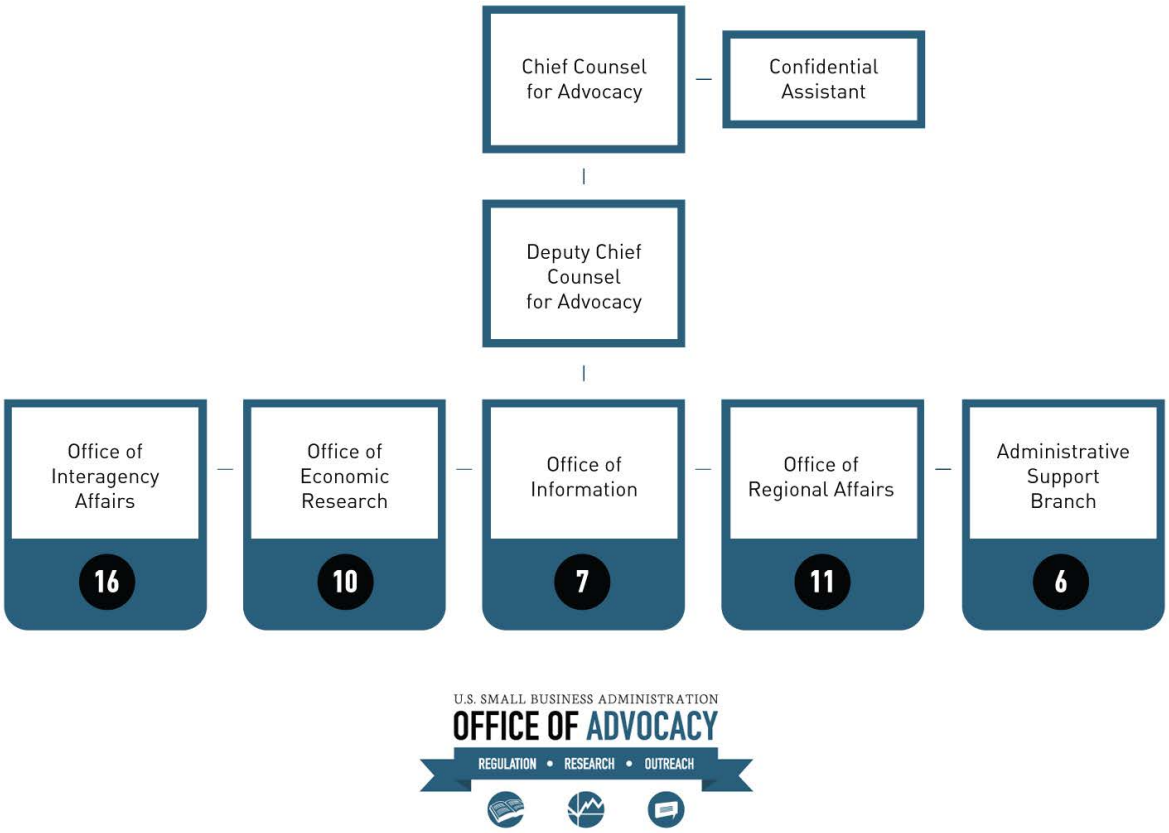
[345] Hearing before the Senate Committee on Small Business and Entrepreneurship, "Office of Advocacy Fiscal Year 2012 Budget;" March 31, 2011.

[346] A comparison of various aspects of SBA and the Office of Advocacy is provided in Appendix N.

inquiries, keeps records, and generally manages the countless chores that keep the office running smoothly.

Chart 10 depicts Advocacy's organization and authorized staffing levels by division in 2016. Its largest operating division, the Office of Interagency Affairs (Advocacy's legal team), has the primary responsibility for one of Advocacy's two primary legislative mandates, regulatory advocacy. The Office of Economic Research is responsible for the other key mandate of economic research. Advocacy maintains the flexibility to shift resources among its divisions as needed, subject to the availability of resources.

Chart 10.
Office of Advocacy Organizational Chart



Budget History and Current Levels

The term "budget" is often used with bewildering inconsistency by those not familiar with the federal budget process. This is understandable because that process is quite complex, and through its many stages an amount specified for any given project, program, or activity (PPA in budget parlance) can change many times. There are at least four types of "final" numbers that are commonly, if sometimes incorrectly, cited as the "budget" for a given PPA: 1) the congressional authorization or "program level" that is sometimes in place before the annual funding process commences; 2) the administration's

"request" level for the PPA; 3) the program level authorized by an appropriation, including those levels set in the report language in committee reports to accompany appropriations laws; and 4) the final "actuals" or dollars eventually spent on the PPA. Many PPA's, including Advocacy's, may not be the subject of one or more of these types of budget numbers, or their treatment in the budget may change from year to year.

To simplify this section, we will deal with three types of budget numbers for Advocacy, authorized program levels in the office's early years, appropriations for those years after Congress gave Advocacy its own Treasury account and appropriations line-item, and the amount of funds obligated (actuals) throughout the entire history of the office.

Historic Advocacy authorization levels. During the history of the Office of Advocacy as constituted by P.L. 94-305, there were specific statutory program levels for a "research and advocacy" function in fiscal years 1978 and 1979, and for an "office of the Chief Counsel for Advocacy" in fiscal years 1981 through 1984. Beginning in FY 1985, no specific program level has been set for Advocacy in SBA's authorization legislation. Advocacy, and the rest of SBA, operated under a general authorization in FY 1980, subsequent to President Carter's 1978 pocket veto of a multi-year reauthorization bill, H.R. 11445. Chart 11 sets out the Advocacy program levels for the six years in which these appeared in the Small Business Act. Note that the original program levels in FY 1982 – FY 1984 were revised downward with the enactment of P.L 97-35.

Chart 11.
Advocacy Authorized Program Levels, FY 1978–FY 1984

Fiscal Year	Program level	Authorizing law	Enactment
FY 1978	$6.0 million	Public Law 95-89[1]	August 4, 1977
FY 1979	$6.6 million	Public Law 95-89	August 4, 1977
FY 1981	$8.8 million	Public Law 96-302[2]	July 2, 1980
FY 1982	$9.68 million	Public Law 96-302	July 2, 1980
FY 1982	$8.0 million	Public Law 97-35[3]	August 13, 1981
FY 1983	$9.68 million	Public Law 96-302	July 2, 1980
FY 1983	$8.0 million	Public Law 97-35	August 13, 1981
FY 1984	$9.68 million	Public Law 96-302	July 2, 1980
FY 1984	$8.0 million	Public Law 97-35	August 13, 1981

1. Public Law 95-89 (August 4, 1977), 91 Stat. 553.
2. Public Law 96-302 (July 2, 1980), 94 Stat. 833.
3. Public Law 97-35, Title XIX, § 1905 (August 13, 1981), 95 Stat. 772.

Advocacy appropriations. Congress in 2010 provided Advocacy with its own appropriations account and line-item in the budget. These provisions became operational with the administration's budget request and the subsequent final appropriation for FY 2012. Chart 12 depicts Advocacy's budget request and appropriation (in new budget authority, or BA) for each year these provisions have been in effect, in addition to its final obligations for those years. The significant drop in FY 2013 was due to government-wide budget sequestration provisions enacted in that year that adjusted Advocacy's FY 2012 baseline of $9.12 million downward as described in the footnote to the table.

Advocacy actuals can sometimes exceed the appropriation of new funds in a given year because of the availability of "carryover" funds from prior years. Advocacy's authorizing legislation specifically provides that funds appropriated to it remain available until expended, a very useful provision due to uncertainties that sometimes arise in the contracting process for economic research projects.

Chart 12.
Advocacy Budgets Since Establishment of Separate Treasury Account, FY 2012–FY 2017
(Millions of Dollars)

Fiscal Year	Request (New BA)	Enacted (New BA)*	Obligated (Actuals)
FY 2012	9.120	9.120	8.440
FY 2013	8.900	8.643	8.811
FY 2014	8.455	8.750	8.628
FY 2015	8.455	9.120	9.264
FY 2016	9.120	9.120	9.157
FY 2017	9.320		

***Enacted amounts include only new budget authority. Carryover from prior fiscal years and other available funds are not reflected in these amounts, and obligated levels can exceed new BA for a given year. The FY 2013 enacted level of $8.643 million is the post-sequestration level. It includes $8,642,969 in new BA after: 1) a 5 percent sequestration reduction from FY 2012 enacted baseline of $9.12 million; 2) a 0.2 percent across-the-board rescission; and 3) a further OMB-approved adjustment to resolve technical assumption differences between OMB and CBO, all provided for in the FY 2013 continuing resolution.**

Prior to FY 2006, Advocacy's "budget" appeared as two items in SBA's formal congressional budget request and in the agency's appropriations legislation. One item (often referred to as "salaries and expenses" or S&E) related to Advocacy's operating expenses, including employee compensation and benefits, travel, printing and all other direct expenses except for economic research contracts. The second item related to Advocacy's economic research program, and included funds for contracts with other government agencies for data and with private sector researchers for specialized projects. From FY 2006 through FY 2011, economic research funding was included with all other Advocacy expenses, so that the office's budget appeared as a single item in SBA's congressional budget submission under the "Executive Direction" budget heading.

Since FY 2012, Advocacy has had its own line-item in the budget which includes all direct Advocacy expenses, including economic research, but not various overhead costs that, pursuant to Section 1602(b) of Public Law 111-240, SBA must provide to Advocacy, including office space and equipment, communications and IT services, and maintenance of equipment and facilities. The costs for these services, as well as centralized indirect expenses shared with other SBA offices, are not charged to Advocacy's appropriation. Advocacy and SBA have executed a Memorandum of Understanding setting forth what expenses are charged to Advocacy's appropriation and what services SBA will provide to Advocacy without charge to that account.[347]

Advocacy actuals. Chart 13 depicts Advocacy actual spending from FY 1978, the first year in which Advocacy as chartered by Public Law 94-305 was operational, through FY 2016. Advocacy's budget request for FY 2017 is also provided, pending as this report was finalized.

[347] See Appendix O.

Chart 13.
Advocacy Actual Obligations, FY 1978–FY 2017 (Thousands of Dollars)[A]

Fiscal Year	Advocacy Actuals	Fiscal Year	Advocacy Actuals
FY 1978	1,930	**FY 1998**	4,869
FY 1979	2,836	**FY 1999**	5,134
FY 1980	6,050[B]	**FY 2000**	5,620
FY 1981	7,264[B]	**FY 2001**	5,443
FY 1982	5,755	**FY 2002**	5,019
FY 1983	6,281	**FY 2003**	8,680[E]
FY 1984	5,654	**FY 2004**	9,360[E]
FY 1985	5,701	**FY 2005**	9,439[E]
FY 1986	5,546	**FY 2006**	9,364[E]
FY 1987	6,018	**FY 2007**	9,858[E]
FY 1988	6,043	**FY 2008**	9,133[E]
FY 1989	5,769	**FY 2009**	10,660[E]
FY 1990	5,645	**FY 2010**	9,318[E]
FY 1991	5,647	**FY 2011**	8,309
FY 1992	5,764	**FY 2012**	8,440
FY 1993	5,362	**FY 2013**	8,811
FY 1994	6,090[C]	**FY 2014**	8,628
FY 1995	7,956[D]	**FY 2015**	9,264
FY 1996	4,617	**FY 2016**	9,157
FY 1997	4,762	**FY 2017**	9,320[F]

A. Source: Expenses are derived from "salary and expense" (S&E) data from the appendices of OMB's annual congressional budget submissions. From the 1997 submission forward, SBA's own more detailed congressional budget submission documents were used to refine the OMB budget numbers, which were rounded to millions beginning in that year. Advocacy totals include economic research.
B. During 1980 and 1981, Advocacy provided extensive staff support to the 1980 White House Conference on Small Business. Also, Congress provided unusually high funding for directed economic research during this period.
C. $1,507,000 of this amount was expended for the 1995 White House Conference on Small Business.
D. $2,157,000 of this amount was expended for the 1995 White House Conference on Small Business.
E. Dollars include an agency overhead charge representing Advocacy's share of services and facilities shared in common with all SBA offices and programs. An analogous charge is not included in years prior to FY 2003. Advocacy's direct costs, analogous to those prior years, are again reflected in totals for years from FY 2011 forward.
F. Amount requested for Advocacy in Advocacy's congressional budget submission.

General Accountability Office 2014 Performance Audit

Federal government offices and programs are subject to review and audit, both with respect to general performance and more specific topics. Several different offices conduct such reviews, including agencies' Inspector General offices and the General Accountability Office (GAO), a congressional agency that examines the use of public funds, evaluates federal programs and policies, and provides analyses and recommendations to Congress to help it make more informed decisions. Such reviews and audits are a normal part of the operation of the federal government, and they provide not just the Congress, but also the offices subject to their scrutiny, with valuable insights on how to improve program and office performance.

GAO audits are typically triggered by a request from a congressional committee of jurisdiction over the subject office or program. In 2013, the Senate Appropriations Subcommittee on Financial Services and General Government requested that GAO conduct a performance audit of the Office of Advocacy. The audit was very thorough and lasted for nearly one year. It focused on three main areas: 1) research activities; 2) regulatory activities, including the applicability of the Federal Advisory Committee Act's (FACA) requirements to Advocacy roundtables; and 3) workforce planning efforts.

GAO released its report on Advocacy in July 2014.[348] It identified several areas in which GAO made recommendations for Advocacy to improve its operations. These were all non-financial in nature, and included the following:

- improve guidance in the selection of peer reviewers for Advocacy's research products, and improve documentation of the peer review process;
- strengthen procedures related to federal information quality guidelines;
- strengthen documentation of sources of input for comment letters and roundtable discussions;
- coordinate with SBA officials who oversee website administration to comply with Advocacy's roundtable policy to make information on the events—agendas, presentation materials—publicly available on its website; and
- improve Advocacy's workforce planning efforts by incorporating succession planning.
- Advocacy concurred with GAO's recommendations and took action on all immediately after the report was received. Importantly, GAO concurred with Advocacy's longstanding position that its regulatory roundtables were not "advisory committees" within the meaning of FACA. Its summary of this performance audit stated that:

GAO also found that the Federal Advisory Committee Act's transparency and other requirements do not apply to Advocacy's meetings with stakeholders to get input on regulations (roundtables).[349]

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[348] United States Government Accountability Office, *Office of Advocacy Needs to Improve Controls over Research, Regulatory, and Workforce Planning Activities* (GAO-14-525), www.gao.gov/products/GAO-14-525.

[349] Ibid., Highlights preface to full report.

Conclusion

This concludes our survey of Advocacy's legal authority, organization and budget. We have described in detail Advocacy's basic charter, Title II of Public Law 94-305, and Public Law 96-354, the Regulatory Flexibility Act, which conferred additional responsibilities on the Chief Counsel, along with authorities to implement those new duties. Each of these core statutes was amended a number of times over the years, and a legislative history of both the original statutes and all substantive amendments appears in this chapter. We traced in detail how Advocacy's independence from SBA developed incrementally from 1974 forward.

Advocacy's current organization and authorized staffing levels were then described, followed by treatments of the office's past authorizations, appropriations since the establishment of a separate Treasury account, and actual obligations from FY 1978 through FY 2016. We concluded the chapter with the findings of a 2014 GAO performance audit of Advocacy.

We now turn to issues pending for Advocacy as we prepare for the transition in administrations to follow the 2016 election.

Chapter 7
Pending Issues

In this, the concluding chapter of Advocacy's 2016 transition background paper, we will review a number of pending issues of which the transition team and next Chief Counsel should be aware. Some of the items mentioned in this chapter will resolve themselves in the normal course of time. Pending economic research projects sponsored by Advocacy will be completed, and regulations will be finalized or withdrawn. Other concerns have and probably will persist over longer periods. We cannot predict every new issue of importance to the small business community that will arise in the future, but many of the concerns with which Advocacy has dealt in the past will continue to be on the agenda in 2017 and beyond. This chapter is divided into three main sections relating respectively to research, regulatory development, and other Advocacy issues.

Research

In Chapter 2, we examined the vital role of data and research in Advocacy's activities. A significant portion of the office's operating budget has been dedicated to economic research. Since Fiscal Year 2000, approximately $1 million has been allocated annually for economic research and data products.[350] Advocacy uses its economic research funds for two primary purposes: 1) to purchase special data tabulations from government agencies and to otherwise support the development of small firm data at these agencies; and 2) to fund contract research by private-sector vendors on specialized issues. A third use is to enable rapid economic analysis of regulatory proposals as they are published and to assist Advocacy in the special review of EPA, OSHA and CFPB rules subject to SBREFA panels. In each instance, Advocacy strives to produce current and relevant research products that are useful for policymakers and other Advocacy stakeholders.

Data acquisition from other government agencies. It may come as a surprise to some that government agencies charge each other for their services. But it is a long-established principle in government accounting that users of government work products and services should bear at least some

[350] Funds for Advocacy's economic research function, excluding salaries and expenses, were for many years set by a specific line item in SBA's annual budget request and appropriations. Since FY 2006, however, Advocacy research has been included within a general amount for Advocacy as a whole.

of the costs of their production. Just like other users, Advocacy, with the support of appropriations from Congress, must compensate other government agencies for the extra work involved in creating various types of products from the massive data at their disposal that are not published in the normal course of their own activities. These special data tabulations from other government agencies are essential to many Advocacy research endeavors. In using them, Advocacy adds value to existing government resources, while at the same time reducing the need for new or duplicative data collection from small entities. Also, because of the statutorily confidential nature of the microdata that certain agencies are authorized to collect and maintain, often the only way to derive useful, and disclosable, macrodata from these sources is to let the "custodians" of the data do the analyses requested. That is what Advocacy is doing when it purchases many of the special tabulations that it uses. With Advocacy economists now obtaining Sworn Special Status with the U.S. Census Bureau, there is an additional avenue for conducting research using this confidential data. Advocacy anticipates that three research economists will obtain this status by 2017 (two already had that status in 2016 with another in application).

Improving small business data availability. In Chapter 2, we reviewed government sources of data that Advocacy routinely uses. The U.S. Census Bureau and the Internal Revenue Service are two regular sources from which data is acquired on a reimbursable basis. The most common specific sources and uses follow.

- U.S. Census Bureau's Statistics of U.S. Businesses (SUSB) firm size data. Each year, the Office of Advocacy purchases special tabulations of static and dynamic firm size data. This information is available by North American Industrial Classification System (NAICS) codes, by states, and by metropolitan statistical areas (MSAs). These data are the source of many Advocacy statistics on the number of businesses in the United States and the main source of factoids in Advocacy's popular Frequently Asked Questions publication. (Total annual cost: $150,000)
- U.S. Census Bureau, UMetrics Data Project. Advocacy has partially sponsored a joint Census and University of Michigan IRIS data project that pairs administrative data from Census and IRS with data from a broad swath of research universities that track recipients of research grants. Ultimately, OER hopes to leverage its Sworn Special Status to conduct detailed research using this data, and has also consulted on relevant data-fields and cuts of data Advocacy would find useful. (Total FY 2016 cost: $100,000)
- U.S. Census Bureau, other special tabulations. From time to time, Advocacy requests special data tabulations from Census. Past tabulations have included specialized data from the Bureau's quinquennial Economic Census, its Survey of Business Owners, and additional data on non-employer firms. In FY2015, Advocacy contracted with Census for a special tabulation that allowed for detailed tracking of entrepreneurship by age categories and/or generational classifications. (Total FY 2015 cost: $135,000)
- U.S. Census Bureau and Kauffman Foundation, Annual Survey of Entrepreneurs (ASE). The U.S. Census Bureau and the Kauffman Foundation recently partnered on a smaller, annual version of the Survey of Business Owners, which is the most comprehensive federal dataset on small businesses. In 2016, Advocacy joined a working group to discuss additional survey questions for future annual modules. Among the questions Advocacy has suggested and that the group is considering are some general questions related to regulatory burden. In FY 2017, Advocacy anticipates commencing a sole source contract with the Kauffman Foundation aimed at sponsoring further ASE module questions. (Anticipated cost for FY 2017: $120,000)

- Internal Revenue Service's Statistics of Income (SOI) special tabulations. Advocacy periodically requests data from the IRS on sole proprietorship, and it is exploring new opportunities whereby data might be examined for research purposes.

Outstanding research contracts. Much of Advocacy's independent economic research is conducted through contracts awarded competitively to private sector vendors. Advocacy sponsors contract research on a wide variety of specific topics and other issues of general interest to Advocacy stakeholders. Each year, subject to the availability of funding, Advocacy solicits research proposals from small business contractors using normal federal procurement procedures. Ideas for solicitation topics come from many sources, including input from congressional offices, business organizations and other advocacy groups, National Economic Council staff, and small businesses themselves. Internal discussions among Advocacy staff and leadership also seek to identify areas where new research is needed. Between seven and ten topic areas are usually selected, at least one of which is general enough to encourage interested parties to "think outside the box" and submit proposals on topics not specified in the solicitation.

Most Advocacy contract research solicitations are in the form of requests for quotations (RFQs) that are posted on FedBizOpps, the federal government's electronic portal for posting contracting opportunities.[351] They are typically small business set-asides (only small firms can compete), and Advocacy has also used a special authority to allow competition to be reserved for firms owned by service-disabled veterans. The proposals received in response to Advocacy RFQs are evaluated primarily on their technical merit, and awards are made prior to the end of the fiscal year.

Listed below are projects that were outstanding as this report was being finalized. Although Advocacy expects that each of these projects will be completed satisfactorily, each must pass through peer review and meet government-wide data quality standards before publication. Occasionally, contractors are unable to complete a project for various reasons, or problems arise as part of the data quality review process that are insurmountable. Although such instances are rare, it is possible that a project on the list below may not result in a final product. The titles for these "in the pipeline" projects are working titles only, and may change before release.

There are five contracts that were awarded in FY 2015 that still have work remaining:

- ***How Accelerators Promote Regional Entrepreneurship*** **by Cheryl Winston Smith.** This study explores the relationship between accelerators and regional entrepreneurship using a dataset developed by the contractor, a well-published subject matter expert on accelerators.
- ***The Performance of Minority-Owned and Women-Owned Businesses Using SBIR Data*** **by Research Triangle Institute.** This study analyzes the National Academy of Sciences (NAS) SBIR dataset to better understand the performance of Minority- and Women-Owned businesses. In summer 2016, the NAS granted Advocacy special access to updated SBIR data.

[351] For more information on FedBizOpps, see www.fbo.gov/.

- ***Small Business Lending after the Great Recession*** **by Krahenbuhl Consulting.** This study explores possible lagged impacts to small business access to capital immediately following the Great Recession.
- ***Small Business GDP*** **by Economic Consulting Services and OER.** This study updates previous reports on the small business share of GDP. Under this contract, the contractor provided data and some preliminary analysis and will work jointly with the OER COR to co-author a report. The forthcoming report will provide complete transparency and reproducibility of the analysis, with access to all underlying data, in addition to updated calculations.
- ***Technology Effects on Small Businesses in International Markets*** **by Washington CORE.** This study explores the role of IT in small business presence in the global economy. The study focuses on key countries as well as the United States in analyzing the role of IT in international markets.

Six contracts awarded at the end of FY 2016 are in progress:

- ***Do Minority Firms Suffer More from Immobility in Founder Control?*** **by William Bradford.** This study will analyze minority ownership according to general ownership and whether a minority is a founder of a small entity to see if there are differences in the growth and mobility for either specific racial or ethnic groups and/or by type of ownership.
- ***Latino Business Ownership, Contributions and Barriers for U.S. Born and Immigrant Latino Entrepreneurs*** **by Robert Fairlie.** This study will explore Latino and Hispanic business ownership by making use of current Census data. A further exploration of U.S. born versus native born Latino and Hispanic entrepreneurship will also be conducted.
- ***ASE Data Project*** **by Alicia Robb.** This four-month data project will offer descriptive statistics for minority-owned businesses and will provide Advocacy with ready cuts of data for future publications.
- ***Trade Shocks and Regional Entrepreneurship*** **by Palo Alto Analytics.** This study will examine the impacts of external trade shocks from China on U.S. regional entrepreneurship. Building on well-established methodologies in the literature, the contractor will focus on regional and small-business entrepreneurship.
- ***Contributions of Small Business Indirect Imports to U.S. International Trade*** **by Economic Consulting Services and OER.** This study will offer an update to a previous Department of Commerce study with updated data and approaches, and by providing a completely transparent and reproducible product that will allow stakeholders to access the underlying data utilized for the report. The contractor will provide data cuts and will co-author with the OER Contracting Officer's Representative (COR).
- ***Data Collection Investigating the Impacts of New Technologies in Small Business*** **by McColm & Co.** This data collection will collate and centralize data on entrepreneurship in the era of social media and streaming. The contractor will make use of both iTunes usage data and other media application usage data and will sort the data by entrepreneurial categories established in the request for quotations. The data will be used for further Advocacy research on small business use of new technologies.

Other pending contracts using research funds. In addition to data acquisition from other federal agencies and issue-specific contract research, Advocacy has found it useful to maintain a specialized "indefinite delivery, indefinite quantity" or IDIQ contract to enable rapid economic analyses of regulatory proposals as they are published and to assist Advocacy in the special review of EPA, OSHA,

and CFPB rules subject to SBREFA panels. The turnaround times for highly specialized and technical research on the cost of specific regulatory proposals can be very short, and the use of an IDIQ contract allows Advocacy to create a specific task order for a specific need quickly. A rapid economic analysis of a proposed rule is often necessary in order to comment for regulatory flexibility purposes within statutorily set deadlines. As this paper was being prepared, Advocacy has an IDIQ contract for these purposes with SCA Inc.

Understanding the regulatory landscape for small business. The small business regulatory burden is one of the office's primary concerns. Three research efforts are in progress to shed more light on this.

- ***Pilot study.*** In FY2016, Advocacy began to gather research and prepare for a pilot information collection aimed at assessing the regulatory "red tape" burden to small business. The initial focus of this study will be narrow and small so that the survey instrument can be tested and fully vetted by OMB's Office of Information and Regulatory Affairs (OIRA). The focus on "red tape" issues is also intentional in order to manage variables that may be more easily and directly quantifiable by prospective respondents. Advocacy has begun preliminary discussions with OIRA in anticipation of this information collection and anticipates releasing a Request for Quotations (RFQ) in early 2017.
- ***Regulatory landscape Fact Sheets and Issue Briefs.*** In addition to this pilot study, Advocacy plans to release a new research product that provides a combination of regulatory resources, industry, and demographic data for startup entrepreneurs. In our outreach to small businesses, it was suggested that a topline regulatory checklist and background statistics would be helpful to startups that often have little initial experience with federal regulations. Advocacy plans to combine this new product rollout with a series of roundtables that will allow startup entrepreneurs to access not only Advocacy economic research but also Advocacy attorneys and other federal agency contacts.
- ***Cumulative regulatory burden.*** In FY 2016, Advocacy commenced preliminary discussions with OIRA regarding a possible joint project aimed at measuring cumulative regulatory burden to small entities in light of newly available federal data. This project is currently only in the feasibility and scope phase of discussion.

Veteran business owners. In FY 2016, Advocacy solicited proposals for but did not award on a project related to veteran entrepreneurship. In FY 2017, Advocacy may explore the possibility of a jointly sponsored project with SBA's Office of Veterans Business Development.

Regulatory Development

In this chapter on pending issues, we are attempting to identify issues that should be on the radar screen of the transition team and new staff that may join Advocacy in the next administration. Although it is relatively easy to list pending economic research contracts and ongoing data needs, it is more difficult to identify regulatory issues and specific rules that may or may not be under consideration in the next year and beyond. Administration and agency priorities could change, and Advocacy will need to be especially attentive to its regulatory work in progress. In this section, we will briefly discuss pending regulations on which Advocacy has commented publicly and other anticipated regulatory issues.

Pending regulatory issues. Following are specific regulatory issues that Advocacy was following as this paper was being finalized. They are organized alphabetically by agency.

- ***Animal and Plant Health Inspection Service (APHIS)**. Horse Protection; Licensing of Designated Qualified Persons and Other Amendments*

  APHIS is currently accepting public comments on a proposed rule that would (1) reassign responsibility for the training, monitoring, and licensing of Designated Qualified Persons (DQPs) to APHIS; (2) impose additional eligibility requirements for DQPs, and (3) prohibit the use of pads, substances, and action devices on horses involved in horse shows, exhibitions, sales, and auctions. Advocacy is concerned that this rule may have a significant economic impact on a substantial number of small businesses associated with the Tennessee Walking Horse industry.

  As Advocacy requested, APHIS extended the comment period an additional 30 days (ending on October 26, 2016). APHIS also published a "clarification" with the notice of the extension that may impose an even greater burden on the Tennessee Walking Horse industry, as well as other horse breed-specific industries.

- ***Centers for Medicare and Medicaid Services (CMS).** Medicare Program; Merit-Based Incentive Payment System (MIPS) and Alternative Payment Model (APM) Incentive Under the Physician Fee Schedule, and Criteria for Physician-Focused Payment Models*

  Medicare Access and CHIP Reauthorization Act of 2015 (MACRA) repealed the Medicare sustainable growth rate methodology for updates to the physician fee schedule (PFS) and replaced it with a new Merit-based Incentive Payment System (MIPS) for MIPS eligible clinicians or groups under the PFS. MACRA was intended to reward physicians based on quality of care versus quantity of care (waste of resources to maximize payments) through monetary incentives and performance measures to promote better care. MACRA has two payment tracks from which physicians must choose. The first, doctors whose performance and quality of care exceeds benchmarks will get bonuses of up to 4 percent of their total Medicare reimbursements (based on evaluations of care beginning in 2017, and will rise to a maximum of 9 percent by 2022). The second track involves alternative payment models, which hold large practices or accountable care organizations accountable for the quality of care by their physicians. The second track will provide a 5 percent annual bonus between 2019 and 2024.

  During interagency review Advocacy voiced concerns to CMS about the rule's impacts on small practices, noting that the system was designed to reward large practices at the expense of small practices. During the comment, period physicians in solo or small practices argued that they will either have to cease practicing or join large group practices. The American Medical Association, other physician trade associations, and state medical associations have commented that the system must be simplified and accommodate the needs of physicians in rural, solo or small practices. They

argue that the rule's reliance on performance data beginning in 2017 should be extended while the rule's impact is evaluated.

This issue will likely require a legislative fix of the Affordable Care Act through MACRA. Advocacy has no indication when the final rule will be published at this time.

- ***Department of Energy (DOE).*** *Energy Conservation Standards for Hearth Products*

  DOE has proposed updated Energy Conservation Standards for Hearth Products that will impose significant costs on small manufacturers. In a public comment letter, Advocacy told DOE that the department should better determine the small business impact and should explain its rationale for rejecting significant alternatives. Advocacy believes that DOE's regulatory impact analysis understates the impact to small businesses. Advocacy also believes that DOE mistakenly foreclosed on consideration of significant alternatives and that DOE can and should consider less burdensome alternatives that would still accomplish the energy goals of this regulation.

  The public comment period has closed, and the next action by the agency will be the publication of a final rule.

- ***Department of Energy (DOE).*** *Energy Conservation Standards for Manufactured Housing*

  DOE has proposed updated Energy Conservation Standards for Manufactured Housing that will impose significant costs on small manufacturers. The new rule would require energy efficiency standards that exceed those already in place for such homes. Advocacy has concerns that DOE's proposal will have a disproportionate impact on small manufacturers of manufactured homes. Given the significant and disproportionate impact that this proposed rule would have on small manufacturers of manufactured housing, Advocacy encouraged DOE in a public comment letter to adopt a standard that will achieve energy savings without imposing serious harm on small business manufacturing.

  The public comment period has closed, and the next action by the agency will be the publication of a final rule.

- ***Department of Labor (DOL).*** *Permanent Employment of Foreign Workers in the U. S.*

  The PERM regulations govern the labor certification process for employers seeking to employ foreign workers permanently in the United States. DOL has not comprehensively examined and modified the permanent labor certification requirements and process since 2004. The Department is engaging in rulemaking that will consider options to modernize the PERM program to be more responsive to changes in the national workforce, to further align the program design with the objectives of the U.S. immigration system and needs of workers and employers, and to enhance the

integrity of the labor certification process.

The draft proposed rule has been under review at OMB's Office of Information and Regulatory Affairs since March 2016.

- ***Department of Labor (DOL)****. Fair Labor Standards Act Overtime White Collar Exemption for Executives, Administrative and Professionals.*

  The final rule was released in May 2016 and will be effective on December 1, 2016. Under the Fair Labor Standards Act (FLSA), employees are entitled to overtime pay if they work over 40 hours a week. However, there are many exemptions under the FLSA. This final rule amends the FLSA "white collar" exemption from overtime pay for executive, administrative, and professional employees. The new rule updates the minimum salary threshold that determines which employees are subject to the exemption, increasing this threshold from $23,660 to $47,476. All employees, including managers, making under $47,476 will be eligible for overtime pay on December 1. DOL will be making automatic updates to this minimum salary threshold every 3 years beginning on January 1, 2020.

  Two lawsuits challenging the rule and seeking to stay its effective date were filed in the U.S. District Court, Eastern District of Texas, on September 20, 2016. One was filed by 21 states and governors, and the other lawsuit was filed by over 50 business organizations, including the National Federation of Independent Business and the U.S. Chamber of Commerce.

- ***Department of State****. Exchange Visitor Program—Summer Work Travel*

  The Department of State published two interim final rules (IFRs) on the Exchange Visitor Program – Summer Work Travel (SWT) category. The Department has reviewed the comments submitted in response to the 2011 and 2012 IFRs, and it plans to publish a notice of proposed rulemaking with 60 days for public comment to reflect comments received from both rulemakings and further protect the health, safety, and welfare of participants by specifically requesting comments on greater protections for participants, restrictions on eligible participation in the SWT Program, and some additional requirements and restrictions on sponsors of the SWT Program.

  The draft rule has been at OIRA since February 2016. This rule will likely be released in late 2016, and finalized in the next administration.

- ***Environmental Protection Agency (EPA)****. Formaldehyde Emission Standards for Composite Wood Products*

  In June 2013, EPA proposed a rule to implement the Formaldehyde Emissions for Composite Wood Products Act, amending the Toxic Substances Control Act (TSCA) Title VI. The agency also convened a SBREFA panel on the proposed rule in 2011. A pre-publication version of the final rule has been

published by the agency on its website; it has not been published in the Federal Register yet. The prepublication final rule incorporates the emission standards established by TSCA Title VI for hardwood plywood, medium-density fiberboard (MDF) and particleboard, and products containing these composite wood products. It also includes provisions on labeling, chain of custody requirements, sell-through provisions, low-emitting formaldehyde resins, finished goods, third-party testing and certification, auditing and reporting of third-party certifiers (TPCs), recordkeeping, enforcement, laminated products, and exceptions from regulatory requirements for products and components containing de minimis amounts of composite wood products.

There are staggered compliance dates for key provisions that will impact small entities ranging from one to seven years. Small businesses have expressed the need for extensive stakeholder outreach from the agency regarding the rule to avoid compliance issues.

- ***Environmental Protection Agency (EPA).*** *Regulation of N-Methylpyrrolidone and Methylene Chloride in Paint and Coating Removal under Section 6(a) of the Toxic Substances Control Act (TSCA)*

  On June 1, 2016, EPA convened a SBREFA Panel for its rulemaking under Section 6(a) of the Toxic Substances Control Act (TSCA) for Methylene Chloride and N-Methylpyrrolidone (NMP) in paint removers. Methylene chloride and NMP are used in both occupational settings and in consumer products. In August 2014, EPA completed a TSCA Work Plan Chemical Risk Assessment for methylene chloride; EPA identified risks associated with the use of this chemical in occupational and consumer paint and coating removal activities. In March 2015, EPA completed a TSCA Work Plan Chemical Risk Assessment for NMP; EPA identified chronic risks to workers and acute risks to anyone who uses NMP for more than four hours in a single day without wearing appropriate gloves. EPA initiated rulemakings under TSCA section 6 to address the risks in these assessments. Specifically, EPA is considering restricting the use of NMP and methylene chloride in commercial and consumer paint including a potential elimination of the retail market for the chemicals. Through the SBREFA Panel process EPA is seeking the small entity representatives' advice on the impacts to small businesses from the potential requirements and other regulatory alternatives that would adequately protect against the identified risks.

  A Panel outreach meeting was held on June 15, 2016. The SBREFA Panel report has been signed. The proposed rule will likely be published by the end of 2016 with a public comment period extending into the next administration.

- ***Environmental Protection Agency (EPA).*** *Regulation of Trichloroethylene (TCE) used as a spotting agent and aerosol spray degreaser under Section 6(a) of the Toxic Substances Control Act (TSCA)*

  EPA has submitted its first proposed rule since TSCA reform for a Section 6(a) rulemaking to regulate TCE by prohibiting its use as a spotting agent in dry cleaning and in commercial and consumer aerosol spray degreasers. Section 6(a) of the TSCA provides authority for the EPA to ban or restrict

the manufacture (including import), processing, distribution in commerce, and use of chemicals, as well as any manner or method of disposal. In the June 2014 TSCA Work Plan Chemical Risk Assessment for TCE, the EPA identified risks associated with commercial degreasing and some consumer uses. EPA has concluded that there is a reasonable basis to conclude that the risks to human health or the environment are unreasonable. EPA has certified under the RFA that this rule will not have a significant impact on a substantial number of small entities. There are stakeholders that disagree and have requested Executive Order 12866 meetings to suggest to OMB that EPA's RFA certification is not justified.

The proposed rule will likely publish by the end of 2016, and the public comment period will likely extend into the next administration.

- ***Environmental Protection Agency (EPA).*** *Regulation of Trichloroethylene (TCE) in Vapor Degreasing under Section 6(a) of the Toxic Substances Control Act (TSCA)*

  On June 1, 2016, EPA convened the SBREFA Panel for its rulemaking under Section 6(a) of the Toxic Substances Control Act (TSCA) for Trichloroethylene (TCE) in vapor degreasing. EPA identified Trichloroethylene (TCE) for risk evaluation as part of EPA's Work Plan for Chemical Assessments under TSCA. TCE is used primarily in industrial and commercial processes, with some limited uses in consumer products. In EPA's June 2014 TSCA Work Plan Chemical Risk Assessment for TCE, it identified risks associated with commercial degreasing, among other uses. EPA initiated this rulemaking under TSCA section 6 to address the risks identified in the assessment. Specifically, EPA is considering eliminating or restricting the use of TCE in commercial degreasing operations.

  The SBREFA Panel report has been signed. The proposed rule will likely publish by the end of 2016 with a public comment period extending into the next administration.

- ***Environmental Protection Agency (EPA)****. Financial Responsibility Requirements for Hardrock Mining Industry SBREFA Panel*

  EPA convened a SBREFA panel in August 2016 for a CERCLA Section 108(b) rulemaking intended to assure that owners and operators of hardrock mining facilities obtain bonds to pay the costs to address releases and potential releases of hazardous substances associated with activities at their facilities. The Bureau of Land Management, the U.S. Forest Service, and several state agencies already enforce a financial responsibility requirement for hardrock mining, yet the agency has failed to adequately address the extent of the overlap of these regulations. EPA has provided materials that appear to be un-supportive of EPA's own rule. EPA has a court-ordered deadline to produce a signed rule by December 1, 2016.

  The SBREFA Panel has met with its small entity representatives (SERs) and they have provided their feedback. Panel deliberations and drafting of the Panel report are in progress. The 60-day clock to

complete the Panel is due to run out on October 24, 2016. A proposed rule will follow in December, with a comment period extending into the next administration.

- ***Environmental Protection Agency (EPA).*** *Nanoscale Materials; Reporting and Recordkeeping Requirements*

  EPA is currently developing a final rule to require reporting and recordkeeping requirements under section 8(a) of the Toxic Substances Control Act (TSCA) for certain chemical substances when they are manufactured or processed at the nanoscale. Specifically, the EPA proposed to require persons that manufacture (defined by statute to include import) or process, or intend to manufacture or process these chemical substances, to electronically report to EPA certain information, which includes the specific chemical identity, production volume, methods of manufacture and processing, exposure and release information, and existing data concerning environmental and health effects. This proposal involves one-time reporting for existing nanoscale materials and one-time reporting for new discrete nanoscale materials before they are manufactured or processed.

  Advocacy submitted a public comment and held a roundtable on this rule during the public comment period. The final rule may be published under the new administration; it has not been submitted for interagency review under Executive Order 12866.

- ***Environmental Protection Agency (EPA).*** *Final Rule for the Certification of Pesticide Applicators*

  Advocacy is reviewing the draft final rule for EPA's regulations for the certified pesticide applicator program. In August 2015, EPA proposed to improve the competence of certified applicators of Restricted Use Pesticides (RUPs) and to increase protection for noncertified applicators of RUPs operating under the direct supervision of a certified applicator through enhanced pesticide safety training and standards for supervision of noncertified applicators. A SBREFA Panel was convened for this rule jointly with the rulemaking for the revision of Worker Protection Standards.

  Advocacy held a roundtable discussion and submitted a public comment during the public comment period. Interagency review under E.O. 12866 is currently underway and will likely conclude soon, with the final rule out by the end of 2016 or early 2017.

- ***Environmental Protection Agency (EPA):*** *Lead; Renovation, Repair, and Painting Program for Public and Commercial Buildings*

  Section 402(c)(3) of the Toxic Substances Control Act requires EPA to regulate renovation or remodeling activities in target housing (most pre-1978 housing), pre-1978 public buildings, and commercial buildings that create lead-based paint hazards. In 2008 EPA finalized a rule to establish requirements for training renovators, other renovation workers, and dust sampling technicians; for certifying renovators, dust sampling technicians, and renovation firms; for accrediting providers of

renovation and dust sampling technician training; for renovation work practices; and for recordkeeping for target housing and child-occupied facilities. After the 2008 rule was published, EPA was sued, in part, for failing to address potential hazards created by the renovation of public and commercial buildings. In the settlement agreement and subsequent amendments, EPA agreed to commence proceedings to determine whether or not renovations of public and commercial buildings create hazards. Further, in the instances that these activities do create hazards, EPA agreed to propose work practice and other requirements by March 31, 2017, and to take final action, if appropriate, no later than 18 months after the proposal. A SBREFA Panel process was started in 2014 but the Panel was not convened.

EPA has indicated that they will likely restart the process of the SBREFA Panel for this rulemaking soon. EPA can alternatively decide not to proceed by finding before March 2017 that there is no lead-based hazard for public and commercial building renovations.

- ***Environmental Protection Agency (EPA).*** *Section 610 Review of Lead-Based Paint Activities; Training and Certification for Renovation and Remodeling Section 402(c)(3)*

  EPA has initiated a review of the 2008 Lead Renovation, Repair, and Painting Program (RRP) pursuant to the section 610 retrospective review provisions of the Regulatory Flexibility Act. The rule was amended in 2010 and 2011 to eliminate a provision for contractors to opt out of prescribed work practices and to affirm the qualitative clearance of renovated or repaired spaces, respectively. Although the section 610 review only needs to address the 2008 RRP Rule, EPA will exercise its discretion to consider relevant comments to the 2010 and 2011 amendments. The RRP rule is intended to reduce exposure to lead hazard created by renovation, repair, and painting activities that disturb lead-based paint. The current rule establishes requirements for training renovators and dust sampling technicians; certifying renovators, dust sampling technicians, and renovation firms; accrediting providers of renovation and dust sampling technician training; and for renovation work practices. This new entry in the regulatory agenda announces that EPA will review this action pursuant to RFA section 610. As part of this review, EPA will consider and solicit comments on the following factors: (1) The continued need for the rule; (2) the nature of complaints or comments received concerning the rule; (3) the complexity of the rule; (4) the extent to which the rule overlaps, duplicates, or conflicts with other Federal, State, or local government rules; and (5) the degree to which the technology, economic conditions or other factors have changed in the area affected by the rule. This review will also serve as an additional opportunity to provide comment on lead test kits, field testing alternatives and other broader RRP rule concerns. EPA's public comment period has closed for this review.

  Advocacy held a roundtable during the public comment period but did not submit any public comments. EPA expects to issue a report and its findings of its review in early 2017.

- ***Environmental Protection Agency (EPA).*** *Modernization of the Accidental Release Prevention Regulations Under the Clean Air Act*

  EPA, in response to Executive Order 13650, is considering amending its Risk Management Program regulations. In a proposed rule, EPA proposed several revisions to the accident prevention program requirements, including an additional analysis of safer technology and alternatives for the process hazard analysis for some Program 3 processes, third-party audits and incident investigation root cause analysis for Program 2 and Program 3 processes, enhancements to the emergency preparedness requirements, increased public availability of chemical hazard information, and several other changes to certain regulatory definitions and data elements submitted in risk management plans. A SBREFA Panel was convened and completed earlier this year. Advocacy held a roundtable and submitted public comments during the public comment period.

  The rule is likely to undergo Executive Order 12866 review at OMB's Office of Information and Regulatory Affairs soon and will likely be finalized in late 2016 or early 2017.

- ***Environmental Protection Agency (EPA).*** *Chlorpyrifos; Tolerance Revocations*

  In August 2015, EPA was sued to take action on tolerances for chlorpyrifos, and as a result the court ordered EPA to take action by October 2015. In compliance with the court deadline, EPA signed a proposed rule to revoke all chlorpyrifos tolerances, entitled "Chlorpyrifos; Tolerance Revocations" on October 28, 2015. The Proposed Rule was published in the Federal Register on November 6, 2015, and public comments were accepted for 60 days. In order to meet the court's original October 30, 2015 deadline, EPA issued the proposal before completing two important scientific analyses that may ultimately bear on EPA's conclusions regarding the safety of chlorpyrifos. In the analysis, EPA proposed to use epidemiological data instead of acetylcholinesterase inhibition as the point of departure in determining the safe level of an organophosphate pesticide for the first time. An April 2016 review by the Scientific Advisory Panel advised EPA against this new approach. As a result, EPA requested a six month extension from the December 30, 2016 deadline for a final rule. The court, however, only granted EPA a three month extension. A SBREFA Panel was not conducted for this rulemaking. The Department of Agriculture submitted public comments with concerns of a significant economic impact on a substantial number of small entities.

  The current court ordered deadline is March 31, 2017. In the meantime, EPA expects to publish a proposal or a notice of data availability in November 2016.

- ***Environmental Protection Agency (EPA).*** *Toxic Substances Control Act Reform: the Frank R. Lautenberg Chemical Safety for the 21st Century Act*

  President Obama signed the Frank R. Lautenberg Chemical Safety for the 21st Century Act into law on June 22, 2016. This Act represented the first significant change to the Toxic Substances Control

Act (TSCA) in 40 years, and the first major revision to a core environmental statute in 25 years. The scale of this bipartisan achievement is hard to overstate, but it comes with a significant amount of work for both EPA and the regulated industries. Small businesses that manufacture, process or formulate chemicals, as well as small businesses that use chemical mixtures in their manufacturing processes, are impacted directly by the changes in the statute. There are several milestones in the statute for changes EPA must implement. EPA is required to propose rules on prioritization and evaluation of existing chemicals by the end of 2016. EPA is also working on issuing a proposed rule for user fees and is required to engage in a consultation with the Small Business Administration for determining the significant economic impact amount for small businesses; this consultation is ongoing. As part of the user fees proposed rule, EPA is also currently determining whether it will have to do a SBREFA Panel for the rulemaking. Another issue that will require SBA consultation and have a direct impact on small businesses is the definition of small manufacturer for the TSCA Section 8 reporting rules.

Advocacy held a roundtable to inform small businesses of the agency's plans.

- ***Environmental Protection Agency (EPA).*** *Chlorinated Paraffins; PMN Risk Assessments*

EPA is currently reviewing certain medium-chain and long-chain chlorinated paraffins (MCCPs and LCCPs) through its pre-manufacture notices (PMN) process for new chemicals under Section 5 of the Toxic Substances Control Act (TSCA). MCCPs and LCCPs are used as extreme pressure additives in metalworking fluids and as flame retardants, plasticizers, and additives in specialized coatings. EPA is reviewing these PMNs as a result of settlements with the manufacturers/importers of the substances. EPA is concerned about the potential persistent, bio-accumulative, and toxic properties of these chemicals. EPA previously announced a May 2016 deadline to eliminate the production and import of MCCPs and LCCPs, but the deadline has now been extended to mid-2017. Small businesses in the industry, in particular the downstream users, are concerned with the use of the non-public PMN process to review chemicals that have been in commerce for decades, and the time frame provided to successfully develop alternatives or substitutes.

As a result of Advocacy's request during a roundtable discussion, EPA published a notice on December 23, 2015 in the Federal Register to provide stakeholders an opportunity to provide comments and submit additional data or information on the risk assessments for these chemicals. EPA is anticipated to make a decision on whether it will conduct peer review on the risk assessments in the near future—this is something Advocacy stakeholders have sought because the PMN process is limited between the submitter (manufacturer) and EPA, and there has been concern about EPA's findings in the risk assessments.

- ***Environmental Protection Agency (EPA).*** *Clean Power Plan*

  The Obama Administration's Clean Power Plan instructs states to reduce CO2 emissions from the electric power sector between 2023 and 2030. This program encompasses a series of actions, including:

  - new source performance standards (NSPS) for coal-fired power plants (a.k.a. 111(b));
  - emission guidelines for CO2 emissions from power plants;
  - model rules for states to comply with the emission guidelines;
  - state submission and EPA approval of plans to comply with the emission guidelines; and
  - a federal plan for states that do not comply with the emission guidelines.

  EPA conducted a SBREFA Panel for the federal plan. (Only the NSPS and the federal plan would directly regulate emission sources.) EPA has published the final NSPS and emission guidelines, and issued draft model rules and a generic draft federal plan. Advocacy submitted a comment on the federal plan.

  The Clean Power Plan is in litigation, and development of state plans has paused. The litigation may take several years, but EPA may decide to proceed with the draft model rules and a generic Federal plan.

- ***The Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps)****. Definition of Waters of the U.S.*

  On May 27, 2015 EPA and the Corps finalized a rule defining the scope of waters protected under the Clean Water Act (CWA). The rule sets forth several categories of waters to be included in the definition as well as establishes the waters that are subject to the act. Advocacy held roundtable discussions in Washington, DC and Los, Angeles, CA in July and August of 2014 and participated in two small entity meetings held by EPA and the Corps in 2011 and 2014. Advocacy also met with numerous individual small entities and associations concerned about the effects of this rule over the four years preceding the final rule. These small entities represented many different industries, including but not limited to agriculture, real estate, home builders, cattle ranchers, farmers, and the mining industries. Feedback from these small entities led Advocacy to the conclusion that the rule as proposed would be an expansion of jurisdiction that will increase the costs to small businesses.

  Advocacy submitted a public comment letter on this rule. In the final rule, EPA agreed to some changes that were responsive to small business concerns including the following:

  - The ditch exclusion was expanded to include all ephemeral waters except for those excavated in existing tributaries, all intermittent ditches except for those excavated in existing tributaries or drain into wetlands, and all ditches that did not connect to the nation's waters;
  - The definition of "adjacent" was revised to exclude from adjacency any wetland on farmland, ranchland, or forestlands; and

- In places where the 100 year flood plain exceeds the 4,000 foot "bright line," isolated waters located in the area covered by the flood plain were potentially jurisdictional.

This rule has been challenged and the litigation is continuing.

- ***Environmental Protection Agency (EPA).*** *Oil and Gas Production*

EPA completed work on a new source performance standard for the oil and gas production industry that restricts methane emissions from these sources. When the final rule was released, EPA announced its intent to regulate existing sources as well. EPA has begun work on a comprehensive information collection on the industry that will support such a rulemaking. Advocacy has consulted with EPA and industry sources on the design of this information collection.

Advocacy is now waiting for EPA to submit the information collection to OMB for review and approval.

- ***Federal Acquisition Regulation Council (FAR Council).*** *Reverse auctions*

For nearly 10 years, Advocacy has been involved with the issue of the negative impact of reverse auctions on small businesses. Advocacy has testified before Congress on the issue, and it has worked closely with OMB's Office of Federal Procurement Policy to explore processes that would lessen the negative impact of this acquisition tool. As noted in FAR CASE 2015-038:

> DoD, GSA, and NASA are proposing to revise the FAR in response to a Government Accountability Office (GAO) report, GAO-14-108, Reverse Auctions: *Guidance is Needed to Maximize Competition and Achieve Cost Savings*, dated December 2013. Reverse auctions are a tool utilized by federal agencies to increase competition and reduce the cost of certain items. During a reverse auction, offerors provide sequentially lower prices in an effort to win the contract award. Offerors may be told whether their offer is the currently lowest price, or may be told the low price but without the identity of the low offeror being revealed to other offerors.
>
> GAO identified five agencies conducting about 70 percent of Government reverse auctions. According to the sample, agencies used reverse auctions to acquire predominantly commercial items, services, and small dollar awards. Four of the five agencies reviewed used the third-party provider, FedBid.
>
> GAO found that – (i) confusion exists about the use of reverse auctions, and (ii) the potential benefits of reverse auctions had not been maximized by the agencies. Over one-third of fiscal year 2012 reverse auctions had no interactive bidding, where vendors engage in multiple round of bids against each other to drive prices lower. In addition, almost half of the reverse auctions were used to obtain items from pre-existing contracts that in some cases resulted in agencies

paying two fees – one to use the contract and one to use the reverse auction contractor's services.

As a result of its findings, GAO recommended that the OMB Director amend the FAR to address agencies' use of reverse auctions and issue government-wide guidance to maximize competition and savings when using reverse auctions.

The FAR Council has published a proposed rule, but there is no timetable for further action.

- ***Federal Acquisition Regulation Council (FAR Council)****. Fair Pay and Safe Workplaces*

On August 25, 2016 the FAR Council published a final rule, Fair Pay and Safe Workplaces, to amend the Federal Acquisition Regulation (FAR) to implement the Executive Order (EO) "Fair Pay and Safe Workplaces." The EO requires that for contracts over $500,000 prospective and existing contractors disclose whether they have been found to have violated certain labor laws during the preceding three-year period. Under the EO, agencies must include clauses in their contracts to require similar disclosures by certain subcontractors. The EO requires contractors and subcontractors to provide individuals with information each pay period regarding how they are paid and to provide notice to those workers whom they treat as independent contractors. The E.O. also addresses arbitration of employee claims. Advocacy held three roundtables on this issue.

Advocacy filed two comment letters, one to the FAR Council on the proposed rule, and the second letter to the Department of Labor on the proposed guidance document that is a companion to the rule as required by the EO. The FAR Council made several changes to the final regulation due to the public comments and comments from the Office of Advocacy:

- Subcontractors will now be required to submit their compliance information to the Department of Labor and not to the prime contractor.
- The final rule delays the implementation date for small subcontractors.
- The final rule implements a phase-in of the final rule. Small subcontractors have 12 months from the effective date of the rule. Prime contractors for the first 6 months have to provide representations and disclosures for solicitations that are expected to result in contracts valued at $50 million or above. This will reduce the number of small business prime contractors that have to comply with the rule. After the first 6 months, representations and disclosures will return to the $500,000 level.
- Labor law disclosures must cover labor law decisions rendered during the time period beginning October 25, 2015 to the date of the offer. Any violation prior to this date will not have to be reported.

Many observers believe this rule will be challenged in court.

- ***Federal Acquisition Regulation Council (FAR Council).*** *Small Business R&D*

  On August 10, 2012, the FAR Council published in the Federal Register a proposed regulation: "Small Business Set Asides for Research and Development Contracts," (Federal Register Volume 77, Number 155, Pages 47797-47799). On October 8, 2012, Advocacy submitted a comment letter to the FAR Council on the proposed rule. The comment letter focused on the proposed amendment to FAR Part 19.502(b)(2), which requires agencies in making set-aside small business research and development contracts to require these contracts to meet a scientific and technological test that is not imposed on other FAR 19 small business set-aside contracts. Advocacy has been advised by small businesses that the additional language in FAR Part 19.502(b)(2) requiring the best scientific and technological sources has been interpreted as an additional and unique condition that must be met before a contracting officer can proceed with a small business set-aside for research and development. This additional burden has resulted in few if any contracts being awarded under this clause. It is significant that there is no statutory nor regulatory basis for this additional burdensome requirement.

  The comment period ended on the proposed rule, but no further action has occurred.

- ***Federal Communications Commission (FCC)****. Enhanced Network Transparency Requirements for Providers of Broadband Internet Service*

  In 2014, the FCC finalized a set of rules classifying broadband as a Title II communications service, and governing the conduct of internet service providers (ISPs) with regard to their network management. The rules require, among other things, that ISPs disclose changes in their network management practices to their customers on an ongoing basis. The stated goal of these increased transparency requirements was to ensure that ISPs refrain from discriminating between different types of network traffic in a commercially unreasonable way. When the FCC finalized these rules, it acknowledged that the increased transparency requirements would be burdensome for some small ISPs and extended the compliance date for small ISPs for one year. In response to comments from regulated small entities, the FCC determined that it was appropriate to exempt small ISPs from the requirements until December 2016. Small ISPs believe the FCC has severely underestimated the cost of collecting and providing the required information to their customers. In addition, they believe that the rules are unclear and make efforts to comply uncertain. Small ISPs asked the FCC to make the exemption permanent, and expand the scope of the exemption to cover all small ISPs, as defined by SBA size standards.

  Advocacy filed public comments in 2015 asking the FCC to consider permanently exempting small ISPs from the regulations. The FCC is currently considering whether to extend the existing small business exemption past December 2016.

- ***Federal Communications Commission (FCC)****. Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*

  In 2014 the FCC reclassified broadband internet as a "communications service" under Title II of the Communications Act. This reclassification gave the FCC the authority to regulate internet service providers (ISPs) like telecommunications companies. (*Note: On June 14, 2016, the DC Circuit denied challenges to the FCC's decision, and upheld its reclassification of broadband.*). In April 2016, the FCC proposed regulations to protect the privacy of broadband customers using its new authority. The proposed regulations include: (1) requirements to provide notice of privacy policies, (2) requirements to obtain customer approval for the use and disclosure of customer proprietary information (PI), (3) conditions for disclosure of aggregate customer PI, (4) requirements to protect the security and confidentiality of customer PI, (5) data breach notification requirements, (6) other practices implicating privacy, and (7) dispute resolution provisions.

  Advocacy filed public comments asking the FCC to offer flexibility to small ISPs. The FCC is expected to finalize a set of rules before the end of 2016, or in early 2017.

- ***Federal Communications Commission (FCC).*** *Expanding Consumers' Video Navigation Choices*

  In February 2016, the FCC proposed rules that would allow consumer electronics manufacturers and applications developers to build devices or software solutions that can navigate the universe of multichannel video programming with a competitive user interface. The proposed rules would require multi-video-programming distributors (MVPDs, i.e. cable companies) to give the public access to information flows regarding programming that can then be used by consumer electronics manufacturers and software developers to develop new user interfaces. This proceeding has been dubbed the "unlock the box" proceeding because it will allow consumers to purchase cable set-top boxes that will work with any MVPD's programming.

  Advocacy filed public comments asking the FCC to exempt small MVPDs from its rules when finalized. In September 2016, FCC Chairman Tom Wheeler announced that he is circulating a new set of proposed rules that would exempt small MVPDs and offer more flexibility for MVPDs generally. FCC is expected to finalize rules in late 2016 or early 2017.

- ***Food and Drug Administration (FDA)****. Tobacco Deeming Rule*

  On April 24, 2014, the FDA issued a proposed rule to implement the Tobacco Control Act. The FDA proposed rule would deem formerly unregulated or uncovered products subject to FDA regulation, including premium cigars, e-cigarettes, and hookah tobacco, and would subject these products to regulatory requirements currently only applicable to cigarettes, cigarette tobacco, roll-your-own tobacco, and smokeless tobacco. Among other requirements, the proposed rule would have required manufacturers of newly deemed tobacco products to submit an application for premarket approval with 24 months of the effective date of the rule. In addition, the proposed rule would have banned from the market flavored tobacco products, including flavored e-cigarettes. Small business

owners and representatives had expressed concern over the impact of this rulemaking. Based on input from small business stakeholders, Advocacy filed a public comment letter on June 11, 2014. Advocacy's comment letter noted that the Initial Regulatory Flexibility Analysis (IRFA) contained in the proposed rule lacked essential information required under the RFA. Advocacy encouraged the FDA to revise the IRFA to provide a more accurate description of the costs of the proposed rule.

Advocacy also recommended that the FDA take into consideration small business stakeholders' suggested alternatives to minimize the proposed rule's potential impact. On May 10, 2016, the FDA issued the final rule. The final rule permits flavored tobacco products on the market, but otherwise adopts the approach of the proposed rule.

Several lawsuits are currently pending, seeking to overturn the tobacco deeming rule.

- ***Internal Revenue Service (IRS)****: Excise Tax on Highway Vehicles*

  IRS proposed regulations would update the IRS requirements related to the Highway Revenue Act of 1982. The proposed rules would mandate a number of new paperwork and recordkeeping requirements that small business owners contend would far exceed the average of fifteen minutes that the IRS estimates in the Special Analysis portion of the proposed rules. Because the IRS certified that the collection of information in the proposed regulations will not have a significant economic impact on a substantial number of small entities, and because the statement in support of the certification lacks a factual basis, Advocacy submitted a comment letter recommending that the IRS publish for public comment either a supplemental RFA assessment with a valid factual basis or an Initial Regulatory Flexibility Analysis (IRFA). Advocacy also encouraged the IRS to extend the comment period for the proposed regulations by 60 days.

  The IRS is in the process of considering comments.

- ***Internal Revenue Service (IRS)****. Cafeteria Plans*

  A cafeteria plan is an employee benefit plan that allows employees to choose from a variety of benefits to formulate a plan that best suits their needs. The IRS currently prohibits employers from participating in cafeteria plans that they sponsor for their employees. This causes burdens for small business employers that sponsor cafeteria plans. The IRS has historically contended that legislation is required to permit employers to participate in cafeteria plans that the employers sponsor. At a small business roundtable hosted by Advocacy in 2016, speakers and Department of Treasury staff discussed that it may be possible for the IRS to change this policy administratively through guidance. The Department of Treasury and the IRS are contemplating whether the agencies may revise the current rules through guidance or whether legislation is required.

- ***Internal Revenue Service (IRS)**. Estate Valuation*

  On August 4, 2016, the IRS issued proposed regulations concerning the valuation of estate interests for corporations and partnerships. Included were provisions that would eliminate "valuation discounts." A valuation discount is a technique used by transferors of closely-held businesses to reduce the value of a small percentage of their ownership interest (on a per share basis), which reduces the amount of the transfer subject to tax. Small business owners and representatives in contact with Advocacy have said that the proposed regulations would result in increased estate taxes on the death of owners of closely held family businesses, possibly causing the liquidation of the business or sale of big pieces to outsiders. In addition, in the Special Analysis portion of the proposed regulations, the IRS certified that the proposed rule would not have a significant impact on small businesses because "any economic impact on entities…is derived from the operation of the statute, or its intended application, and not from the proposed regulations in this notice of proposed rulemaking."

  The comment period is open for the proposed rule until November 2, 2016.

- ***Occupational Safety and Health Administration (OSHA)**. Communication Tower Safety*

  OSHA has informally notified Advocacy that it intends to convene a SBREFA Panel on Communication Tower Safety in late 2016. Communication towers are tall structures (ranging from 100 to 1,000 feet) that carry antennas for wireless, cellular, radio, or broadcast television communications. These antennas are increasingly being installed on structures other than communication towers (e.g., water towers, electrical and telephone poles, building roofs, etc.) and can present occupational hazards to workers who build and maintain them. OSHA published a Request for Information (RFI) on this issue on April 25, 2015 to obtain public input on key safety and health issues associated with this topic. Advocacy discussed this issue at a recent small business regulatory roundtable, where professional staff from OSHA outlined the expected parameters of the contemplated rule. In addition, representatives from the Telecommunications Industry Association (TIA), an ANSI-accredited standards development organization, discussed their recently completed industry consensus standard for the design, fabrication, and production of communication towers. In addition, the ANSI/TIA-222 standard addresses the requirements for design, construction, and maintenance of communication towers and could significantly overlap with potential OSHA regulations.

  Advocacy is conducting active outreach to small entity representatives to participate on this anticipated SBREFA Panel.

- ***Securities and Exchange Commission (SEC)**. Definition of Accredited Investor*

  The SEC is considering broadening the definition of "accredited investor" to expand the pool of people who would qualify. Accredited investors may participate in opportunities that are not

registered with the SEC and are generally unavailable to non-accredited investors. Currently, the SEC defines an accredited investor as someone who has earned $200,000 in each of the previous two years or has a net worth of more than $1 million, excluding the value of a primary residence. In July 2016, the SEC's Advisory Committee on Small and Emerging Companies recommended that the SEC expand the definition, which would broaden the number of investors eligible to buy unregistered securities through Regulation D. This recommendation is non-binding and the SEC is currently considering whether to issue a rule to expand the definition.

SEC is expected to soon propose a rule to expand the definition of accredited investor.

- ***U.S. Citizenship and Immigration Services (USCIS)****. International Entrepreneur Rule*

  In September 2016, USCIS proposed a new rule that would allow international entrepreneurs to be considered for parole or temporary permission to be in the United States. Entrepreneurs may be granted an initial stay of two years, and seek a subsequent request for re-parole for up to three additional years. Comments were due by October 17, 2016. Advocacy held a roundtable on September 30, 2016, and submitted a comment letter on this rule. There are significant problems with the rulemaking, such as the high thresholds for this program that may exclude many international entrepreneurs from applying for this program. In addition, the temporary nature of the program will not be preferred by entrepreneurs, who need a more certain status to obtain funding for their ventures.

  This rule will likely be finalized in the next administration.

Institutionalizing relationships with regulatory agencies. In Chapter 3 we explained the many ways in which Advocacy interacts with other federal agencies in the rule development process. In the past, Advocacy often found itself in a largely reactive posture, responding to initiatives from other agencies as they appeared in the formal notice and comment period. In such circumstances, Advocacy usually had little warning of a rule's appearance and limited time to prepare its comments representing the interests of small entities.

Fortunately, as more and more agencies have been considering small entity effects early in the rule-writing process, Advocacy has been developing strong working relations with many agencies, and it is now not uncommon for regulatory development officials in those agencies to seek Advocacy input and technical assistance before their rules are in the home stretch. These agencies are learning that early consideration of the potential effects of their proposals on those to be regulated results in better rules – rules that impose fewer unnecessary burdens on the public, have better compliance experience and lower litigation risk, and still meet the regulatory and public policy objectives of the agency.

This shift to greater institutionalization of small business awareness in many regulatory agencies is the result of a number of factors. The legislative framework of the RFA, as amended by SBREFA, is certainly

of special importance, particularly its provisions relating to judicial review and early notification to Advocacy about rules with potentially significant effects on substantial numbers of small entities. Executive Order 13272 and the series of Executive Orders we outlined in Chapter 3, with their emphasis on small business concerns, built on these provisions, and made it clear they had the strong support of the Executive Office of the President and that they applied throughout government.

But as important as these institutional mandates are, it is the responsibility of individuals within regulatory agencies and within Advocacy to make their promise become reality. Advocacy's own professionals work every day with their counterparts in other agencies to make this happen. We have seen how Advocacy's Office of Interagency Affairs provides RFA compliance training to agencies throughout government. Advocacy attorneys and economists always stand ready to respond to the most routine or most complex inquiry on the RFA or small business effects, or to provide any appropriate technical assistance requested. And, of course, Advocacy works with small business organizations and trade associations to develop information that can help agencies write better rules by understanding their effects on small entities. Advocacy has encouraged agencies to seek out the opinions of small businesses early in the regulatory development process. Many agencies routinely participate in Advocacy roundtables both in DC and elsewhere in advance of rule development.

Through the years, strong relationships have been built between the professional staffs at Advocacy, regulatory agencies, and OMB's Office of Information and Regulatory Affairs. These relationships have served the small business community well, and Advocacy works hard to keep them strong. Advocacy's outreach efforts, combined with a greater willingness on the part of many agencies to participate in these efforts, give small businesses greater access to the regulatory process. Advocacy will continue its efforts to build new relationships with regulatory agencies and to strengthen old ones.

Advocacy and international trade. As discussed in Chapter 3, Advocacy began a special initiative relating to international trade in 2012. Advocacy's unique knowledge of how regulations affect small business gives the office the ability to help American small businesses have a place at the table during trade negotiations. Advocacy can be their voice encouraging policies that will allow them easier access to the 95 percent of the world's customers outside of our borders.

International Regulatory Cooperation (IRC). Since 2012, Advocacy has participated in a number of IRC and international trade initiatives that will impact U.S. small businesses. Although IRC is not a new concern, President Obama's Executive Order 13609, Promoting International Regulatory Cooperation, has further impressed upon executive agencies the importance of cooperating with their foreign counterparts.[352] IRC has become a subject of negotiations in recent trade agreements, as have the disproportionate burdens that small businesses may face in international trade.

Advocacy has been invited by the Office of U.S. Trade Representative (USTR) to participate in high-level meetings of various international working groups on regulatory cooperation, and Advocacy has received

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[352] Executive Order 13609, Promoting International Regulatory Cooperation (May 1, 2012), 77 Fed. Reg. 26413. See Appendix I.

positive feedback from its involvement in these meetings. The office anticipates continuing participation in future IRC efforts, and has dedicated staff for this purpose. Because of the experience and contacts that Advocacy has gained through these activities, the office is now actively involved in international regulatory matters that affect U.S. small businesses, including participation in the official U.S. delegations to trade negotiations.

Advocacy is a member of the Regulatory Working Group for International Regulatory Cooperation (RWG IRC) on regulatory cooperation activities between the U.S. and Canada and other countries. Advocacy educates foreign regulators about small business regulatory flexibility, provides insight on questions specific to small and medium sized enterprises (SMEs), and advocates for small business regulatory flexibility to be included in work plans and memoranda of intents wherever possible.

The Regulatory Cooperation Council (RCC) is the structure through which the United States and Canada work together on bilateral regulatory cooperation. In 2016, Advocacy discussed next steps for the RCC "Small Business Lens" with Canada's Director of Regulatory Affairs and a Senior Advisor of Regulatory Affairs at the Treasury Board of Canada Secretariat. The RCC's Stakeholder and Senior Official meetings were held in May 2016, and Advocacy participated in smaller breakout sessions with stakeholders and regulators, including U.S. small businesses and trade associations.

Advocacy has requested that analyses of the potential impact of regulations on small businesses – and the provision of regulatory flexibility to small businesses wherever possible – be included as goals of U.S. regulatory cooperation discussions. Advocacy stands ready to assist the U.S. RCC team with educating regulators on the importance of regulatory flexibility for small businesses.

In 2016, Advocacy's international trade team met with representatives from the Korea Small Business Institute (KOSBI, a government-funded research institute), the Small and Medium Business Administration (SMBA) and Korea's Public Private Joint Regulation Improvement Initiative about Advocacy's role in the U.S. federal rulemaking process. Korea is one of four countries that the RWG IRC has begun to engage on bilateral regulatory cooperation. As the bilateral process moves forward and the U.S. and Korea develop common goals for regulatory cooperation, Advocacy will work to encourage the inclusion of regulatory flexibility in the Korean rulemaking process and any rules resulting from U.S.-Korea regulatory cooperation.

Transatlantic Trade and Investment Partnership (TTIP). Advocacy has been involved with TTIP since negotiations first began in the summer of 2013. Negotiations are generally held every other month, and the rounds alternate between Brussels, Belgium; Washington, D.C.; and New York City. During the 13th round of TTIP in Brussels, Advocacy met with the Director of Small and Medium-Sized Enterprise Policy for the Directorate General of Growth about the economic impact of regulations on SMEs, and about opportunities for future collaboration on the U.S.-E.U. SME dialogue. This provides Advocacy with the ability to share information and best practices directly with E.U. regulators in a collegial and informal manner.

Advocacy is primarily involved in the SME chapter of TTIP; however, small business issues cut across many chapters of the trade agreement, and it was at the 11th round of TTIP negotiations that Advocacy

became more active in other TTIP chapters. Advocacy coordinates with the USTR, the U.S. Department of Commerce International Trade Administration (ITA), the Department of State, and SBA's Office of International Trade to provide expertise to the trade agreement negotiations throughout the rounds. The 14th round of negotiations was held during October 2016 in New York City.

E.U.-U.S. SME Best Practices Workshops. The best practices workshop is an annual TTIP SME event in the framework of the Transatlantic Economic Council that alternates between the U.S. and the E.U. It provides U.S. and E.U. policymakers the opportunity to collaborate on SME support, and to hear directly from SMEs on the challenges and barriers they encounter in international trade. Advocacy staff participated in the first workshop that was held at the Ministry of Foreign Affairs in Tallinn, Estonia. The event included robust discussions on: the European Commission's actions supporting European startups within the E.U. single market; SME cooperation in the Transatlantic Intellectual Property Rights Working Group; transatlantic cooperation in incubators, accelerators, and startups; and improving access to finance through venture capital and crowdfunding.

A second workshop was held at the Ministry of Industry and Trade in Prague, Czech Republic at a meeting of the Visegrad Group, consisting of the Czech Republic, Hungary, Poland, and Slovakia. The participants included SMEs, startups, and policymakers from the E.U. and U.S. Advocacy presented at both workshops on the Regulatory Flexibility Act, the role of Advocacy within the federal rulemaking process, and the many resources that we offer to policymakers and small businesses. Advocacy's involvement in these international dialogues has elevated the issue of regulatory flexibility for small businesses in trade agreements and regulatory cooperation.

Other Advocacy Issues

In addition to the pending research and regulatory issues outlined above, we will conclude this chapter with other issues pending as we prepare for the 2016 transition including: the challenge of measuring effectiveness and outcomes, and Advocacy's legislative priorities.

The challenge of measuring effectiveness and outcomes. As part of the annual federal budget process, agencies are required to prepare plans for performance in future years and to report on whether the goals set in their past plans have been met. Each agency has its own primary "strategic" goals, and its various offices and programs contribute to achieving the strategic goals. These component activities establish their own indicators to measure whether they are meeting internal goals that assist their agency achieve its overall strategic goals.

Prior to the establishment of Advocacy's separate appropriations account by the Small Business Jobs Act of 2010, Advocacy participated in SBA's overall performance plan that was submitted with the agency's official annual congressional budget submission. In recognition of the office's independent status and newly separate appropriations account, Advocacy's FY 2013 Congressional Budget Justification and FY 2011 Annual Performance Report were for the first time presented in a separate appendix to SBA's submission. The new format was intended to improve the transparency of Advocacy operations and

costs, more clearly identify the resources available to Advocacy, and provide a basis for performance measurement.

Advocacy adopted two strategic goals that are specific to the office, and it revised the performance indicators that are associated with these goals. The two goals align closely with Advocacy's two primary statutory responsibilities, regulatory advocacy and economic research.

- **Advocacy Strategic Goal 1:** To be an independent voice for small businesses inside the government and to assist federal agencies in the development of regulations and policies that minimize burdens on small entities in order to support their start-up, development, and growth.
- **Advocacy Strategic Goal 2:** To develop and disseminate research and data on small businesses and the role that they play in the economy, including the availability of credit, the effects of regulations and taxation, the role of firms owned by women, minority and veteran entrepreneurs, innovation, and factors that encourage or inhibit small business start-up, development, and growth.

To measure progress in meeting these goals, three performance indicators and one efficiency measure from prior years were continued unchanged, two new indicators were added, and two other indicators that had proved of limited usefulness to managers were dropped. Advocacy has had since FY 2013 five performance indicators and one efficiency measure. The five performance goals for FY 2017 are as follows:[353]

- To achieve at least $6.5 billion in regulatory cost savings for small businesses;
- To provide RFA compliance training to at least 100 regulatory development officials;
- To publish at least 20 research or data products;
- To have regional advocates participate in at least 360 regional outreach events; and
- To have Advocacy economists participate in at least 12 outreach events.

Most of Advocacy's indicators are relatively straightforward and not difficult to measure. However, the measurement of regulatory cost savings is both difficult and complex, and it requires some explanation. We have already covered the basic principles of how cost savings are calculated in Chapter 3, but a number of points should be made here in the context of future challenges in the measurement of effectiveness and outcomes.

- There can be considerable variation from year to year in cost savings estimates. This arises from a number of factors beyond Advocacy's control, including the timing of agency proposals and the publication of final rules, the use of varying methodologies by different agencies in the calculation of cost savings, occasional "outliers" with unusually large savings, and the willingness of agencies to agree to Advocacy recommendations.
- Advocacy's official cost savings estimates reflect only those savings captured after a regulatory proposal is made public. Advocacy's efforts pursuant to Executive Orders 13272, 13563 and 13579 have proven increasingly successful, and more agencies are doing a better job in outreach

[353] These goals and performance metrics for past years are posted in Advocacy's annual congressional budget submissions on the office's performance and budget website at www.sba.gov/advocacy/performance-budget.

to small entities and in their analyses of a rule's impact before the regulation is made public in the *Federal Register,* proposing less burdensome regulatory alternatives at the outset of the process. Part of Advocacy's role in the interagency process is to encourage agencies to use more accurate cost estimates and more realistic assumptions in both their Initial Regulatory Flexibility and Regulatory Impact Analyses. This means that cost estimates often increase and key assumptions (such as the number of affected small entities) may change. As a result, there are often improvements in the quality and accuracy of agencies' analyses, but a decrease in calculated cost savings after rules are actually proposed.

- Many of Advocacy's greatest successes cannot be explained or quantified publicly because of the importance of maintaining the confidentiality of pre-proposal interagency communications. Advocacy measures its accomplishments through cost savings that can be claimed publicly, but actual savings may be much higher.
- Some potential cost savings, such as time saved by small entities in regulatory compliance due to Advocacy's efforts, are not currently quantified at all.

Theoretically, as Advocacy achieves its goals in utilizing these tools and agencies become more proficient in complying with the RFA and institutionalizing consideration of small entities in the rulemaking process, cost savings between the first public proposal of a rule and its finalization should diminish. As agencies begin to see for themselves the importance of implementing the RFA early in the rulemaking process, cost savings will be more difficult to calculate, and other measures of the law's effectiveness may be needed.

In fact, this is exactly the experience that Advocacy has had in recent years. These factors, together with increased rigor in the calculation of cost savings themselves, have resulted in lower annual cost savings from Advocacy's public interventions. Also, many Advocacy regulatory efforts in recent years have resulted in significant regulatory actions by agencies that cannot be quantified, but are still of benefit to small entities. Advocacy has begun to publish examples of such actions in its annual RFA reports, but they are still not reflected in the office's performance metrics.

An important pending issue for Advocacy is how better to measure the effectiveness of its efforts to reduce regulatory burdens on small entities, and how to integrate such metrics into the office's performance goaling and measurement requirements.

Legislative priorities. From time to time, Advocacy publishes a listing of its legislative priorities in order to provide to its stakeholders and the public at large basic information in a convenient format on matters that the Chief Counsel believes are most in need of legislative attention.[354] At the end of FY 2016, Advocacy's legislative priorities were focused on revisions to the Regulatory Flexibility Act.
As detailed in prior chapters, Advocacy's experience with the implementation of the RFA is both long and deep. The RFA gives the Chief Counsel a variety of specific duties and authorities. Agencies are required to transmit to the Chief Counsel their regulatory agendas, both their initial and final regulatory flexibility analyses, and their certifications of rules without significant effects. The Chief Counsel participates in the SBREFA panels required for significant EPA, OSHA, and CFPB rules. The Chief Counsel

[354] The formatted Legislative Priorities document is reprinted in Appendix K.

reports annually to the President and the Congress on agency compliance with the RFA, and is authorized to appear as *amicus curiae* in any action brought in a court of the United States to review a rule, including RFA compliance issues.

Advocacy has worked closely with agencies throughout the government in assisting them with RFA compliance. Executive Order 13272 requires Advocacy to provide RFA training to regulatory development officials, and more than 1,100 have received such training from Advocacy attorneys and economists since this requirement went into effect in 2002, including officials in 18 cabinet level departments, 67 separate component agencies and offices within these departments, and 22 independent agencies. Advocacy publishes a comprehensive RFA compliance guide for agencies, and its professionals are always available to provide technical assistance to agencies' regulatory staff.

This broad experience with the RFA since its original enactment in 1980, together with a growing body of case law, give Advocacy a unique perspective on the legislation's implementation. Based on this experience and on input from its stakeholders, Advocacy has identified six areas that it believes need legislative attention if the RFA is to provide small entities with the full consideration that Congress originally intended.

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

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

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

Further, the IRS regularly promulgates rules that are costly and complicated for small businesses. However, the IRS contends that it has no discretion in implementing legislation and that the agency has little authority to consider less costly alternatives under the RFA. Therefore, the IRS often does not analyze the cost of its rules to small business under the RFA. In the absence of the IRS considering the impact of its rules under the RFA, Congress should require the Congressional Budget Office (CBO) to

provide small business cost and paperwork burden estimates for pending tax legislation. This would help ensure that tax writers and the public are aware of the compliance burden in addition to the fiscal consequences.

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

> **Advocacy recommendation:** Require RFA analysis for all interim final rulemakings with a significant economic impact on a substantial number of small entities. Require CBO to score proposed tax legislation for the estimated costs and paperwork burden to small business. Amend the conditions for IRS rulemakings to require an IRFA/FRFA to reference the PRA.

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

> **Advocacy recommendation:** Require agencies to develop cost savings estimates.
>
> Require a clearly delineated statement of the contents of the IRFA and FRFA in the preamble of the proposed and final rule.

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

> **Advocacy recommendation:** Require agencies to publish a threshold analysis, supported by data in the record, as part of the factual basis for the certification.

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

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

number of affected small entities, a preferred alternative, a series of viable alternatives, and projected costs and benefits of compliance for each alternative.

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

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

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

Conclusion

The foregoing pages have described the Office of Advocacy's solid foundation of research, regulatory involvement, and outreach to stakeholders. These three elements are the basis of the office's efforts on behalf of small business over the previous eight years. As the year 2016 draws to a close, Advocacy staff will work to advance the open issues and other projects described in this closing chapter. And the office will continue to heed the concerns of small entities as new challenges and opportunities emerge in the years to come.